

FILED
SUPREME COURT
STATE OF WASHINGTON
11/30/2020 9:57 AM
BY SUSAN L. CARLSON
CLERK

NO. 99185-5

(COA 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; and Z.V. COMPANY, INC., a Washington
Corporation,

Appellants-Petitioners,

v.

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

Respondents.

APPELLANTS' PETITION FOR REVIEW

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I. INTRODUCTION

CenturyLink, one of the country's largest telecommunications companies, recklessly caused one of its cable-laying subcontractors to drill blindly underground for hundreds of feet into private property, without permission, causing extensive damages. Yet to date CenturyLink has escaped any legal accountability for its actions. This Court should grant review to address the approach taken by the lower courts to the governing statutes and legal doctrines, which in those courts' view dictate this result.

CenturyLink obtained a permit from the City of Fife to install conduit under a public right-of-way adjacent to industrial property owned by Fife Portal. As a permit holder, CenturyLink was required to comply with all conditions imposed by the City of Fife for the right to place its conduit in the public right-of-way. CenturyLink directed its subcontractor, Pacific Utility, to use an underground boring method that left Pacific blind to existing utilities. CenturyLink then compounded the inherent danger of this method with a series of missteps—including several permit violations—that made the ensuing disaster virtually inevitable: CenturyLink (1) failed to locate underground utilities; (2) failed to obtain an easement from Fife Portal; (3) gave Pacific inaccurate engineering plans showing nine feet between the public sidewalk and Fife Portal's property, rather than the actual one foot; and (4) ignored Pacific's request to survey the boundary lines.

Under pressure to proceed, Pacific relied on CenturyLink's inaccurate plans and bored into Fife Portal's property. The inevitable

ensued—Pacific bored into Fife Portal’s storm drain and the City’s water main, causing hundreds of thousands of dollars in damages. When CenturyLink refused to accept responsibility, Fife Portal incurred substantial mitigation and remediation costs. Pacific was eventually held liable and ordered to pay nearly \$200,000 in compensatory damages, trebled under the trespass statute (RCW 4.24.630) and the Underground Utility Damage Prevention Act (chapter 19.122 RCW, colloquially known as the *Dig Law*). But CenturyLink avoided liability when, astonishingly, the trial court granted a directed verdict based on *lack of causation*.

The Court of Appeals affirmed, applying a crabbed reading of the trespass statute and the Dig Law, thus allowing CenturyLink—the principal miscreant—to avoid any accountability for its reckless actions and omissions. In an era when only a few telecommunications companies control the public’s ability to work remotely and access information, the legislative expression of public policy embodied in the trespass statute and the Dig Law demands that CenturyLink be punished for its actions through the treble-damage provisions of these statutes, to deter further misconduct.

The Court of Appeals also affirmed a summary judgment that dismissed most of Fife Portal’s investigative and restoration costs on the ground that Fife Portal had not yet incurred those costs, even though the services had already been provided and were continuing. This legal conclusion conflicts with established law, under which an injured party may recover costs incurred—or to be incurred—because of tortious wrongdoing.

The issues raised by the errors of the Court of Appeals warrant review because they present issues of substantial public interest and a conflict between the decisions of this Court and the Court of Appeals.

II. COURT OF APPEALS DECISION

Fife Portal, LLC, the Fife Portal 140 Owners Association, LLC, and Z.V. Company, Inc. (collectively *Fife Portal*) seek review of the unpublished Court of Appeals' decision terminating review issued on August 11, 2020 (the *Decision*) (copy attached as App. A). A timely motion for reconsideration was denied on October 26 (copy attached as App. B).

III. ISSUES PRESENTED FOR REVIEW

1. **Separate liability for treble damages.** Fife Portal recovered statutory treble damages against CenturyLink's now-defunct subcontractor, but not against CenturyLink, which was dismissed on a directed verdict. The near-universal rule is that punitive damages are recoverable from each liable defendant. Should this Court grant review to decide whether to adopt that rule and permit recovery against CenturyLink? *Yes.* RAP 13.4(b)(4).

2. **Scope of liability for treble damages under the trespass statute.** The Court of Appeals held that a defendant must itself go onto the plaintiff's property to be liable for trebling of damages under RCW 4.24.630(1). Should this Court grant review to decide whether a defendant may be liable for trebling of damages under 4.24.630(1) when an agent of the defendant goes onto the plaintiff's property and damages it, and the defendant directed and controlled the agent's actions that caused the damage? *Yes.* RAP 13.4(b)(4).

3. **Scope of liability for treble damages under the Dig Law.** Excavators who willfully or maliciously damage marked underground utilities are liable for treble damages under RCW 19.122.070(2). The Court of Appeals held that CenturyLink was not an excavator. Should this Court grant review to decide whether an entity like CenturyLink, which routinely performs excavations in Washington through the actions of third-party subcontractors under CenturyLink's direction and control, may be liable

under RCW 19.122.070(2) for treble damages to the same degree as its subcontractors? *Yes*. RAP 13.4(b)(4).

4. **Recoverability of costs yet to be incurred.** The Court of Appeals' holding that costs necessitated by a defendant's wrongdoing are not recoverable unless they have been "incurred" (*e.g.*, by the formal tender of a bill) conflicts with this Court's precedents. Should this Court grant review to resolve this conflict? *Yes*. RAP 13.4(b)(1)-(2), (4).

IV. STATEMENT OF THE CASE

A. Fife Portal owns an industrial property in Fife, designed and developed by First Corps.

Fife Portal owns a 7.5-acre industrial property in Fife, Washington, which includes six industrial buildings and has several tenants. RP 420-21, 435, 588-90; Ex. 1. Fife Portal hired First Corps, Inc., to design and develop the property as a general contractor. RP 588-89, 602; CP 795. The property includes an 11-foot-wide space between the industrial buildings and the boundary of a City of Fife public right-of-way that abuts the property's northern boundary; the space is landscaped with grass and trees and contains all of the property's underground utilities. RP 595, 735; CP 26, 475.

B. CenturyLink hired subcontractor Pacific to install conduit under the public right-of-way located next to Fife Portal's property. CenturyLink directed Pacific to use underground boring, which would render Pacific blind to underground obstacles.

CenturyLink—the nation's second largest telecommunications company—provides cable and communication services to customers across the country. CenturyLink hired Pacific Utility Contractors to install underground conduit under the public right-of-way next to Fife Portal's property. CP 26, 161; Ex. 8 at 2-3; Ex. 9. CenturyLink directed Pacific to

use a trenchless-boring method to install the conduit. RP 531; CP 1114-15, 1862. This method uses a drill to bore a hole underground through which conduit can be pulled, without incurring the expense of excavating the surface landscape. CP 162, 1861-64. Because the subcontractor does not excavate the surface, it is blind to any obstructions that may lie below the surface. CP 1861-64.

C. CenturyLink ignored permit conditions intended to prevent trespass onto private property and damage to underground utilities.

CenturyLink obtained a permit from the City of Fife to install its conduit (Exs. 5, 8), but then did not comply with permit conditions meant to prevent trespass onto private property and to protect underground utilities from damage.

1. CenturyLink failed to locate the underground utilities on Fife Portal's property and the public right-of-way, as required by its permit from the City of Fife.

The permit required CenturyLink to take "special precautions" to protect the integrity of underground utilities. Ex. 8 at 4. This included the specific requirement to locate all underground utilities at least three days before starting work. Ex. 5 at 1. Every state in the union requires utility companies and excavators to call 811 to locate all underground utilities before starting work. Yet CenturyLink neither itself requested nor directed its subcontractor to perform any utility "locates" near the planned work. RP 511-12, 521-22, 597; CP 26, 142-43.

2. CenturyLink failed to obtain an easement from Fife Portal, as required by its permit from the City of Fife.

CenturyLink's engineering plans showed nine feet between the public sidewalk and Fife Portal's boundary line. Ex. 5; RP 484-85. The plans required work to be done several feet from the sidewalk edge, under a landscape strip located between the sidewalk and Fife Portal's buildings—including placement of the bore pit from where the underground boring would start. Ex. 5; RP 456-57, 484-89, 511-12. But CenturyLink's plans were wrong; there was only *one foot* between the public sidewalk and Fife Portal's boundary line, meaning that CenturyLink's boring work would extend beyond the right of way, onto Fife Portal's property. RP 489, 511-12, 520-22; Ex. 5 (incorrectly showing that the City's right-of-way boundary line encompassed all of Fife Portal's landscape area).

The City recognized that Century Link's plans would require boring outside the right of way and on private property. RP 484-89, 511-12. So the City's permit required CenturyLink to get an easement from Fife Portal. Ex. 8 at 3; RP 487-89. But CenturyLink did not get that easement and never contacted Fife Portal before directing Pacific to begin work.

D. CenturyLink ignored a request from Pacific to confirm the location of Fife Portal's boundary lines.

Before boring began, Pacific requested that CenturyLink survey the project's boundary lines because Pacific was unable to confirm Fife Portal's property line as reflected on CenturyLink's plans. RP 467-68, 476-77, 520-23, 809; Ex. 7. CenturyLink typically performs surveys when requested, but ignored this request because it was "inundated with work." RP 468; *see*

also RP 522-23. With CenturyLink's permit about to expire, Pacific chose to begin boring based on the supposed nine feet between the public sidewalk and Fife Portal's property, as shown on CenturyLink's plans. Ex. 5.

E. Under CenturyLink's supervision, Pacific proceeded to bore into Fife Portal's property, striking Fife Portal's storm-drain pipe and the City's water main, causing extensive damage to Fife Portal's property and underground utilities, and the City's water main.

After Pacific began boring under Fife Portal's landscape area, a CenturyLink representative visited the project site to monitor the progress. RP 813-14, 822-23; Ex. 10 at 14. CenturyLink had authority to stop the boring, but did not. RP 530, 813-15, 822-23.

Pacific first struck and damaged Fife Portal's storm-drain piping. Ex. 10 at 14; CP 26, 31-32, 41, 71-72, 80. Instead of notifying Fife Portal and investigating the extent of the damage, Pacific excavated and reburied the damaged piping, meanwhile causing more damage to Fife Portal's property. RP 596, 627; CP 26-27, 68, 81. Pacific then resumed boring and again struck and damaged the storm-drain piping, and also struck the City's water main, causing it to rupture and blow out the concrete covering immediately above. Exs. 2-3, 8, 10 at 19-22, 12 at 1; CP 25-26, 68, 71-72, 78-79; RP 425. This created a large, dangerous sinkhole in Fife Portal's driveway and damaged about 3,200 square feet of its property. CP 1055; Ex. 15 (copy attached as App. C).

F. After CenturyLink refused to take responsibility for the damage it caused, Fife Portal hired First Corps to investigate and remediate the damage. Meanwhile, Pacific—still under CenturyLink’s supervision—again trespassed on Fife Portal’s property, causing additional damage.

CenturyLink refused to accept responsibility for the damages it caused.¹ RP 634, 638-39, 645-46. Fife Portal—specifically, the Owners Association—then hired First Corps as general contractor to oversee the investigation and remediation of the damage. CP 385, 387-95, 402-03, 433, 435-39, 475, 477-48; RP 601-02, 795, 1365. First Corps performed the same role as it did in developing the property. CP 24-26, 402, 475-78. It hired the same engineers and contractors to perform the remediation work as it did ten years earlier to design and develop the property. RP 600-01, 641, 646-47, 944-45; Ex. 16. It retained George Humphrey—drawing on his extensive experience developing industrial properties, including Fife Portal’s—to facilitate the effort. CP 24-25, 385, 396, 403, 433-36, 475; RP 588, 602.²

Despite the ongoing remediation efforts, and ignoring an express direction from Fife Portal to stay off its property, Pacific trespassed *again*,

¹ This is despite CenturyLink’s being required by the City of Fife municipal code to repair and to pay for all damage to private property. FIFE MUNICIPAL CODE (FMC) 11.01.170(G)(1), (H); FMC 12.09.100; FMC 12.09.150.

² For instance, Fife Portal had to excavate portions of its landscape area to inspect the subgrade infrastructure. CP 1365. Fife Portal observed that water was backing up in the storm-drain piping and that the storm-drain piping was continuing to subside. CP 1366. Because the soil supporting the flatwork on Fife Portal’s property also continued to subside, the driveway’s concrete panels began cracking, collapsing, and breaking apart. CP 1366; RP 673-78, 744-56, 759, 947. As a result, Fife Portal had to cut out the driveway panels and replace them. CP 1367. CenturyLink’s boring operation also caused the soil bedding beneath Fife Portal’s underground utilities to settle, which compromised their structural integrity. RP 898-900, 908, 948. Fife Portal ultimately incurred hundreds of thousands of dollars to investigate and to remediate the damages.

using a backhoe to remove part of CenturyLink's conduit and causing further damage in the process. CP 27, 114; RP 432-33; Ex. 10 at 37-38. Fife Portal saw a CenturyLink representative standing on its property and overseeing this work. RP 669-70.

G. Fife Portal sued CenturyLink and Pacific. The trial court established Pacific's liability on summary judgment before trial, but barred Fife Portal from recovering the cost of First Corps' investigation and remediation work.

Fife Portal sued CenturyLink and Pacific for trespass, violation of the Underground Utility Damage Prevention Act, and negligence. CP 3-4. Fife Portal sought treble damages against both defendants under the trespass statute (RCW 4.24.630) and the Dig Law (RCW 19.122.070).

The trial court concluded on summary judgment that Pacific was liable for trespass and unauthorized conduit installation, triggering statutory treble damages. CP 195-98, 2832. The only issues left for trial were CenturyLink's liability and the amount of damages owed. The trial court, however, barred Fife Portal from recovering the cost of hiring First Corps to oversee the investigation and remediation of the damage caused by the boring work. CP 580-81.

H. The trial court dismissed Fife Portal's claims against CenturyLink, ruling that Fife Portal had failed to raise a jury question on causation. The jury awarded Fife Portal \$195,074.79 in compensatory damages against Pacific, which the trial court trebled.

After Fife Portal concluded its case-in-chief, CenturyLink moved for a directed verdict. CP 2251-59. The trial court dismissed all of Fife Portal's claims against CenturyLink, ruling that Fife Portal failed to raise a

jury question on whether CenturyLink's actions or omissions had been a cause-in-fact of Fife Portal's damages. RP 1012-13; CP 2557-60.³ The jury rendered a verdict awarding Fife Portal \$195,074.79 in compensatory damages against Pacific. CP 2838-39. The trial court trebled those damages for a total award of \$585,224.37 and then awarded Fife Portal \$267,748.61 in attorneys' fees, for a total judgment of \$852,972.98 against Pacific. CP 3741-43, 3747-48, 3752-53.

I. The Court of Appeals affirmed across the board.

On appeal, Fife Portal sought reinstatement of its claims against CenturyLink and a trial against both defendants on the damages element that had been dismissed on summary judgment. Pacific cross-appealed the summary judgment on liability. Almost a year after judgment was entered against it, Pacific satisfied the judgment and dismissed its cross-appeal. CenturyLink then claimed that this satisfaction barred any claims against it. The Court of Appeals affirmed.⁴

³ If the trial court had denied CenturyLink's directed-verdict motion, and the jury had found CenturyLink liable, Fife Portal would have sought a judgment that awarded treble damages against both CenturyLink and Pacific.

⁴ After the trial against CenturyLink and Pacific, to protect its rights to full compensation, Fife Portal sued the Pacific employees also responsible for the damages for which their employer had been found liable. (By this point, Pacific had not satisfied the judgment and had ceased operations.) The trial court denied a motion to dismiss those claims on res-judicata grounds, and the Court of Appeals granted discretionary review. The Court of Appeals ruled in favor of the employees on the sole ground that its resolution of Fife Portal's appeal mooted the claims against the employees. *Fife Portal, LLC v. Kotulan*, No. 53444-4-II, 2020 WL 4783740 (2020). Fife Portal does not seek review of that decision.

V. REASONS WHY REVIEW SHOULD BE ACCEPTED

A. This Court should grant review to hold that a principal is separately liable from its agent for statutory treble damages.

A party generally may obtain only one recovery for an injury. Under the “one satisfaction” rule, a satisfied judgment against one defendant typically bars a suit against other defendants jointly liable for the same injury. *Crown Controls, Inc. v. Smiley*, 110 Wn.2d 695, 702, 756 P.2d 717 (1988); *Marshall v. Chapman’s Estate*, 31 Wn.2d 137, 144-46, 195 P.2d 656 (1948); see also RESTATEMENT (SECOND) OF JUDGMENTS § 50 cmt. c (1982). But that rule does not apply to punitive damages. That is because punitive damages do not compensate; they seek to punish all culpable defendants and to deter them from repeated misconduct. *Morgan v. Kingen*, 141 Wn. App. 143, 161-62, 169 P.3d 487 (2007); *Bosco v. Serhant*, 836 F.2d 271, 281 (7th Cir. 1987) (Posner, J.). Indeed, crediting a satisfaction of judgment to any portion of punitive damages would “defeat the purposes of punitive damages.” LINDA L. SCHLUETER, PUNITIVE DAMAGES § 4.10(C)(1), at 233 (7th ed. 2015). That is why nearly all jurisdictions permit a plaintiff to recover punitive damages against each liable defendant.

Id. § 4.10(C)(3), at 235⁵; *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 51 cmt. d (illustration 8).

This Court should grant review to consider whether to adopt this near-universal principle. Doing so will effectuate the purpose of the treble damage provisions of RCW 4.24.630(1) and RCW 19.122.070(2), both of which embody a legislative policy to punish and deter wrongdoers—the hallmark features of punitive damages.⁶ Adopting this rule will prevent CenturyLink—the principal miscreant—from escaping full accountability for its wrongdoing. That Pacific has fully paid the compensatory damages awarded to date should not free CenturyLink from accounting via treble damages for its role in causing those damages to Fife Portal’s property.

⁵ *See, e.g., McGee v. Bruce Hosp. Sys.*, 545 S.E.2d 286, 288-89 (S.C. 2001) (holding that a satisfaction of judgment for compensatory and punitive damages against one defendant did not bar the plaintiff from seeking punitive damages separately against another defendant who had been dismissed on a directed verdict); *Sanchez v. Clayton*, 877 P.2d 567, 572 (N.M. 1994) (holding that a plaintiff could seek punitive damages against all responsible parties, even though the plaintiff had obtained a satisfied judgment of compensatory and punitive damages against other defendants); *Medearis v. Miller*, 306 N.W.2d 200, 204 (N.D. 1981) (concluding that the plaintiff’s judgment against some defendants in a prior action did not preclude him from seeking punitive damages against other defendants); *Turner v. Firststar Bank, N.A.*, 845 N.E.2d 816, 824 (Ill. App. Ct. 2006) (affirming the judgment that had awarded punitive damages separately against two defendants); *Beerman v. Toro Mfg. Corp.*, 615 P.2d 749, 755 (Haw. Ct. App. 1980) (holding that a satisfaction of judgment for compensatory damages against one defendant did not bar the plaintiff from seeking punitive damages against other jointly liable defendants who had been dismissed on a directed verdict).

⁶ This Court has recognized that statutory double or treble damages are a form of punitive damages. *See, e.g., Hill v. Garda CL Nw., Inc.*, 191 Wn.2d 553, 573, 576, 424 P.3d 207 (2018); *Pendergrast v. Matichuk*, 186 Wn.2d 556, 567-68, 379 P.3d 96 (2016); *Schilling v. Radio Holdings Inc.*, 136 Wn.2d 152, 157, 161-62, 961 P.2d 371 (1998); *Birchler v. Castello Land Co., Inc.*, 133 Wn.2d 106, 110, 942 P.2d 968 (1997).

B. This Court should grant review to hold that a principal may be directly liable for treble damages under the trespass statute and under the Dig Law.

1. The Court of Appeals erred in concluding that the Legislature intended to impose a physical-entry requirement for treble-damages liability under the trespass statute.

This Court has never addressed whether RCW 4.24.630, which applies broadly to trespasses on any land, requires a physical entry to trigger liability for treble damages. The statute provides:

Every person who [1] goes onto the land of another and who removes timber, crops, minerals, or other similar valuable property from the land, or [2] wrongfully causes waste or injury to the land, or [3] wrongfully injures personal property or improvements to real estate on the land, is liable to the injured party for treble the amount of the damages caused by the removal, waste, or injury. . . .

RCW 4.24.630(1) (emphasis and brackets added). It mandates the recovery of treble damages against “every person” who wrongfully causes injury to land. It imposes liability under three scenarios, and for only one of those scenarios does the statute’s plain language require a physical entry.

The Court of Appeals disregarded that plain language when it concluded that a defendant must physically enter the property to trigger liability for treble damages. *Decision* at 14. It also ignored that the common law informs the statute’s meaning. *See Broughton Lumber Co. v. BNSF Ry. Co.*, 174 Wn.2d 619, 628, 278 P.3d 173 (2012). The common law of trespass holds a principal vicariously liable for their agent’s actions.

Fordney v. King County, 9 Wn.2d 546, 557-58, 115 P.2d 667 (1941); accord RESTATEMENT (SECOND) OF TORTS § 158 (1965).⁷

CenturyLink admitted at trial that it could stop Pacific’s work at any time. RP 540, 814-15. Under the common law, that authority would be sufficient to hold CenturyLink liable for the damage its agent caused. There is no reason to believe that the Legislature intended to depart from the common law and insulate a principal from treble-damages liability under the trespass statute, so long as that principal managed to avoid going onto the plaintiff’s property and *itself* commit the damaging trespass.⁸ Such a reading of the statute allows the ultimate responsible party to avoid accountability for its wrongdoing and frustrates the public policies of deterrence and punishment that treble damages are designed to achieve. That the Court of Appeals’ approach has allowed a major utility company such as CenturyLink to insulate itself from accountability illustrates why this Court should grant review, given the potential for damage to innocent property owners from what amounts to a business model of evading

⁷ See also *Longview Fibre Co. v. Roberts*, 2 Wn. App. 480, 483, 470 P.2d 222 (1970) (“In other states, under similar statutes, the rule of vicarious liability and application of the treble damages penalty upon an employer subsequent to trespass by his employees has been clearly established[,] . . . even when the employee’s trespass is contrary to the employer’s orders[.]”).

⁸ This Court presumes that the Legislature did not intend to alter the common law unless that disposition is clear. See *Wichert v. Cardwell*, 117 Wn.2d 148, 155, 812 P.2d 858 (1991); *Marble v. Clein*, 55 Wn.2d 315, 317-18, 347 P.2d 830 (1959).

responsibility by hiding behind the subcontractors who physically carry out the actual wrongdoing.⁹

2. The Court of Appeals erred in concluding that CenturyLink was not liable for treble damages under RCW 19.122.070(2) because it was not an “excavator.”

As the permit holder, CenturyLink was required to comply with all conditions imposed by the City and its ordinances for the right to place conduit in the public right-of-way and with all “state safety laws,” including the Dig Law. RCW 35.99.030(6); *see also Opening Br.* at 35-38 (identifying all of the City of Fife ordinances with which CenturyLink failed to comply). The Dig Law imposes treble damages on any “excavator who willfully or maliciously damages marked underground utilities.” RCW 19.122.070(2). It also bars attempts to shift liability via contractual indemnification. RCW 19.122.040(3). It defines “excavator” as “any person who engages directly in excavation.” RCW 19.122.020(10). It defined “excavation” broadly as “any operation, including the installation of signs, in which earth, rock, or other material on or below the ground is moved or otherwise displaced by any means.” RCW 19.122.020(8).

CenturyLink directed its subcontractor to use an inherently dangerous boring method. The City told CenturyLink to locate and protect

⁹ The evidence at trial established that a CenturyLink representative did in fact trespass on at least one occasion, when Pacific—defying Fife Portal’s instructions to stay off its property—returned and used a backhoe to dig up and recover a portion of CenturyLink’s conduit. RP 669-70. Under the Court of Appeals’ approach, CenturyLink still is not liable because, apparently, the Court of Appeals would require that the CenturyLink representative have personally operated the backhoe in order for CenturyLink to be liable under the statute. This Court should grant review to make clear that this is not the law of this state.

the underground utilities, and to get an easement from Fife Portal; Pacific also asked CenturyLink to conduct a survey to confirm the location of the boundary between the public right-of-way and Fife Portal's property. CenturyLink did none of those things, thereby blowing three chances to prevent catastrophic damage to Fife Portal's property and the City's water main. If anything, it is more important to punish CenturyLink than its subcontractor, to deter it from ignoring its responsibilities under chapter 19.122 RCW. Otherwise, CenturyLink may fob off on its subcontractors the sole responsibility for damaging property. As a practical matter, that is no different from impermissibly shifting that responsibility by contractual indemnification from the subcontractor.

If left to stand, the Court of Appeals' interpretation of the Dig Law will encourage major telecommunications companies to hire subcontractors to perform highly dangerous work, knowing that they will not be subject to treble damages as long as their own employees don't themselves put a shovel to the ground. That cannot be what the Legislature intended when it enacted the Dig Law "to protect the public health and safety and prevent disruption of vital utility services." RCW 19.122.010(1).

C. This Court should grant review to hold that a principal may be vicariously liable for treble damages.

Nearly every jurisdiction allows a principal to be held vicariously liable for punitive damages. 1 STEIN ON PERSONAL INJURY DAMAGES TREATISE (STEIN) § 4:31 (3d ed., updated electronically Oct. 2020); Philip H. Corboy, *Vicarious Liability for Punitive Damages: The Effort To*

Constitutionalize “Tort Reform,” 2 SETON HALL CONST. L.J. 5, 7 (1991) (“[C]ourts have long recognized the imposition of vicarious liability for punitive damages as an important deterrent to tortious misconduct.”).

Two theories of vicarious liability have emerged. Most jurisdictions have extended the general rule of respondeat superior to hold principals vicariously liable for punitive damages based on their agents’ tortious acts, even if the principal did not authorize or ratify the acts. 1 STEIN § 4:31; *see also Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 15, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991) (holding that the imposition of punitive damages on a principal based on the fraudulent acts committed by its agent did not violate the Due Process Clause of the Fourteenth Amendment and embracing the respondeat-superior theory). A minority of jurisdictions requires that the principal participated in, ratified, or authorized the tortious conduct. 1 STEIN §§ 4:31-32.

The Court of Appeals declined to address whether CenturyLink could be vicariously liable for treble damages.¹⁰ *Decision* at 16. Fife Portal presented sufficient evidence at trial from which a jury could reasonably find CenturyLink vicariously liable under any of three theories of vicarious liability: trespass, agency, and “peculiar risk” (this last theory arising out of CenturyLink’s decision requiring Pacific to use underground boring).

¹⁰ The Court of Appeals’ assertion that Fife Portal did not argue for holding CenturyLink liable for treble damages, based on principles of vicarious liability for Pacific’s violations of the trespass statute and the Dig Law, is conclusively refuted by Fife Portal’s reply brief and its answer to CenturyLink’s post-argument motion to strike. *See Reply Br.* at 2-14; *Answer to Mot. Strike* at 1-14.

See Opening Br. at 44-63.¹¹ This Court should grant review to decide whether to adopt the nearly universal approach of holding principals vicariously liable for treble damages, and to determine whether Fife Portal presented sufficient evidence at trial from which a jury could find that CenturyLink was vicariously liable for its subcontractor's established violations of RCW 4.24.630(1) and RCW 19.122.070(2).

D. This Court should grant review to confirm that a plaintiff may recover necessary costs, regardless of whether they have yet been incurred.

Fife Portal—specifically, the Owners Association—was required to retain First Corps to lead the investigation and remediation efforts. CP 402-03, 477-78; RP 602. The Association had an oral agreement with First Corps to do this work, and First Corps acted through George Humphrey.¹² CP 387, 395, 435-39. Of the 569 hours that Humphrey spent on the matter, he devoted 66 percent to “site” work, valued at \$131,232.50. CP 433, 435-39. That work included attending on-site inspections and meetings with engineers and the City, reviewing plans to remediate the property, and coordinating with contractors. CP 435-39, 477-78. First Corps' work on the property was ongoing when Humphrey was deposed in March 2017, shortly before the summary-judgment hearing. Humphrey testified that,

¹¹ This Court recognized peculiar-risk vicarious liability under sections 416 and 427 of the *Restatement (Second) of Torts* in *Stout v. Warren*, 176 Wn.2d 263, 290 P.3d 972 (2012).

¹² The Court of Appeals states there was no agreement between Fife Portal and First Corps. *See Decision* at 10. The court is correct, but also misses the relevant point: that the Association—a plaintiff in its own right—did enter into such an agreement with First Corps.

once First Corps finished its work on the property (which ultimately continued well beyond March 2017), it would bill the Association. CP 384, 403-04.¹³

Although the Court of Appeals rejected the trial court’s rationale for dismissing Fife Portal’s claim for these costs on summary judgment,¹⁴ it affirmed the result based on a supposed rule requiring any injured party “to come forward with evidence showing that *it had incurred* costs” to survive summary judgment. *Decision* at 9-10 (emphasis added).

The Court of Appeals’ holding conflicts with this Court’s precedents. Those precedents allow a plaintiff to recover the reasonable value of services needed because of the defendant’s wrongdoing, regardless of whether the costs have yet been incurred, billed or paid. This Court has held that a tort plaintiff may recover both costs incurred and *to be incurred* in the future. *Reed v. Jamieson Inv. Co.*, 168 Wash. 111, 114-16, 10 P.2d 977 (1932) (approving a jury instruction allowing recovery of costs “to be incurred” and affirming the judgment on the jury verdict for the plaintiff).¹⁵

¹³ At the start of trial, the trial court adhered to its earlier summary-judgment order and barred Fife Portal from presenting evidence to the jury on First Corps’ time. RP 324-25; CP 1807. Fife Portal submitted a declaration from Humphrey that updated his time working through First Corps. RP 283-84; CP 1799-1800. By then, First Corps had concluded its work, and Fife Portal would have sought \$180,332.50 in investigative and restoration costs “for the services rendered by First Corps in leading and directing the repairs of damages.” CP 1799-1800. Thus, by the time of trial, Fife Portal was prepared to show that First Corps had billed—and the Association had paid—for First Corps’ time.

¹⁴ The trial court relied on a plainly untenable ground involving misplaced notions of corporate disregard. RP 16-17; CP 580-81.

¹⁵ See also *Schurk v. Christensen*, 80 Wn.2d 652, 657-58, 497 P.2d 937 (1972); 6 WASH. PRAC., WASH. PATTERN JURY INSTR. CIV. WPI 30.07.02 (7th ed., updated July 2019) (allowing recovery of “[t]he reasonable value of necessary medical care, treatment, and services with reasonable probability to be required in the future”); WPI 30.13 (“The reasonable value of necessary repairs to any property that was damaged”).

It has also held that costs “can be recovered even before payment.” *Nelson v. W. Steam Nav. Co.*, 52 Wash. 177, 184, 100 P. 325 (1909); *see also Hayes v. Wieber Enters., Inc.*, 105 Wn. App. 611, 616, 20 P.3d 496 (2001) (observing that the “amount actually billed or paid is not itself determinative” of damages); RESTATEMENT (SECOND) OF TORTS § 924 cmt. f (1979); 2 STEIN § 7:7.

To dismiss an injured party’s claim on summary judgment because a necessary cost has not yet been incurred flies in the face of basic principles of justice and fairness long recognized by this Court. Review is warranted to determine whether a jury should be allowed to award these restoration and investigative costs to Fife Portal.¹⁶

VI. CONCLUSION

This Court should grant review, reverse the Court of Appeals’ decision, and remand for a trial (1) on the compensatory damages that the trial court erroneously precluded Fife Portal from recovering and (2) on CenturyLink’s liability for treble damages.

¹⁶ RCW 4.24.630(1) treats both “investigative costs” and “attorneys’ fees” as “reasonable costs” that may be recovered. Under the Court of Appeals’ supposed rule, if Fife Portal had failed to present any billings as of the March 2017 summary judgment showing that it had “incurred” attorneys’ fees, then CenturyLink and Pacific could have obtained a summary judgment barring Fife Portal from recovering any attorneys’ fees. Clearly that is neither what the Legislature intended nor what this Court’s precedents permit.

Respectfully submitted: November 30, 2020.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorneys of record by the method noted:

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APPENDIX

A

August 11, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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,

Appellants,

v.

CENTURYLINK, INC., a Washington Corporation; PACIFIC UTILITY CONTRACTORS, INC., a Louisiana corporation licensed to do business in Washington, JOHN DOE 1; JOHN DOE 2,

Respondents.

No. 52415-5-II

UNPUBLISHED OPINION

MAXA, J. – Fife Portal, LLC; Fife Portal 140 Owners Association, LLC (“Association”); and Z.V. Company, Inc. (collectively “Fife Portal”) filed suit against CenturyLink, Inc. and its subcontractor Pacific Utility Contractors, Inc. (“Pacific”) to recover for damage to Fife Portal’s property and underground utilities. Pacific caused the damage when drilling for the installation of underground conduit for CenturyLink. The trial court found Pacific liable as a matter of law on summary judgment.

Fife Portal sought to recover as damages the value of time spent working on the property repair and the lawsuit by George Humphrey, allegedly working for his independent company First Corps, Inc., and by Peter Wooding. Humphrey was the manager of Fife Portal, LLC and

the president of the Association. Wooding managed Z.V. Company's property. The trial court in a partial summary judgment order precluded Fife Portal from making this claim because it involved the personal time of Humphrey and Wooding, which the court ruled was unrecoverable.

Fife Portal also sought to present evidence that Humphrey's estimate for future restoration costs regarding Fife Portal's property should include an amount for unknown conditions on the damaged property. In an evidentiary ruling during trial, the trial court precluded Fife Portal from presenting this evidence.

At trial, the trial court granted CenturyLink's motion for judgment as a matter of law and dismissed all of Fife Portal's claims against CenturyLink. A jury subsequently awarded Fife Portal damages against Pacific. The court entered judgment against Pacific for the amount of the awarded damages, treble damages, interest, and attorney fees. Pacific eventually paid that judgment in full. Fife Portal acknowledges that Pacific's payment of the judgment generally precludes Fife Portal from recovering the judgment amount again from CenturyLink even if CenturyLink is found liable. But Fife Portal claims that its appeal regarding CenturyLink's liability is not moot because this rule does not apply to treble damages, which can be recovered twice from different parties.

We hold that (1) the trial court did not err in granting partial summary judgment precluding Fife Portal from seeking recovery for the value of Humphrey's and Wooding's time or in excluding evidence at trial that Humphrey's estimate for future restoration costs should include an amount for unknown conditions; and (2) Fife Portal's appeal regarding CenturyLink's liability is moot because as a matter of law, CenturyLink cannot be liable for treble damages on Fife Portal's liability theories.

Accordingly, we affirm the trial court's judgment.

FACTS

Background

The Association managed the Fife Portal Industrial Park in Fife. Fife Portal, LLC and Z.V. Company were two members of the Association. Humphrey was the manager of Fife Portal, LLC and the president and only officer of the Association. He also was the president of First Corps, Inc., a real estate development company that designed and developed the industrial park. Wooding managed Z.V. Company's property.

CenturyLink's Conduit Work

CenturyLink applied to the City of Fife for a permit to install conduits under a public right-of-way in Fife to expand CenturyLink's cable network. The right-of-way was located adjacent to Fife Portal's property. The City issued the permit in June 2015.

In September 2015, CenturyLink retained Pacific to install the conduits. CenturyLink directed Pacific to drill under a public sidewalk on the right-of-way. CenturyLink required Pacific to employ a drilling method that uses a drill to bore a path underground through which conduit can be pulled from the entry point to the exit point.

CenturyLink's Engineering Drawings

CenturyLink prepared engineering drawings regarding Pacific's installation of the conduits. The drawings instructed Pacific to bore under the sidewalk. CenturyLink's drawings mistakenly showed that there was a distance of nine feet from the edge of the sidewalk to Fife Portal's property line. The actual distance was six inches to a foot.

Damage to Underground Utilities

In October 2015, Pacific began work on installing CenturyLink's conduits. Pacific placed CenturyLink's conduits on Fife Portal's property, two or three feet beyond the boundary

line of the right-of-way. While drilling, Pacific struck and damaged Fife Portal's underground storm drain pipe. Without giving notice to Fife Portal, Pacific excavated the pipe, attempted to repair the damage, and reburied the drain, causing damage to Pacific's landscape area.

Several days later, Pacific again struck the storm drain pipe as well as the City's underground water main, causing the water main to rupture and blow apart asphalt above, creating a large hole. Pacific then notified Fife Portal about its work on Fife Portal's property and damage to its underground utilities.

First Corps Work for Fife Portal

Fife Portal hired First Corps, the original developer of the industrial park, to investigate Fife Portal's property and ascertain the extent of damage. As the president of First Corps, Humphrey rendered all services on behalf of that company.

Fife Portal asserted a claim for First Corps/Humphrey's time from October 2015 to June 2016 that totaled 568.95 hours at \$350 per hour. The claim was broken down as 194 hours for "Legal" and 374.95 hours for "Site." Fife Portal produced a log that provided a date and a description of the time Humphrey spent in the two categories.

There was no written agreement between Fife Portal and First Corps regarding work on this project. Humphrey agreed to his own \$350 rate on behalf of Fife Portal. Humphrey testified that eventually he would bill First Corps for his time and First Corps would bill the Association. However, the summary judgment record reflected that First Corps had not billed Fife Portal and had not been paid for these services even though they had been performed months earlier.

In addition, Fife Portal claimed as damages the value of time incurred by Wooding, the representative of Z.V. Company. Fife Portal asserted a claim for 200 hours at \$250 per hour. The claim was broken down as 40 hours for "Legal" and 160 hours for "Site." Fife Portal did

not provide a date or description of Wooding's time. There was no evidence that Wooding had been retained to participate in repair work.

Lawsuit Against Pacific and CenturyLink

Fife Portal filed a lawsuit against Pacific and CenturyLink to recover for the damage Pacific caused. The lawsuit asserted claims for common law trespass; trespass under RCW 4.24.630; violation of the Underground Utility Damage Prevention Act (UUDPA), chapter 19.122 RCW; and negligence. Fife Portal sought recovery of treble damages pursuant to RCW 4.24.630 and the UUDPA.

Fife Portal moved for partial summary judgment against Pacific on liability. The trial court granted Fife Portal's motion and established Pacific's liability for common law trespass, trespass in violation of RCW 4.24.630, and multiple UUDPA violations.

Summary Judgment on the Measure of Damages

In March 2017, Pacific and CenturyLink filed a motion for partial summary judgment on the measure of damages under RCW 4.24.630, seeking to exclude the value of time Humphrey and Wooding spent regarding repair work on the property and the litigation. The trial court granted the motion in part. The court ruled that Humphrey's and Wooding's personal time was not compensable under RCW 4.24.630.

Motion in Limine on "Unknown Conditions"

CenturyLink filed a motion in limine to exclude evidence of Fife Portal's claim that Humphrey's estimate of future property repairs should include a line item for unknown conditions. The trial court reserved its ruling to determine whether Fife Portal could lay a sufficient foundation for the evidence. The court expressed doubt as to the certainty of the costs calculated by Humphrey to restore the property back to the condition before it was damaged.

At trial, Humphrey testified that he compiled a summary of costs already incurred and future costs. Among the future costs identified by Humphrey was a \$25,000 contingency fee for unknown conditions. Humphrey stated that in his experience, he always included a contingency fee in construction estimates for worst case scenarios.

After hearing Humphrey's testimony, the trial court granted CenturyLink's motion in limine and excluded further testimony on unknown conditions as part of Humphrey's repair estimate. The court stated that "a lot of this is unknown conditions, frankly, in my book." 11 Report of Proceedings at 719. The court later confirmed that it had sustained a defense objection to the line item for unknown conditions.

Judgment as a Matter of Law

At the close of Fife Portal's case in chief, CenturyLink moved for judgment as a matter of law on all direct and vicarious liability claims against it. The trial court entered judgment as a matter of law in favor of CenturyLink on all claims and dismissed CenturyLink from the case.

Verdict and Judgment

The jury found that Fife Portal incurred \$195,074.79 in damages because of Pacific's conduct. The trial court trebled the damage award as allowed under RCW 4.24.630 and the UUDPA and awarded attorney fees and costs of \$267,748.61. The court entered judgment against Pacific for \$852,972.98.

Pacific eventually paid the judgment in full, including the treble damages. The trial court entered a satisfaction of judgment.

Fife Portal appeals the trial court's summary judgment order and evidentiary ruling regarding damages evidence and the trial court's entry of judgment as a matter of law in favor of CenturyLink.

ANALYSIS

A. SUMMARY JUDGMENT REGARDING INVESTIGATION TIME

Fife Portal argues that the trial court erred in granting partial summary judgment on its claims under RCW 4.24.630 for the value of time spent by Humphrey and Wooding in investigating the damages Pacific caused and managing restoration efforts. We disagree.

1. Summary Judgment Standard

Our review of a dismissal on summary judgment is *de novo*. *Mackey v. Home Depot USA, Inc.*, 12 Wn. App. 2d 557, 569, 459 P.3d 371 (2020). We review all evidence and reasonable inferences in the light most favorable to the nonmoving party. *Keck v. Collins*, 184 Wn.2d 358, 368, 357 P.3d 1080 (2015). We may affirm an order granting summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Mackey*, 12 Wn. App. 2d at 569. A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation. *Id.*

The party moving for summary judgment has the initial burden to show there is no genuine issue of material fact. *Zonnebloem, LLC v. Blue Bay Holdings, LLC*, 200 Wn. App. 178, 183, 401 P.3d 468 (2017). A moving defendant can meet this burden by showing that there is an absence of evidence to support the plaintiff's claim. *Id.* Once the defendant has made such a showing, the burden shifts to the plaintiff – here, Fife Portal – to present specific facts that show a genuine issue of material fact. *Id.* Summary judgment is appropriate if a plaintiff fails to show sufficient evidence to establish the existence of an element essential on which he or she will have the burden of proof at trial. *Lake Chelan Shores Homeowners Ass'n v. St. Paul Fire & Marine Ins. Co.*, 176 Wn. App. 168, 179, 313 P.3d 408 (2013).

2. Damages Under RCW 4.24.630(1)

RCW 4.24.630(1) provides:

Every person who goes onto the land of another and . . . wrongfully causes waste or injury to the land . . . is liable to the injured party for treble the amount of the damages caused by the removal, waste, or injury. . . . *Damages recoverable under this section include, but are not limited to, damages for the market value of the property removed or injured, and for injury to the land, including the costs of restoration.* In addition, the person is liable for reimbursing the injured party for the *party's reasonable costs, including but not limited to investigative costs and reasonable attorneys' fees and other litigation-related costs.*

(Emphasis added.)

The trial court ruled on summary judgment that Pacific violated RCW 4.24.630(1) when it drilled on Fife Portal's property and damaged underground utilities. The question here is whether Fife Portal's claims for the value of time spent by Humphrey and Wooding is recoverable as costs of restoration or reimbursable as investigation costs.

In granting summary judgment in favor of CenturyLink, the trial court ruled that Fife Portal was precluded from asserting the claim for Humphrey's and Wooding's time because it represented their personal time. As discussed below, we affirm for different reasons. However, we can affirm on any grounds supported by the record. *Port of Anacortes v. Frontier Indus., Inc.*, 9 Wn. App. 2d 885, 892, 447 P.3d 215 (2019), *review denied*, 195 Wn.2d 1005 (2020).

3. Claim for Humphrey's "Legal" Time

Fife Portal asserted a claim for time Humphrey spent on matters that were characterized as "Legal." However, Fife Portal's claim for Humphrey's time is for services rendered on behalf of First Corps. There is evidence that Fife Portal retained First Corps to coordinate repair efforts (discussed below), but there is no evidence that Fife Portal retained First Corps to provide *litigation* services. Therefore, the time Humphrey spent on legal matters was beyond the scope of First Corps' work.

Further, we conclude that time spent on legal matters is not recoverable under RCW 4.24.630(1) even if Humphrey was acting in his personal capacity as a representative of two of the plaintiffs. Fife Portal has presented no authority for the proposition that a party can recover damages for participating in litigation matters under RCW 4.24.630(1), and we have found none.¹

We affirm the trial court's partial summary judgment order with regard to the claim for Humphrey's and Wooding's "Legal" time.

4. Claim for Humphrey's "Site" Time

Fife Portal asserted a claim for time Humphrey spent on matters that were characterized as "Site." Fife Portal argues that the trial court erred in precluding this claim because Humphrey's time constituted restoration costs and investigative costs recoverable under RCW 4.24.630(1).

CenturyLink argues, and the trial court ruled, that Fife Portal's claim was for Humphrey's personal time as manager of Fife Portal, LLC and president of the Association. However, Humphrey testified that Fife Portal retained First Corps, an independent legal entity, to coordinate the repair of the damage Pacific had caused. Humphrey stated that his work was performed on behalf of First Corps and that First Corps would bill Fife Portal for his work. Viewed in the light most favorable to Fife Portal, a question of fact exists as to whether Humphrey was spending the claimed time in his capacity as a representative of Fife Portal, LLC or the Association.

¹ CenturyLink cites to *Washington State Physicians Insurance Exchange & Association v. Fisons Corporation*, 122 Wn.2d 299, 858 P.2d 1054 (1993), for the proposition that a party may not be compensated for litigation-related pursuits. However, the court in *Fisons* did not hold that damages for litigation-related time were not recoverable. The court simply noted the trial court's *unchallenged* ruling that such damages were not recoverable. *Id.* at 332-33.

However, Fife Portal did not present any evidence that it actually incurred costs relating to Humphrey's time. Fife Portal did not enter into a written or oral agreement to reimburse First Corps for Humphrey's time. And First Corps did not bill Fife Portal for Humphrey's time and Fife Portal never made any payments to First Corps.

Humphrey did testify that eventually he would bill First Corps for his time and First Corps would bill the Association. But the summary judgment motion regarding Humphrey's time was filed almost nine months after his last work on the project. As the nonmoving party, Fife Portal was required to come forward with evidence showing that it had incurred costs regarding Humphrey's time. *See Zonnebloem*, 200 Wn. App. at 183. Fife Portal failed to do so. In the absence of any such evidence, we conclude that summary judgment was appropriate regarding the claim for Humphrey's "Site" time.

We affirm the trial court's partial summary judgment order with regard to the claim for Humphrey's "Site" time.

5. Claim for Wooding's Time

The parties do not focus specifically on Fife Portal's claim for Wooding's time. But we hold that the summary judgment record is insufficient to support a claim for the value of his time.

The sole reference in the summary judgment record to Wooding's work regarding repair of the property in Fife Portal's claim for 40 hours for "Legal" and 160 hours for "Site." But unlike for Humphrey's time, Fife Portal presented no description of Wooding's time. And there was no other evidence as to what Wooding actually did regarding repair work at the site or the litigation. In the absence of such evidence, Fife Portal cannot create a question of fact as to

whether Wooding's time constituted costs of restoration, investigation costs, or any other amounts recoverable under RCW 4.24.630(1).

We affirm the trial court's partial summary judgment order with regard to the claim for all of Wooding's time.

B. EVIDENTIARY RULING REGARDING ESTIMATE FOR UNKNOWN CONDITIONS

Fife Portal argues that the trial court erred when it excluded evidence that the estimate for future restoration costs should include an amount for unknown conditions. We disagree.

1. Legal Principles

Claimants generally must establish damages with reasonable certainty. *Holmquist v. King County*, 192 Wn. App. 551, 559, 368 P.3d 234 (2016). Although mathematical certainty is not required, the amount of damages must be supported by competent evidence. *Id.* at 560. Evidence of damage is sufficient if it gives the trier of fact a reasonable basis for estimating the loss and does not require mere speculation or conjecture. *Id.*

We review a trial court's evidentiary rulings for abuse of discretion. *Cole v. Harveyland, LLC*, 163 Wn. App. 199, 213, 258 P.3d 70 (2011). Therefore, we will overturn the trial court's ruling on the admissibility of evidence only if its decision was manifestly unreasonable, exercised on untenable grounds, or based on untenable reasons. *Gorman v. Pierce County*, 176 Wn. App. 63, 84, 307 P.3d 795 (2013).

2. Analysis

Fife Portal argues that because it established that its property had been damaged, it was not required to establish the amount of damages with precision. Fife Portal claims that Humphrey's extensive experience in the construction industry provided an adequate foundation

for his inclusion of a line item for unknown conditions in his repair estimate and the amount of that line item.

Fife Portal also contends that contingency amounts for unknown conditions routinely are included in construction bids and repair estimates. Fife Portal cites *Chandler v. Madsen*, 197 Mont. 234, 642 P.2d 1028 (1982) for this proposition. In *Chandler*, the court held that including a 12 percent contingency in a bid to repair a damaged house was not speculative. *Id.* at 236. Fife Portal provides no Washington authority on this issue.

But the trial court here did not exclude the evidence on the ground that a contingency amount could never be included in a repair estimate. Instead, the court ruled that under the particular facts of this case, including \$25,000 for unknown conditions was speculative and arbitrary because several unknowns already had been accounted for in Humphrey's estimate. The evidence showed that other aspects of Humphrey's estimate already involved imprecise numbers for costs that may or may not occur. In other words, as the trial court noted, much of Humphrey's estimate already accounted for unknown conditions.

The standard of review for the trial court's evidentiary ruling is abuse of discretion. *Cole*, 163 Wn. App. at 213. The trial court made its ruling after hearing all of Humphrey's testimony about his estimate for future repair costs. We hold that the trial court did not abuse its discretion in excluding evidence that the estimate for future restoration costs should include an amount for unknown conditions.

C. JUDGMENT AS A MATTER OF LAW IN FAVOR OF CENTURYLINK

Fife Portal argues that the trial court erred in entering judgment as a matter of law under CR 50(a)(1) in favor of CenturyLink and dismissing Fife Portal's claims for negligence, peculiar risk vicarious liability, trespass vicarious liability, and principal-agent vicarious liability. Fife

Portal claims that its appeal regarding CenturyLink's liability is not moot even though Pacific has now paid the judgment in full because it can recover a second payment of treble damages from CenturyLink if on remand CenturyLink is found directly liable for treble damages.

We conclude that the appeal regarding CenturyLink's liability is moot because Pacific has paid the judgment in full and CenturyLink cannot be held liable for treble damages under either RCW 4.24.630(1) or the UUDPA, the only two liability theories that allow for the recovery of treble damages. As a result, we decline to address the legal issue of whether the same treble damages can be imposed on separate defendants.

1. Issue Not Addressed in Trial Court

Initially, Fife Portal argues in its supplemental reply brief that we should remand the issue of CenturyLink's liability for treble damages to the trial court for determination because the trial court never ruled on this issue.

At times we will remand legal issues that have not yet been decided by the trial court when other case developments may mean that the issue never arises. However, CenturyLink's liability for treble damages under RCW 4.24.630(1) and the UUDPA is a legal issue that can be resolved based on undisputed facts. Therefore, we address this issue rather than remanding for trial court determination.

2. No Direct Liability Under RCW 4.24.630(1)

CenturyLink argues that it has no direct liability for treble damages under RCW 4.24.360(1). We agree.

RCW 4.24.630(1) provides in part:

Every person who goes onto the land of another and who removes timber, crops, minerals, or other similar valuable property from the land, or wrongfully causes waste or injury to the land, or wrongfully injures personal property or improvements to real estate on the land, is liable to the injured party for treble the

amount of the damages caused by the removal, waste, or injury. For purposes of this section, a person acts “wrongfully” if the person intentionally and unreasonably commits the act or acts while knowing, or having reason to know, that he or she lacks authorization to so act.

(Emphasis added). Under the plain language of RCW 4.24.630(1), a party is liable if he “goes onto the land of another” and does one of three acts: (1) “removes timber, crops, minerals, or other similar valuable property from the land”; (2) “wrongfully causes waste or injury to the land”; or (3) “wrongfully injures personal property or improvements to real estate on the land.”

There can be no liability under RCW 4.24.630(1) unless the defendant actually goes onto the plaintiff’s land. *Kave v. McIntosh Ridge Primary Rd. Ass’n*, 198 Wn. App. 812, 824, 394 P.3d 446 (2017). “The statute’s premise is that the defendant physically trespasses on the plaintiff’s land.” *Colwell v. Etzell*, 119 Wn. App. 432, 439, 81 P.3d 895 (2003).

Here, it is undisputed that CenturyLink did not physically go onto Fife Portal’s land and cause injury. As a result, we conclude that the plain language of RCW 4.24.630(1) establishes that CenturyLink cannot be directly liable for treble damages under that statute.

3. No Direct Liability Under the UUDPA

CenturyLink argues that it has no direct liability for treble damages under the UUDPA.

We agree.

RCW 19.122.070(2) states:

Any *excavator* who willfully or maliciously damages a marked underground facility is liable for treble the costs incurred in repairing or relocating the facility. In those cases in which *an excavator* fails to notify known facility operators or a one-number locator service, any damage to the underground facility is deemed willful and malicious and is subject to treble damages for costs incurred in repairing or relocating the facility.

(Emphasis added.) RCW 19.122.020(10)² defines an “excavator” as “any person who engages directly in excavation.”

It is undisputed that CenturyLink did not directly engage in excavation. Therefore, CenturyLink does not fall within the definition of “excavator” and cannot be liable for treble damages under RCW 19.122.070(2).

The UUDPA imposes certain duties on “project owners” and “facility operators.” See RCW 19.122.030, .040, .053. CenturyLink may fall into one or both of those categories. However, the UUDPA does not impose liability for treble damages for violation of any of those duties. We conclude that CenturyLink cannot be directly liable for treble damages under the UUDPA.

4. Vicarious Liability

Pacific went onto Fife Portal’s land and caused injury in violation of RCW 4.24.630(1) and violated RCW 19.122.070(2), and was found liable for treble damages as a result. Fife Portal argues that CenturyLink is vicariously liable for Pacific’s conduct under various theories. If CenturyLink was vicariously liable for Pacific’s liability, CenturyLink could have been required to pay the treble damages imposed on Pacific if Pacific had not already paid those damages.

However, Fife Portal argues only that CenturyLink can be liable separately for treble damages based on CenturyLink’s *own* reckless and willful misconduct in order to punish CenturyLink for that misconduct. Fife Portal claims that it can recover treble damages from

² RCW 19.122.020 has been amended since the events of this case transpired. Because these amendments do not impact the statutory language relied on by this court, we refer to the current version of the statute.

CenturyLink based on CenturyLink's *own* violation of RCW 4.24.630(1) or RCW 19.122.070(2). Those arguments do not apply to vicarious liability.

Fife Portal does not argue that it can recover *separate* treble damages from CenturyLink if CenturyLink is only vicariously liable under RCW 4.24.630(1) or RCW 19.122.070(2). Therefore, we do not address that issue.

5. Mootness

An appeal is moot if we no longer can provide effective relief. *Randy Reynolds & Assocs., Inc. v. Harmon*, 193 Wn.2d 143, 152, 437 P.3d 677 (2019). Fife Portal acknowledges the general rule that one liable person's payment of a judgment eliminates any other person's liability for the amount paid because a plaintiff generally can only have one satisfaction of a judgment. *See Marshall v. Estate of Chapman*, 31 Wn.2d 137, 145-46, 195 P.2d 656 (1948); *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 50(2) (AM. LAW INST. 1982); RESTATEMENT (SECOND) OF TORTS § 885(3) (AM. LAW INST. 1965). This rule applies here because Pacific has paid the judgment Fife Portal obtained.

Fife Portal's only argument is that this "one satisfaction" rule does not apply to treble damages, and therefore it can recover additional treble damages from CenturyLink if CenturyLink is found liable. But as we have held above, CenturyLink cannot be held liable for treble damages as a matter of law under RCW 4.24.630(1) or the UUDPA. Therefore, Fife Portal cannot obtain the relief it requests.

We hold that the appeal regarding CenturyLink's liability is moot. Therefore, we affirm the trial court's grant of judgment as a matter of law in favor of CenturyLink.

D. ATTORNEY FEES ON APPEAL

Fife Portal argues that it is entitled to reasonable attorney fees and costs on appeal, citing RAP 18.1 and RCW 4.24.630. However, Fife Portal did not prevail on appeal on its RCW 4.24.630 claim. Therefore, we decline to award attorney fees on appeal to Fife Portal.

CONCLUSION


We affirm the trial court's grant of partial summary judgment precluding Fife Portal's claim for Humphrey's and Wooding's time and the trial court's ruling excluding evidence of Fife Portal's claim for unknown conditions as part of future repair costs. We hold that Fife Portal's appeal of the trial court's entry of judgment as matter of law in favor of CenturyLink is moot. Accordingly, we affirm the trial court's judgment.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.



MAXA, J.

We concur:



LEE, C.J.



SIDDOWAY, J.³

³ The Honorable Laurel Siddoway is a Court of Appeals, Division Three, judge sitting in Division Two under CAR 21(a).

APPENDIX

B

October 27, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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,

Appellants,

v.

CENTURYLINK, INC., a Washington Corporation; PACIFIC UTILITY CONTRACTORS, INC., a Louisiana corporation licensed to do business in Washington, JOHN DOE 1; JOHN DOE 2,

Respondents.

No. 52415-5-II

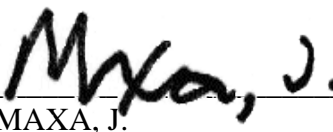
ORDER DENYING MOTION
FOR RECONSIDERATION

Appellants moved for reconsideration of the court's opinion filed August 11, 2020 in this case. Upon consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Maxa, Lee, Siddoway

FOR THE COURT:



MAXA, J.

APPENDIX

C

Trial Ex. 15 Photograph of the blowout of Fife Portal's driveway

Note: The following is a true and correct copy of the image that was used to create Trial Exhibit 15, with annotations added. The document provided to Fife Portal by the Pierce County Superior Court Clerk's Office in response to a request for a copy of Trial Exhibit 15 was a reproduction of a low-quality photograph of a blowup of Trial Exhibit 15. Fife Portal provided this document to the Court of Appeals as an appendix for oral argument.



City of Fife's sidewalk

Fife Portal's property (east-side landscape area and driveway)

Water-main driveway blowout area

CARNEY BADLEY SPELLMAN

November 30, 2020 - 9:57 AM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 99185-5
Appellate Court Case Title: Fife Portal, LLC, et al. v. Centurylink, Inc., et al.
Superior Court Case Number: 15-2-14644-6

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