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COURT OF APPEALS, DIVISION TWO
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,

Appellants/Cross-Respondents,

v.

CENTURYLINK, INC., a Louisiana corporation licensed
to do business in Washington,

Respondent,

and

PACIFIC UTILITY CONTRACTORS, INC., a
Washington Corporation,

Respondent/Cross-Appellant.

ON APPEAL FROM PIERCE COUNTY SUPERIOR COURT
Hons. Gretchen Leanderson and Susan Serko

APPELLANTS/CROSS-RESPONDENTS' OPENING BRIEF

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I. INTRODUCTION

Actions have consequences. So, too, does inaction. Ignorance of, or willful and reckless disregard for, the nature of those actions and inactions does not shield a person from responsibility for the consequences that follow. CenturyLink Inc. and its subcontractor, Pacific Utility, willfully and recklessly disregarded their duties owed to Fife Portal LLC under the Underground Utility Damage Prevention Act, the Fife Municipal Code, and the *Restatement of Torts*.

After obtaining a public right-of-way permit to install underground conduit, CenturyLink hired and directed Pacific to use an inherently dangerous trenchless-drilling technology known as “horizontal directional drilling” to install the conduit. CenturyLink’s engineering drawings attached to its permit application directed Pacific to trespass on private property to do its drilling operation. CenturyLink refused to survey the location of the project’s boundary lines, despite a request from Pacific, before Pacific began drilling. Pacific installed the conduit on Fife Portal’s property and struck multiple underground utilities. As a result of CenturyLink’s refusal to survey the boundary lines, its defective engineering drawings specifying the wrong boundary line for the project, its failure to obtain utility locates on Fife Portal’s property, its failure to obtain an easement from Fife Portal, and its failure to supervise Pacific’s work, CenturyLink caused Fife Portal to sustain significant damages to its property and underground utilities.

CenturyLink willfully and recklessly disregarded its duties requiring its contractors to report damages to underground facilities and to comply with state and local laws. RCW 80.04.440; RCW 35.99.030(6); CP 1104-05, 2008, 2020, 2031. CenturyLink failed to accept any responsibility to repair the damages it caused to private property. CP 1104-05, 2023-24, 2026. CenturyLink refused to promptly repair the damages it caused to Fife Portal's property and underground utilities, resulting in additional damages to the property.

But actions and inactions have consequences. CenturyLink's actions and inactions here cannot shield it from liability for the extensive damages it caused to Fife Portal's property and underground utilities.

This Court should (1) reverse the order granting CenturyLink a directed verdict on Fife Portal's negligence and vicarious-liability claims; (2) reverse the partial-summary-judgment order barring Fife Portal from recovering all of its restoration and investigative costs under RCW 4.24.630; (3) remand for a new trial on the damages the trial court barred Fife Portal from recovering including the future, contingent damages for unknown conditions; and (4) affirm the final judgment against Pacific.

II. ASSIGNMENTS OF ERROR

1. The trial court erred as a matter of law in granting CenturyLink a directed verdict and dismissing Fife Portal's negligence claims. CP 2559-60; RP 1013.

2. The trial court erred as a matter of law in granting CenturyLink a directed verdict and dismissing Fife Portal's peculiar-risk vicarious-liability claim. CP 2557-58; RP 1013.

3. The trial court erred as a matter of law in granting CenturyLink a directed verdict and dismissing Fife Portal's trespass vicarious-liability claim. CP 2557-58; RP 1013.

4. The trial court erred as a matter of law in granting CenturyLink a directed verdict and dismissing Fife Portal's vicarious-liability claim against CenturyLink based on a principal-agent relationship with Pacific Utility. CP 2557-58; RP 1013.

5. The trial court erred as a matter of law on partial summary judgment in precluding Fife Portal from presenting to the jury all of its relevant evidence on recoverable restoration and investigative costs under RCW 4.24.630. CP 580-81, 1799-1800, 1807; RP 16-17, 283-84.

6. The trial court erred as a matter of law in precluding Fife Portal from presenting any evidence to the jury on future, contingent damages based on "unknown conditions" relating to the soil underlying its underground utilities and flatwork. Ex. 20; RP 718-19, 727.

III. ISSUES PRESENTED

1. **CenturyLink's Negligence as the Right-of-Way Permit Holder for the Drilling Project.** A motion for directed verdict must be denied if substantial evidence supports a party's claim. The trial court granted CenturyLink a directed verdict and dismissed Fife Portal's negligence claims solely because Fife Portal failed to prove causation. But Fife Portal presented substantial evidence at trial for a reasonable jury to conclude that but for CenturyLink's actions and inactions, Fife Portal's property and underground utilities would not have been damaged.

CenturyLink's engineering drawings specified the wrong boundary line for the drilling project. Those drawings directed Pacific to trespass on Fife Portal's property. CenturyLink refused to survey the boundary lines before drilling began. CenturyLink failed to get an easement from Fife Portal to allow Pacific to install conduit on Fife Portal's property. CenturyLink failed to stop Pacific's work when CenturyLink inspected the drilling operation. CenturyLink failed to locate any underground utilities on Fife Portal's property.

Did the trial court err in granting CenturyLink a directed verdict and dismissing Fife Portal's negligence claims against CenturyLink? *Yes.*

2. **CenturyLink’s Peculiar-Risk Vicarious Liability: *Restatement (Second) of Torts* §§ 416, 427.** A principal who hires a contractor to do work posing a peculiar risk of harm that is inherent to the work is liable for any harm caused by the contractor’s failure to take special precautions.

CenturyLink obtained a right-of-way permit to install underground conduit. That permit required CenturyLink to take “special precautions” to protect the integrity of underground utilities during its drilling operation. CenturyLink hired Pacific to install the conduit near Fife Portal’s property. CenturyLink directed Pacific to use an inherently dangerous trenchless-drilling method called “horizontal directional drilling” to install the conduit. The risk of encountering underground facilities is inherent to horizontal directional drilling, is not a risk created by negligent performance of the work, and is a risk that cannot be avoided unless special precautions are taken. *J.J’s. Bar & Grill, Inc. v. Time Warner Cable Midwest, LLC*, 539 S.W.3d 849, 859 (Mo. Ct. App. 2017).

Did the trial court err in granting CenturyLink a directed verdict and dismissing Fife Portal’s peculiar-risk vicarious-liability claim? *Yes*.

3. **CenturyLink’s Trespass Vicarious Liability: *Restatement (Second) of Torts* § 427B.** A principal who hires a contractor to do work that the principal knows or has reason to know will likely involve a trespass on another’s land is liable for any harm caused by the contractor’s trespass. CenturyLink directed Pacific to do work on Fife Portal’s property without its permission. Pacific trespassed and caused extensive damages to Fife Portal’s property and underground utilities.

Did the trial court err in granting CenturyLink a directed verdict and dismissing Fife Portal’s trespass vicarious-liability claim? *Yes*.

4. **CenturyLink’s Vicarious Liability under a Principal–Agent Relationship.** The existence of a principal–agent relationship imposes liability on the principal for damages caused by the agent’s negligence. That relationship exists when the principal has the right to control the manner and means by which the agent’s work is performed. And that relationship exists as a matter of law when the principal owes a third party a nondelegable duty, such as for work that involves a peculiar risk of harm absent special precautions.

CenturyLink hired Pacific to drill and install conduit underground near Fife Portal's property. CenturyLink prescribed the process and method to be used by Pacific to install the conduit. CenturyLink directed Pacific to install the conduit underground using an inherently dangerous trenchless-drilling method. CenturyLink's engineering drawings controlled the location for installing the conduit. CenturyLink had the right to shut down Pacific's drilling operation at any time. A CenturyLink representative visited the project site to inspect Pacific's work and to ensure Pacific was safely and correctly performing its work. Pacific performed 80 percent of its work for CenturyLink, and CenturyLink hired Pacific for all of its smaller projects.

Did the trial court err in granting CenturyLink a directed verdict and dismissing Fife Portal's vicarious-liability claim based on a principal-agent relationship? *Yes.*

5. Scope of Recoverable Restoration and Investigative Costs under RCW 4.24.630 to Restore Damaged Property to its Original Condition. A person whose property is damaged through another's negligence may recover the costs and expenses he incurred in investigating and mitigating the damages and in performing his own repairs to restore the property. George Humphrey, acting through First Corps Inc., developed and designed Fife Portal's property as the general contractor. After CenturyLink and Pacific caused extensive damages to Fife Portal's property, CenturyLink refused to repair the property. So First Corps was retained as the general contractor to lead, direct, and oversee the restoration and emergency-mitigation efforts. First Corps hired various subcontractors to help repair the property.

Fife Portal sought to recover the time spent by First Corps—a separate entity with no direct ownership or financial interest in Fife Portal—in directing, leading, and overseeing the repairs to the property as a “cost of restoration” and “investigative cost” under RCW 4.24.630. But the trial court concluded on partial summary judgment that Fife Portal could not recover damages for the time spent by First Corps in remediating the property and in investigating and mitigating the property's damages. The trial court held that so-called “personal time” is not compensable under RCW 4.24.630.

Did the trial court err in interpreting RCW 4.24.630 to bar Fife Portal from recovering all of its recoverable restoration and investigative costs spent in remediating the property and in investigating and mitigating

the property's damages caused by CenturyLink's and Pacific's negligence?
Yes.

6. Recovery of Future, Contingent Damages for Unknown Conditions as Restoration Costs under RCW 4.24.630. A party who has established the fact of damages cannot be denied recovery on the basis that the amount of damages cannot be precisely ascertained. Evidence of damages is sufficient if it affords a reasonable basis for estimating the loss. Once the fact of damage is established, the jury may estimate the amount of damage.

Fife Portal sought to recover for future, contingent unknown conditions relating to the property's disturbed soil supporting Fife Portal's underground utilities and flatwork. The fact of damage had already been established, and the only issue was the amount of damage at trial. Humphrey testified that he used his extensive experience developing commercial properties and his intimate knowledge of the property to prepare a cost estimate, with advice from his engineers, for the unknown soil conditions. He testified that the necessary work to fully restore Fife Portal's property involved unknown soil conditions—an element that inherently creates additional risk and uncertainty—because Fife Portal could not determine the extent of the damages. But the trial court barred Fife Portal from presenting any evidence to the jury of future, contingent damages for unknown conditions to fully restore Fife Portal's property and underground utilities.

Did the trial court err in barring Fife Portal from presenting any evidence of its damages for future, contingent unknown conditions as a “cost of restoration” under RCW 4.24.630? *Yes.*

IV. STATEMENT OF THE CASE

- A. Fife Portal LLC bought a large industrial property in the City of Fife for \$18 million. George Humphrey, through First Corps Inc., designed and developed the property using his extensive experience as a general contractor.**

Fife Portal LLC and Z.V. Company, Inc. own a large industrial property known as the Fife Portal Industrial Park.¹ CP 24, 2551; RP 420-21, 588-90; Ex. 1. The property has six industrial buildings on about eight acres of land with several commercial tenants. CP 24; RP 421, 435. The property is unique and valuable; unlike most properties in the City of Fife, it has no zoning or landscape restrictions on development. CP 1064-65; RP 147-50.



¹ The property's address is 7255 26th Street East in Fife, Washington 98424. An interactive "street view" of the property can be found on Google Maps.

George Humphrey, through First Corps Inc., designed and developed the property as the general contractor. CP 24-25, 475; RP 588-89, 602. Humphrey had extensive experience developing industrial properties, and he prepared the Fife Portal property's site layout and architectural design. CP 475; RP 589-93. Humphrey is the manager of Fife Portal LLC and the president of First Corps. RP 588, 602.

Fife Portal Owners Association manages and oversees the property. CP 40; RP 588. Z.V. Company and Fife Portal are the only members of the Association. CP 391. Humphrey is the Association's president. RP 588. Z.V. Company owns two of the industrial buildings on the property. RP 420-21. Peter Wooding is a member of Z.V. Company. CP 40.

Fife Portal owns an 11-foot-wide landscape area between its industrial buildings and the sidewalk. The landscape area contains the property's critical underground utilities, including fire-hydrant piping,



storm-system piping, water piping, and high-voltage electrical equipment. CP 26, 477; RP 595, 735. The landscape area shown above lies to the right, or south, of the sidewalk.

The City has a public right-of-way on the sidewalk abutting the street and Fife Portal's landscape area; the right-of-way runs between the sidewalk and the landscape area. CP 103-04, 475. (In 2008, soon after Fife Portal bought the property, it sold the sidewalk, the street, and other infrastructure adjacent to its property to the City. CP 666; RP 146, 590.) The sidewalk runs from east to west on 26th Street. CP 2441. The right-of-way's southern boundary line runs along the southern edge of the sidewalk, which in turn runs along the northern edge of Fife Portal's landscape area. CP 475, 1102-03. Stated differently, the right-of-way's southern boundary line abuts the Fife Portal property's northern boundary line. And speaking visually, in terms of the photographic evidence in the record, the right-of-way is to the left of the landscape area.

B. CenturyLink obtained a right-of-way permit from the City and hired Pacific Utility to install underground conduit near Fife Portal's property. CenturyLink directed Pacific to use an inherently dangerous trenchless-drilling technology to install the conduit.

CenturyLink—the second largest communications provider in the United States—provides cable and communication services to various customers across the country, including in Washington State. *Welcome to CenturyLink*, CENTURYLINK, <http://www.centurylink.com/aboutus/compa>

ny-information.html (last visited Apr. 1, 2019); *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 356, 166 P.3d 667 (2007).

In 2015, CenturyLink sought to expand its cable network in Fife, Washington. CenturyLink hired Pacific Utility to install underground conduit, which would house CenturyLink’s fiber-optic cable, to service a nearby residential subdivision. CP 26, 161; Ex. 8 at 2-3; Ex. 9. At that time, Pacific was a “major customer” of CenturyLink, performing “80 percent” of its work for CenturyLink. RP 538. Pacific did all of CenturyLink’s “smaller jobs.” RP 805.

CenturyLink directed Pacific to use an inherently dangerous trenchless-drilling technology, known as “horizontal directional drilling,” to install the conduit. CP 1114-15, 1862; RP 531. This technology uses a drill to bore a hole underground through which conduit can be pulled without excavating the surface landscape. CP 162, 1862. It involves blind drilling into underground areas unseen by the operators and poses inherent risks to operators, neighboring properties, and passersby. CP 1861-64; RP 548, 812-13.

The City requires public-utility companies, like CenturyLink, to obtain a permit to work in public rights-of-way. RP 450, 482. CenturyLink applied for a permit to install conduit under the City’s right-of-way and attached engineering drawings to the permit application. CP 102; Exs. 5, 8 (attached as Appendices D and E). The City approved and issued the permit to CenturyLink in June 2015, which expired six months after its issuance if no work had begun. Ex. 5; Ex. 8 at 5; RP 529. The permit required

CenturyLink to take “special precautions” while installing the conduit to protect the integrity of underground utilities. Ex. 5 at 4 (condition no. 9).

1. The City required CenturyLink—as condition number one of its right-of-way permit—to obtain an easement from Fife Portal. CenturyLink failed to obtain an easement.

CenturyLink’s engineering drawings attached to its permit application defined the scope of the drilling project. Exs. 5, 8; CP 102; RP 458, 482-84. The principal purpose of the project was to install conduit under the middle of the sidewalk within the public right-of-way. CP 107; RP 474; Ex. 5. But its engineering drawings showed that part of the work CenturyLink proposed was on Fife Portal’s property. RP 489, 511-12, 520-22; Exs. 5, 8. For instance, its drawings directed Pacific to place an electrical pedestal and to dig bore pits on Fife Portal’s property. Ex. 5 (SH 3 of 9, SH 4 of 9); Ex. 6 at 2; RP 456-57, 462, 479, 485-86. A bore pit is the location where a drilling operation begins or ends.

Because the scope of the drilling project contemplated work on private property, the City required CenturyLink—as “Condition Number 1” of its permit—to get an “EASEMENT FOR WORK ON PRIVATE PROPERTY.” Ex. 8 at 3 (emphasis in original); RP 487-89; *see also* Fife Municipal Code (FMC) 12.09.110 (requiring permit holders to obtain an easement to enter on private property). CenturyLink failed to get an easement from Fife Portal.

2. Pacific asked CenturyLink to survey the boundary lines of the project due to concerns about the precise location of Fife Portal's property line. CenturyLink refused to survey the project's boundary lines.

Before drilling began, representatives from CenturyLink, Pacific, and the City inspected the property to determine the project's scope. CP 104, 106, 216; RP 483. After the meeting, Pacific asked CenturyLink to survey the right-of-way's southern boundary line.² CP 1113, 1122-23; RP 467-68, 476-77, 522-23, 809; Ex. 7. This is the boundary line delineating where the right-of-way ends and where Fife Portal's property begins. A survey identifies the location of boundary lines to ensure the operator does not trespass on private property. RP 523, 812.

Pacific requested the survey because it was unable to determine the precise location of Fife Portal's property line as reflected on the engineering drawings. RP 520-23. That's because CenturyLink's engineering drawings incorrectly identified Fife Portal's property line as "nine feet south of the sidewalk." CP 965; Ex. 5 (SH 3 of 9, SH 5 of 9) (perforated red line with the tiny letters "PL" purporting to identify Fife Portal's property line); RP 484-85. Those drawings showed that the City's right-of-way boundary line encompassed all of Fife Portal's landscape area. Ex. 5 (SH 3 of 9, SH 5 of 9); RP 484-85. Despite Pacific's concerns about the location of the boundary lines, CenturyLink refused to survey the project's boundary lines. CP 1122-24; RP 467-68, 522-23.

² Testimony at trial reflected that the terms "survey," "stake," or "mark" were used interchangeably to describe the process in determining the precise location of boundary lines for a drilling project. RP 522-23, 810-11.

3. CenturyLink was required to locate all underground utilities at least three days before drilling began on Fife Portal's property by calling "811." CenturyLink failed to locate any utilities on Fife Portal's property.

CenturyLink's right-of-way permit and engineering drawings required CenturyLink to call for utility locates at least three days before drilling. Ex. 5 (SH 1 of 9). Every state in the union requires public-utility companies and excavators to call 811 to locate all underground utilities before any drilling project begins. *Choose Your State*, 811: KNOW WHAT'S BELOW: CALL BEFORE YOU DIG, <http://call811.com/811-your-state> (last visited Mar. 23, 2019); CP 1863 (OSHA circular) ("One common industry practice is to call 811, the 'Call Before You Dig' number, to establish the location of any underground utility installations in the work area."). "811 is the [federally designated] phone number you call before digging to protect yourself and others from unintentionally hitting underground utility lines." *Before You Dig: What is 811?*, 811: KNOW WHAT'S BELOW: CALL BEFORE YOU DIG, <http://call811.com/before-you-dig> (last visited Mar. 23, 2019). CenturyLink failed to request any utility locates on Fife Portal's property before drilling, even though the scope of the project partly contemplated work on Fife Portal's property. CP 26, 142-43; RP 511-12, 521-22, 597; Exs. 5, 8.

C. In October 2015, Pacific twice trespassed and caused extensive damages to Fife Portal's property and underground utilities.

1. Pacific's first trespass damaged Fife Portal's underground storm-drain pipe and landscape area.

Unbeknownst to Fife Portal and without its permission, Pacific began drilling and installing conduit under Fife Portal's landscape area. CP 25, 41; RP 524, 627; Ex. 10 at 14; Ex. 12 at 1. By the time Pacific began drilling, CenturyLink's permit was set to expire in about two months. Ex. 8 at 5. Pacific's drilling occurred next to a high-voltage electrical vault on the property. CP 125; RP 594-95, 735. A CenturyLink representative visited the project site to ensure Pacific was safely installing the conduit in the correct area. CP 274-75, 2000-01, 2006-07; RP 813-14,



822-23. CenturyLink had the authority to stop Pacific's drilling operation, and Pacific would have stopped drilling at CenturyLink's direction. RP 530, 814-15.

While drilling on Fife Portal's property, Pacific struck and damaged an underground storm-drain pipe. Ex. 10 at 14; CP 26, 31-32, 41, 71-72, 80. Without notifying Fife Portal or investigating the extent of the damages, Pacific excavated, "repaired," and reburied the storm drain, which disrupted

Fife Portal's landscape area. CP 26-27, 68, 81; RP 596, 627. The photograph above reflects the landscape area on Fife Portal's property first damaged by Pacific.

2. Pacific's second trespass damaged an underground water main that ruptured and created a large, dangerous sinkhole in Fife Portal's access driveway.

Again, unbeknownst to Fife Portal and without its permission, Pacific resumed work on Fife Portal's property a few days later. CP 25-26, 68, 71; Ex. 12 at 1. While drilling, Pacific again struck and damaged the storm drain and struck an underground water main, which caused it to rupture and blow apart concrete—creating a large, dangerous sinkhole in Fife Portal's access driveway. Ex. 10 at 19-22; Exs. 2-3, 8; CP 25, 71-72, 78-79 (see photographs below); RP 425.

That same day, Pacific for the first time informed Wooding that Pacific had trespassed and damaged Fife Portal's property and underground utilities. CP 25-26, 68; RP 422; Ex. 12. Wooding immediately notified Humphrey. RP 422, 594.

Humphrey was stunned to learn that Pacific had caused damages significantly more catastrophic than what it had represented. CP 71; RP 596-99; Exs. 2-3, 12. Humphrey saw CenturyLink's conduit sticking out of the ground, an open trench in the landscape area, and two metal plates covering a large sinkhole in Fife Portal's access driveway. RP 596-97; Ex. 2. The flatwork (*i.e.*, asphalt and concrete) located on the property, including the City's sidewalk, was cracked and appeared compromised by the drilling operation. RP 599-600; Ex. 2; Ex. 12 at 2. And the soil in the

landscape area was destroyed. RP 600. Humphrey told a Pacific employee to leave the property, but the employee refused, stating that he was following orders to fix the broken pipes and rebury them. CP 25; RP 595-97. The drilling operation damaged about 3,200 square feet of Fife Portal's property. CP 1055. (The larger white pipe shown below is the storm-drain pipe that Pacific damaged, and the two smaller pipes are the conduit that Pacific installed without Fife Portal's permission. RP 426-27, 628.)



D. Fife Portal promptly began investigating the extent of the damages caused by CenturyLink's and Pacific's drilling operation. Contrary to its statutory and municipal duties, CenturyLink refused to repair the damages. Fife Portal hired a team of professionals—led, directed, and overseen by First Corps—to remediate the property.

Fife Portal immediately stopped all further work on its property until it could investigate the extent of the damages. RP 599-600; Ex. 12. Its investigation was also intended to determine any unknown damages that could not be ascertained from a surface inspection. CP 1365-67.

Fife Portal's preliminary investigation revealed that the storm-drain system was no longer functioning. RP 603. The storm drain's pumps had to be shut off; the pipes connecting to the pumps were broken, and debris and other material had invaded the pumps. RP 486-87, 603-06, 671. The shutting down of the storm pumps later caused the property to flood and wash away the topsoil. CP 488; RP 603-08; Ex. 13. A contractor hired by First Corps had to manually pump water off the property. RP 602-06.

Fife Portal determined that CenturyLink had obtained the right-of-way permit to install the conduit. RP 631-33. The City called a meeting with Fife Portal, CenturyLink, and Pacific to determine who would be responsible to repair the damages to Fife Portal's property. RP 634-35. At that meeting, the City directed CenturyLink and Pacific to repair Fife Portal's property. CP 478-79; RP 636-39.

CenturyLink had a duty as the permit holder to promptly repair all private property damaged during the drilling project and was responsible

for any damages to Fife Portal's property and underground utilities.³ CenturyLink refused to accept responsibility to repair the property, and Pacific could not bear the financial costs of the repair. CP 280-81, 462, 478-79; RP 634, 638-39, 645-46. So Fife Portal began fully investigating the property's damages and hired its own contractors to begin the extensive remediation and emergency-mitigation efforts to the property. CP 1365-66; RP 434-36, 599-601, 639, 646; Exs. 12, 16.

First Corps—who had initially developed and designed the Fife Portal property as the general contractor—was retained to lead, direct, and oversee these efforts. CP 385, 390, 393, 395, 402-03, 475, 477; RP 601-02, 1365; Ex. 12 at 2. Indeed the trustee of Fife Portal's bond loan required First Corps to lead the investigation. RP 602, 795. First Corps principally hired Humphrey, drawing on his extensive experience developing industrial properties including the Fife Portal Industrial Park, to help accomplish these remediation and emergency-mitigation efforts. CP 24-25, 385, 396, 403, 433-36, 475; RP 588, 602.

First Corps hired multiple engineers with various specialties to inspect and repair the damages. RP 600-01, 641, 646-47, 944-45; Ex. 16. With the help of its engineers, Fife Portal issued a report from its preliminary investigation of the property's damages. Ex. 16; RP 640-42. The report identified the initial damages and what currently needed to be repaired based on the property's visible damages. RP 642; Ex. 16. Fife

³ FMC 11.01.170(H); FMC 12.09.100; FMC 12.09.150; *see also* Ex. 5 (SH 1 of 9) (requiring CenturyLink to restore all asphalt and concrete damaged as a result of construction to its original condition).

Portal sent the report to CenturyLink and Pacific, but they refused to acknowledge it. RP 639-45.

First Corps hired RV Associates to perform most of the repair and investigation work on Fife Portal's property. RP 653, 662-63; Ex. 18. RV Associates removed some, but not all, of the conduit that Pacific had installed under approximately 400 feet of Fife Portal's landscape area. RP 660-61, 664, 800. While removing the conduit, RV Associates determined that Pacific's first trespass had blown apart a section of underground pipe during its drilling operation and had reburied it without notifying Fife Portal. RP 596-98, 626-27, 660-61, 664; Ex. 16 (FP00011).⁴

Despite Fife Portal's ongoing investigation of the property's damages and before RV Associates began its remediation work, Pacific again—for the third time—trespassed on Fife Portal's property in January 2016 and, using a backhoe, removed part of the conduit that had been previously installed. CP 27, 114; RP 432-33, 666-70; Ex. 3; Ex. 10 at 37-38. Fife Portal saw a CenturyLink representative on the project site monitoring Pacific's work at that time. RP 669-70. CenturyLink and Pacific were impeding Fife Portal's investigation of the property's damages. RP 667. Fife Portal demanded Pacific to cease its operations. CP 478.

Later that month, Fife Portal excavated portions of the landscape area to inspect the subgrade infrastructure. CP 1365. Fife Portal performed

⁴ When Humphrey learned about the damages to Fife Portal's property on October 12, 2015, he asked one of Pacific's principals, Josh Kotulan, if Pacific had done other damage to the property. RP 596-98, 627-28. Kotulan lied and told Humphrey that no other damage had occurred apart from the water main Pacific had destroyed during its second trespass. RP 597-98.

an emergency repair to the access driveway so that its commercial tenants could access the property. CP 1365; RP 860-61. Fife Portal continued to monitor the storm-drain pipe to observe any degradation or backup in the system. CP 1366. Fife Portal observed over time that water was backing up in the storm pipe and that the pipe's settling prevented the natural gravity flow of water from the pipe. CP 1366. The repair work that Humphrey and First Corps did to the property in January 2016 was strictly for mitigation process—done as an emergency repair for health and safety reasons. RP 671.

Beginning in late January 2016, Humphrey and First Corps began actively monitoring the property to see if the conditions worsened, including subsidence and other unknown damages. RP 665, 670-73. Because of inclement weather and the emergency repairs to the property that Fife Portal had to make to protect its commercial tenants, Fife Portal still had not fully inspected the property's damages. RP 665, 670-73. The repair work also had to be put on hold due to inclement weather. RP 665, 671. Fife Portal warned CenturyLink in late 2015 that if it did not immediately repair the City's public right-of-way, which abuts Fife Portal's property, any repairs performed by Fife Portal to its own property could be compromised in the future due to soil subsidence. CP 1366. Fife Portal's warnings proved correct: because the soil supporting the flatwork on Fife Portal's property continued to subside, the access driveway's concrete panels began cracking, collapsing, and breaking apart. CP 1366; RP 673-

78, 744-45, 749-50, 748-56, 759, 947. As a result, Fife Portal had to cut out the driveway panels and replace them. CP 1367.

In addition, Humphrey ordered a flush of the storm-drain pipe and ran a camera through the pipe to determine the full extent of the pipe's damages. RP 675. The damages to Fife Portal's underground utilities caused the storm-drain pipe to sag, which caused "bellies" of free-standing water to develop. RP 675-76, 772-73, 948-49. When an underground pipe begins to settle, it may break or cause the pipe's joints to come apart. RP 897.

While Fife Portal continued to remediate the property, it discovered ongoing damages caused by CenturyLink's and Pacific's drilling operation. The drilling operation caused the soil bedding beneath Fife Portal's underground utilities to settle. RP 898-900, 908, 948. And the storm-drain pipe was continuing to subside in the landscape area. CP 1432, 1437, 1439, 1441, 1443; RP 898.

E. Fife Portal sued CenturyLink and Pacific Utility for trespass, violations of the Underground Utility Damage Prevention Act, and negligence. The trial court established Pacific's liability on summary judgment.

In December 2015, Fife Portal sued both CenturyLink and Pacific for trespass, violations of the Underground Utility Damage Prevention Act (ch. 19.122 RCW), and negligence. CP 3-4. Fife Portal sought statutory treble damages.⁵

⁵ Before CenturyLink and Pacific even filed their Answer, as discussed earlier, Fife Portal learned that Pacific—for the third time—had trespassed on Fife Portal's property by attempting to remove the conduit that had been previously installed. CP 27, 114; RP 432-33; Ex. 10 at 37-38. Fife Portal demanded Pacific to leave the property, and the City ordered Pacific to cease operations. CP 27, 478.

In May 2016, the Washington Dig Law Safety Committee determined that Pacific's drilling operation on Fife Portal's property violated chapter 19.122 RCW.⁶ CP 184. The Committee fined Pacific \$3,000. CP 184.

That same month, Fife Portal sought partial summary judgment to establish Pacific's liability as a matter of law for its trespass and unauthorized conduit installation. CP 48-65. The trial court granted Fife Portal partial summary judgment and concluded:

- Pacific's unauthorized conduit installation constituted intentional trespass under RCW 4.24.630 and was subject to treble damages;
- Pacific violated multiple provisions of the Underground Utility Damage Prevention Act; and
- Pacific's failure to notify known facility operators or a one-number locator service that it would be excavating on Fife Portal's property was willful and malicious and subject to treble damages.

CP 195-98, 2832.⁷

⁶ The Committee is a dispute-resolution board created by the legislature under RCW 19.122.130 to advise the Washington Utilities and Transportation Commission, other state agencies, the legislature, and local governments on best practices, policies, and training to prevent damage to underground utilities and to enhance public safety. The Committee is charged with hearing complaints of alleged violations of chapter 19.122 RCW and with recommending enforcement action to the Commission. The Committee comprises 13 members representing various stakeholder groups. CenturyLink is a member of the Committee. *Washington Dig Law Safety Committee*, WASH. UTILS. & TRANSP. COMM'N, <https://www.utc.wa.gov/publicSafety/pipelineSafety/Pages/Safety-Committee.aspx> (last visited Apr. 1, 2019).

⁷ Two different trial judges presided over this case: the Honorable Gretchen Leanderson and the Honorable Susan Serko. Judge Leanderson presided over the case December 2015–August 2016. Judge Leanderson entered the partial-summary-judgment order establishing Pacific's liability and denied both parties' motions for summary judgment on CenturyLink's liability. CP 195-98, 355-58. Judge Serko presided over the case September 2016–present. Attached as Appendix A to Fife Portal's opening brief is a timeline of this case's procedural history for this Court's convenience.

F. The trial court denied both parties' motions for summary judgment on a principal-agent relationship and on CenturyLink's negligence as the right-of-way permit holder.

CenturyLink sought summary judgment, contending that no principal-agent relationship existed between CenturyLink and Pacific. CP 199-204. Fife Portal cross-moved for summary judgment to establish CenturyLink's liability based on a principal-agent relationship with Pacific and its own negligence under the Fife Municipal Code as the right-of-way permit holder. CP 228-38. The trial court denied summary judgment to both parties, and those claims proceeded to trial. CP 355-58.

G. The trial court on summary judgment concluded that Fife Portal could not recover the restoration and investigative costs it incurred by hiring First Corps to lead, direct, and oversee the mitigation and remediation efforts on Fife Portal's property.

As discussed earlier, Fife Portal retained Humphrey, through First Corps, to lead, direct, and oversee the investigation and remediation of the property as the general contractor. CP 385, 393, 395-96, 402-10, 423, 433, 458-60, 475-79, 483-88. First Corps was the property's original developer, designer, and general contractor, and First Corps and Humphrey intimately knew all matters relating to the property. CP 24-26, 402, 475. The institutional knowledge of the property required access to Humphrey's personal knowledge and all records in First Corps' possession. CP 475.

First Corps performed the same role in remediating the property as it did in developing the property. CP 478. First Corps hired engineers and contractors to prepare the technical specifications for the remediation work; to monitor the remediation work; and to perform the remediation work. CP

395, 477-78. First Corps hired the same engineers and contractors to remediate the property as it did to prepare the original property-development drawings; to install the underground utilities; and to observe, inspect, and approve the utilities' installation. CP 478.

As part of its restoration and investigative costs under RCW 4.24.630, Fife Portal sought to recover the time spent by First Corps, totaling almost 570 hours, in helping to lead, direct, and oversee the investigation and remediation of the property. CP 433. Humphrey was involved in all aspects of remediating the property and mitigating the property's damages, including identifying and inspecting the damages, issuing reports, and attending numerous meetings with the City, CenturyLink, Pacific, and the Safety Commission. CP 407, 415-23, 433, 435-39, 449. Humphrey billed \$350 per hour for his time acting through First Corps. CP 433.

CenturyLink and Pacific sought partial summary judgment on the applicable measure of damages under RCW 4.24.630. CP 359-75. That statute allows a party to recover the "costs of restoration" for any wrongful injury to land, including "investigative costs." CenturyLink and Pacific sought to bar Fife Portal from recovering the time spent by First Corps in leading, directing, and overseeing the investigation and remediation of the property, arguing that Humphrey could not recover for his so-called "personal time." CP 359-75.

The trial court granted CenturyLink and Pacific Utility summary judgment in part. CP 580-81. The trial court precluded Fife Portal from

recovering these restoration and investigative costs incurred by First Corps because it believed the “personal time of corporate leaders, corporate owners [was not] compensable” under RCW 4.24.630. RP 16-17. The trial court later denied Fife Portal’s reconsideration motion and barred Fife Portal from introducing evidence at trial about First Corps’ invoices or Humphrey’s time sheets. CP 722, 837-38.

H. At the first trial, the trial court declared a mistrial after finding that Fife Portal committed discovery violations, purportedly by failing to timely disclose the basis of Humphrey’s valuation method for Fife Portal’s diminution-in-value claim.

During the discovery phrase, Fife Portal had continually made Humphrey available for deposition. CP 891, 897, 899-900, 1352. CenturyLink and Pacific knew about Fife Portal’s diminution-in-value claim as early as March 2016. CP 891-92, 1352-53. They knew Humphrey would testify about the basis for this claim as early as September 2016. CP 892, 1353. Yet they chose not to depose Humphrey until March 2017—less than a month before the discovery-cutoff date. CP 519, 1352.

At his deposition, Humphrey told CenturyLink and Pacific that he used the value of the adjacent property sold to the City of Fife in 2008 to support his diminution claim. CP 1353; RP 146-47, 152-53. CenturyLink and Pacific did not subpoena Humphrey to bring any documents to the deposition. CP 1353. So when CenturyLink and Pacific asked Humphrey to calculate the diminished value of the property, he deferred to his document file because he could not recall the precise value that he calculated almost a decade earlier. CP 1353.

Two days later, CenturyLink and Pacific subpoenaed the documents supporting Humphrey's diminution claim. CP 1353. The broad scope of the subpoena compelled Fife Portal to ask CenturyLink and Pacific to narrow its scope; they declined, and Fife Portal produced all the documents, organized in two boxes, about the diminution claim. CP 889, 892, 1353. The documents were voluminous, mainly because of Fife Portal's meticulous investigation of the property's infrastructure and value. CP 892, 902.

Two weeks before trial, CenturyLink's and Fife Portal's valuation expert, Bill Partin, opined on the merits of the diminution claim. CP 1353-54. Partin knew that Humphrey based the diminution claim on the value of the property previously sold to the City. CP 665-68, 1353-54.

The first trial began on May 8, 2017. On the first day of trial, Fife Portal again provided CenturyLink and Pacific the documents reflecting Humphrey's valuation method. CP 1354. Fife Portal also made Humphrey available again for another deposition. CP 1354. Yet CenturyLink and Pacific sought to preclude Humphrey from testifying on his valuation method for the property. CP 835; RP 43, 110-13. They argued Fife Portal failed to timely disclose the basis of Humphrey's valuation method—even though they already knew about the basis of Humphrey's valuation method, and their expert was able to challenge that valuation method. CP 588, 665-68; RP 43-49, 68, 110-13 154-55. Indeed their expert was scheduled to testify later that week at trial. CP 1354.

Instead of proceeding to trial, the trial court declared a mistrial and imposed monetary sanctions over Fife Portal's purported failure to provide

CenturyLink and Pacific with the precise basis of Humphrey's valuation method for the diminution claim. CP 846-48, 1361-63; RP 174-75. The trial court denied Fife Portal's motion for reconsideration of the sanction ruling.⁸ CP 1072; RP 190, 199.

I. Following the mistrial, the trial court denied Fife Portal summary judgment to establish CenturyLink's peculiar-risk vicarious-liability as a matter of law. Fife Portal's negligence and vicarious-liability claims against CenturyLink proceeded to trial, and Fife Portal voluntarily dismissed its diminution-in-value claim.

Following the mistrial, Fife Portal filed a motion to amend its complaint to assert a negligence claim against CenturyLink. CP 947-50. Fife Portal pointed out that it had already pleaded a negligence claim against CenturyLink in its complaint filed almost three years earlier. RP 191-93; CP 4. Indeed the trial court had earlier denied both parties' summary-judgment motions on CenturyLink's negligence. CP 228-38, 355-58. But Fife Portal had to bring a motion to amend because the trial court had granted CenturyLink's and Pacific's special motion in limine to preclude any evidence at trial about CenturyLink's liability and its violation of the Fife Municipal Code. CP 835, 849-54. The trial court permitted Fife Portal to amend its complaint to allege a negligence claim against CenturyLink. RP 196, 199.

⁸ The trial court specifically awarded CenturyLink and Pacific \$23,282.40 in attorneys' fees and costs for Fife Portal's purported discovery violations that resulted in a mistrial. CP 1361-63. Even though Fife Portal believes the trial court erred in ordering a mistrial and imposing monetary sanctions on Fife Portal, because of the numerous other errors the trial court committed and the consequences of those errors, including the deferential standard of review that would be applied to any challenge to that sanction, Fife Portal has decided not to seek appellate relief from those sanctions.

The next month, Fife Portal sought summary judgment to establish CenturyLink’s peculiar-risk vicarious liability. CP 1073-87. The trial court denied Fife Portal summary judgment but allowed its peculiar-risk vicarious-liability claim to proceed to trial. CP 1248-49.

After Fife Portal discovered additional damages to its property, it voluntarily agreed to dismiss its diminution-in-value claim because the cost to repair the additional damages exceeded the diminution in value to the property. CP 1449; RP 242, 313.

J. The trial court granted CenturyLink a direct verdict and dismissed all of Fife Portal’s claims against CenturyLink.

The second trial began on May 21, 2018. Fife Portal’s case-in-chief consisted of four days of trial testimony, including seven liability witnesses and the admission of numerous exhibits.⁹

CenturyLink moved for a directed verdict on Fife Portal’s negligence and vicarious-liability claims. CP 2251-59. At the directed-verdict hearing, Fife Portal detailed at least eight separate acts or omissions by CenturyLink that caused Fife Portal’s damages. RP 1001-12. Yet the trial court granted CenturyLink a directed verdict and dismissed all of Fife Portal’s claims against CenturyLink. RP 1012-13. For Fife Portal’s negligence claims, the trial court dismissed them solely because Fife Portal had failed to prove “causation.” RP 1013. For its vicarious-liability claims

⁹ RP 420-826 (testimony of liability witnesses: Peter Wooding, Darius Sparks, Ken Gill, Eric Kotulan, Josh Kotulan, George Humphrey, and Steve Entrekin).

(peculiar risk, trespass, and principal–agent relationship), the trial court dismissed them without explanation.¹⁰

After the trial court dismissed CenturyLink from the case, Fife Portal proposed to submit CenturyLink’s liability to the jury “as a huge savings of judicial resources.” RP 1019-21, 1223-24. Fife Portal had already presented all of its liability testimony, and so if the jury found CenturyLink not liable, any possible appeal from the directed verdict would be a “moot issue.” RP 1020. Fife Portal noted that if the jury did find CenturyLink liable, the trial court could enter “a judgment notwithstanding the verdict” to “save [the parties] a lot of money” and to “benefit[] everybody.” RP 1224. The trial court refused to instruct the jury on CenturyLink’s negligence and vicarious liability. RP 1224.

K. The jury awarded Fife Portal damages, which were trebled for a total damages award of \$585,224.37. The trial court awarded Fife Portal \$267,748.61 in fees and costs for a total judgment of \$852,972.98 against Pacific Utility.

Pacific stipulated to \$79,262.74 in undisputed damages. CP 2834. (To date, Pacific has never paid Fife Portal for these damages that it undisputedly caused.) The jury entered a verdict awarding Fife Portal \$195,074.79 in damages. CP 2838-39. The trial court trebled those damages for a total damages award of \$585,224.37. CP 3741-43, 3752-53.

¹⁰ While the trial court at the hearing and in its order did not address by name the three theories supporting Fife Portal’s vicarious-liability claims, the parties understood that the court was dismissing all claims against CenturyLink as a matter of law. RP 1013 (oral ruling incorporated into the order); CP 2557-58 (“Plaintiffs’ vicarious liability claims are hereby dismissed with prejudice.”).

The trial court awarded Fife Portal \$267,748.61 in attorneys' fees and costs against Pacific. CP 3747-48; RP 1495-96. The total judgement entered against Pacific was \$852,972.98. CP 3752-53.

The trial court awarded CenturyLink \$14,435.83 in attorneys' fees and costs for defending against Fife Portal's negligence and vicarious-liability claims that it dismissed on a directed verdict. CP 3738-39, 3750-51; RP 1500.

Fife Portal appealed, and Pacific cross-appealed. CP 3754-55, 3767-68.

V. ARGUMENT

A. **The trial court erred as a matter of law in granting CenturyLink a directed verdict and dismissing Fife Portal's negligence claims against CenturyLink on the sole basis that Fife Portal failed to prove "causation."**

Despite having previously denied a summary judgment on CenturyLink's negligence, the trial court granted CenturyLink a directed verdict and dismissed Fife Portal's negligence claims against CenturyLink. CP 357-58, 2559-60. It concluded Fife Portal failed to show that CenturyLink caused its damages:

I think . . . there is a line in the negligence, some of the things that you just talked about . . . that I think potentially creates a duty. And if that were the only issue, I think I would deny it on the negligence grounds. But all along, my concern has been the causation issue. That's where I get hung up and I do not believe that the plaintiff has shown causation. Again, I feel like the negligence inferences [are] a closer call, but I've been watching and listening for causation all along . . . to convince me that there is a thread on causation and I have not heard it.

RP 1012-13. Because the evidence and the reasonable inferences, when viewed in the light most favorable to Fife Portal, allowed the jury to conclude that Fife Portal would not have been damaged absent CenturyLink's own actions and inactions, the trial court erred in granting CenturyLink a directed verdict.

A directed verdict may be granted only if there is no legally sufficient evidentiary basis for a reasonable jury to find for a party on an issue. *Ramey v. Knorr*, 130 Wn. App. 672, 675-76, 124 P.3d 314 (2005). A motion for directed verdict admits the truth of the nonmoving party's evidence and all inferences that reasonably can be drawn from that evidence. *Id.* The evidence must be considered in the light most favorable to the nonmoving party. *Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508, 528, 20 P.3d 447 (2001).

1. Numerous Washington statutes, municipal ordinances, and other authorities confirm that CenturyLink as the right-of-way permit holder owed duties to Fife Portal.

To prove negligence, a party must establish the existence of a duty of care. *Hansen v. Friend*, 118 Wn.2d 476, 479, 824 P.2d 483 (1992). The existence of a duty of care is a question of law. *Id.*

The trial court acknowledged that CenturyLink, as the right-of-way permit holder, owed duties to Fife Portal to avoid and repair damages to underground utilities and private property caused by its actions and inactions. RP 1012-13. Had the existence of a duty been the only issue at trial, the trial court would have denied CenturyLink a directed verdict. RP 1012-13.

The legislative enactments discussed below, which were specifically intended to protect persons from damages to their private property and underground utilities, confirm the trial court’s oral ruling that CenturyLink owed actionable duties to Fife Portal.

(a) Duties imposed under the Underground Utility Damage Prevention Act.

Following a wave of legislation across the country,¹¹ our legislature recently overhauled our State’s existing underground-utility laws to create the Underground Utility Damage Prevention Act (Act). *Titan Earthwork, LLC v. City of Federal Way*, 200 Wn. App. 746, 748, 752, 403 P.3d 884 (2017). The purpose of the Act was three-fold: accident prevention, public health and safety, and punishment for statutory violations. *See* RCW 19.122.010; RCW 19.122.070 (availability of treble damages). The legislature intended to “protect public health and safety and prevent disruption of vital utility services.” *Titan Earthwork*, 200 Wn. App. at 752 (quoting RCW 19.122.010). The legislature thus recognized the dangers inherent to the work posed by trenchless-underground drilling. *See id.*

The Act “imposes clear and specific statutory duties on parties involved in projects requiring excavation.” *Id.* at 748. This includes “assigning responsibility for providing notice of proposed excavation, locating, and marking underground utilities, and reporting and repairing

¹¹ *See, e.g.*, ARIZ. REV. STAT. ANN. § 40-360.26 (2007); ARK. CODE ANN. § 14-271-101 (1987); DEL. CODE ANN. 26, § 801 (1994); 220 ILL. COMP. STAT. 50/1 (2010); IND. CODE § 8-1-26-22 (1991); KAN. STAT. ANN. § 66-1801 (1993); LA. STAT. ANN. § 1749.11 (1988); MISS. CODE ANN. § 77-13-1 (1999); N.H. REV. STAT. ANN. § 374:55 (2010); R.I. GEN. LAWS § 39-1.2-1.1 (2009); VA. CODE ANN. § 56-265.25 (1995).

damages.” *Titan Earthwork*, 200 Wn. App. at 752 (citing quoting RCW 19.122.010(1)).

The Act requires excavators to use “reasonable care to avoid damaging underground facilities” by determining the precise location of marked underground facilities that have been marked; planning the excavation to avoid damage to or minimize interference with underground facilities in and near the excavation area; and providing support for underground facilities in and near the excavation area as may be reasonably necessary for the protection of those facilities. RCW 19.122.040(2); *see also Titan Earthwork*, 200 Wn. App. at 754 (concluding that RCW 19.122.040(2) imposes a duty of reasonable care). A party is liable for damages to an underground facility caused by its failure to comply with the Act. RCW 19.122.040(3).

In addition, the Act requires a “facility operator” (CenturyLink) to “provide the excavator with reasonably accurate information by marking [underground facilities’] location.”¹² RCW 19.122.030(3)(a). The Act requires a “project owner” to “indicate in bid or contract documents the existence of underground facilities known by the project owner to be located within the proposed area of excavation.”¹³ RCW 19.122.040(1). An excavator must cease excavating in the vicinity of underground facilities

¹² The Act defines “facility operator” as “any person who owns and underground facility or *in the business of supplying any utility service or commodity for compensation.*” RCW 19.122.020(11) (emphasis added).

¹³ *E.g.*, *Titan Earthwork*, 200 Wn. App. at 752 (defining a municipality who contracted with an excavator to relocate utilities as a “project owner”). Akin to the municipality in *Titan Earthwork*, CenturyLink is a project owner under the Act.

and immediately notify the facility operator once the party discovers underground facilities that are not identified. RCW 19.122.030(10); RCW 19.122.050(1). Once a facility operator is notified of damages to an underground facility, it must arrange for repairs as soon as practicable. RCW 19.122.050(2). Any willful violations of the Act for damages to an underground facility subjects the violator to treble the costs incurred in repairing the facility. RCW 19.122.070(2).

And for good measure, the Act provides that any clause in an excavation contract that attempts to allocate liability, or requires indemnification to shift the economic consequences of liability, and that differs from the duties imposed by the Act, “is against public policy and unenforceable.” RCW 19.122.040(3). In its contract with Pacific, CenturyLink tried to do exactly what the Act forbids: shift liability to Pacific for all damages caused by the drilling operation and require Pacific to indemnify CenturyLink. Ex. 9 at 19 ¶7.4 (allocating liability), 30 ¶13.1 (requiring indemnification).

(b) Duties imposed on right-of-way permit holders under RCW 35.99.030.

A municipality may require a “service provider” (CenturyLink) to obtain a permit to install conduit under public rights-of-way.¹⁴ RCW 35.99.020; RCW 35.99.030(1). The City required CenturyLink to obtain a permit to install conduit under its public right-of-way. Ex. 8; RP 450, 482.

¹⁴ The legislature defined “service provider” as any corporation “owning, operating, or managing any facilities used to provide and providing telecommunications or cable television service for hire, sale, or resale to the public.” RCW 35.99.010(6).

Chapter 35.99 RCW imposes specific duties on service providers who intend to install underground conduit within a public right-of-way. RCW 35.99.030(6). The service provider “shall”:

- (a) Obtain all permits required by the city for the installation of facilities in the right-of-way;
- (b) Comply with applicable ordinances, construction codes, regulations, and standards subject to verification by the city of such compliance;
- (c) Cooperate with the city in ensuring that facilities are installed within the right-of-way in such a manner and at such points so as not to inconvenience the public use of the right-of-way or to adversely affect the public health, safety, and welfare;
- (d) Provide information and plans as reasonably necessary to enable a city to comply with subsection (5) of this section;
- (e) Obtain the written approval of the facility or structure owner, if the service provider does not own it, before attaching to or otherwise using a facility or structure in the right-of-way; and
- (g) Comply with state safety laws and standards.

RCW 35.99.030(6). Service providers must thus comply with the Underground Utility Damage Prevention Act and the Fife Municipal Code (discussed in the next subsection).

(c) Duties imposed on right-of-way permit holders under the Fife Municipal Code.

A court may adopt a legislative enactment as a reasonable person’s standard of conduct for purposes of tort liability. *Hansen*, 118 Wn.2d at 480-81. Our state Supreme Court adopted a four-part test, derived from the *Restatement (Second) of Torts* § 286, to determine when a legislative

enactment may be adopted as a standard of conduct.¹⁵ *Id.* The purpose of a legislative enactment's requirements must be to "(a) to protect a class of persons which includes the one whose interest is invaded, and (b) to protect the particular interest which is invaded, and (c) to protect that interest against the kind of harm which has resulted, and (d) to protect that interest against the particular hazard from which the harm results." *Id.*

The City of Fife adopted and codified ordinances to regulate the safe installation of communications systems within public rights-of-way. RCW 35.21.500-.570; FMC 1.01.010. Consistent with the Underground Utility Damage Prevention Act, the purpose of the Fife Municipal Code was "to protect the public health, safety and welfare." FMC 11.01.010(N). The Code requires all underground facilities to be "installed and maintained within the public rights-of-way in such manner and at such points so as not to inconvenience the public use of the public rights-of-way or to adversely affect the public safety and welfare." FMC 11.01.010(P). The primary goal of the Code was accident prevention and prompt remediation of damages to underground utilities and private property. *See* FMC 11.01.170(H); FMC 12.09.100; FMC 12.09.150. To accomplish that goal, the legislature assigned responsibility to permit holders (CenturyLink) to install and maintain underground utilities in full compliance with all ordinances and regulations. FMC 11.01.170(G)(1).

¹⁵ Under the *Restatement*, a "legislative enactment" includes both "statutes and ordinances." RESTATEMENT (SECOND) OF TORTS § 286 cmt. a.

The Code imposes specific duties on permit holders (CenturyLink) performing any work within public rights-of-way. For starters, the Code requires all communication-system facilities to be “installed and maintained underground (including facilities . . . which cross private property) and in full compliance with any and all ordinances and regulations of the city”¹⁶ FMC 11.01.170(G)(1). All “private property disturbed or damaged during the construction, operation, repair or removal of a communications facility shall be promptly repaired by the communications system operator that disturbed the . . . private property.” FMC 11.01.170(H). As the permit holder, CenturyLink is “responsible for any damage done to any public or private property, by reason of the breaking of any water pipes, sewer, gas pipe, electrical conduit or other utility.” FMC 12.09.100. The permit holder must repair “[a]ll damage done to existing improvements during the progress of the right-of-way work.” FMC 12.09.150.

Further, the Code requires all permit holders (CenturyLink) authorized to do work in a public right-of-way to comply with all applicable laws during the entire term of the permit. FMC 11.01.350. The permit holder must confine its work within the property lines indicated on the plan submitted with the application for the permit. FMC 12.09.160. And when the permit holder must enter on private property, it must “obtain a license from the owner of such private property for such purpose.” FMC 12.09.110.

¹⁶ The Code defines a “communications facility” as “a device which alone or as part of an aggregation of devices is capable of transmitting signals from place to place.” FMC 11.01.030(H).

The Code’s requirements easily satisfy *Hansen’s* four-part test for this Court to adopt the Code as a standard of conduct for public right-of-way permit holders who damage private property by drilling operations. The Code intended to protect owners of “private property.” See FMC 11.01.170(G)(1); FMC 11.01.170(H); FMC 12.09.100; FMC 12.09.110; FMC 12.09.150; FMC 12.09.160. The Code intended to protect Fife Portal’s interests in exclusive possession of its property—free from trespass or damages caused by negligent installation of underground conduit. FMC 11.01.170(H); FMC 12.09.100; FMC 12.09.110; FMC 12.09.160; *see also Holmquist v. King County*, 192 Wn. App. 551, 561-62, 368 P.3d 234 (2016) (noting that the “very essence of the nature of property is the right to its exclusive use” and possession). The Code intended to protect these interests against precisely the kind of harm that resulted to Fife Portal’s property. FMC 11.01.170(H). And the Code intended to protect these interests against the particular hazard from which the harm resulted: negligent installation of underground conduit.¹⁷ FMC 12.09.100.

(d) Duty imposed on public-service companies to comply with state law.

In 2006, the legislature created the Washington Utilities and Transportation Commission. RCW 80.01.010. The legislature sought to regulate in the “public interest” the “services, facilities, and practices of all

¹⁷ Even if CenturyLink’s violation of specific Code provisions does not by itself give Fife Portal a right of action against CenturyLink, those violations are certainly evidence of negligence that a trier of fact should be allowed to consider at trial. RCW 5.40.050 (“A breach of a duty imposed by statute, ordinance, or administrative rule shall not be considered negligence per se, but may be considered by the trier of fact as evidence of negligence[.]”).

persons engaging within this state in the business of supplying any utility service or commodity to the public for compensation.” RCW 80.01.040(3). A “public service company” includes a “telecommunications company,” like CenturyLink. RCW 80.04.010(23).

Under chapter 80.04 RCW, the Legislature imposed special duties on public-service companies who engage in the business of supplying any utility service to the public:

In case any public service company shall do, cause to be done or permit to be done any act, matter or thing prohibited, forbidden or declared to be unlawful, or shall omit to do any act, matter or thing required to be done, either by any law of this state, by this title or by any order or rule of the commission, such public service company shall be liable to the persons or corporations affected thereby for all loss, damage or injury caused thereby or resulting therefrom[.]

RCW 80.04.440. Any person or corporation may bring an action to recover for such loss, damage, or injury. *Id.*

(e) Duty imposed under *Restatement (Second) of Torts* § 158 for trespass liability.

Washington recognizes the *Restatement (Second) of Torts* § 158, establishing liability for one who trespasses on another’s land. *Bradley v. Am. Smelting & Refining Co.*, 104 Wn.2d 677, 681-82, 709 P.2d 782 (1985). Trespass exists when there is an intentional or negligent intrusion on or in another’s property. *Hurley v. Port Blakely Tree Farms, L.P.*, 182 Wn. App. 753, 772, 332 P.3d 469 (2014); *Hughes v. King County*, 42 Wn. App. 776, 780, 714 P.2d 316 (1986).

The Restatement provides for trespass liability if the person intentionally or negligently enters land in the possession of another, or causes a third person, such as an independent contractor, to do so. RESTATEMENT (SECOND) OF TORTS § 158 (1965); *id.* cmt. j. A person may be liable for trespass if he directs another person to enter the property. *Schievink v. Wendylou Ranch, Inc.*, 227 S.W.3d 862, 865 (Tex. App. 2007) (citing RESTATEMENT (SECOND) OF TORTS § 158). A trespass may be committed by an intrusion on or beneath the surface of the land. RESTATEMENT (SECOND) OF TORTS § 158 cmt. g.

Thus, if the actor has commanded or requested a third person to enter land in the possession of another, the actor is responsible for the third person's entry if it be a trespass. This is an application of the general principle that one who intentionally causes another to do an act is under the same liability as though he himself does the act in question.

Id. cmt. j. A person thus owes a duty not to interfere with a property owner's right to exclusive use and possession. *Fradkin v. Northshore Util. Dist.*, 96 Wn. App. 118, 123, 977 P.2d 1265 (1999).

2. Fife Portal presented substantial evidence of “cause in fact” supporting its negligence claims against CenturyLink, raising factual disputes that should have been resolved by the jury.

Cause in fact refers to the physical connection between an act or omission and damages. *Wuthrich v. King County*, 185 Wn.2d 19, 28, 366 P.3d 926 (2016) (reversing a summary judgment because of fact questions on causation and remanding for a trial). To establish cause in fact, a party must establish that the harm it suffered would not have occurred but for a

defendant’s act or omission. *Little v. Countrywood Homes, Inc.*, 132 Wn. App. 777, 780, 133 P.3d 944 (2006). Cause in fact is a fact question “generally left to the jury” unless reasonable minds could not differ. *Schooley v. Pinch’s Deli Market, Inc.*, 134 Wn.2d 468, 478, 951 P.2d 749 (1998); *see also HBH v. State*, 197 Wn. App. 77, 93, 94-95, 387 P.3d 1093 (2016) (reversing a directed verdict, concluding that a reasonable jury could have found that DSHS caused the children’s damages, and remanding for a new trial), *aff’d*, 192 Wn.2d 154, 429 P.3d 484 (2018).¹⁸

The trial court granted CenturyLink a directed verdict and dismissed Fife Portal’s negligence claims against CenturyLink because Fife Portal failed to show “causation.” RP 1013. The trial court did so even after it had previously denied summary judgment on CenturyLink’s negligence. CP 357-58; *Caulfield v. Kitsap County*, 108 Wn. App. 242, 249, 29 P.3d 738 (2001) (no substantive difference in standard of review between summary judgment and directed verdict). But the issue of causation for Fife Portal’s negligence claims should have been resolved by the jury because the evidence and all reasonable inferences—when viewed in the light most favorable to Fife Portal—showed that CenturyLink’s actions and inactions caused Fife Portal’s damages.

¹⁸ Our Supreme Court has routinely stated that “cause in fact” should normally be decided by the trier of fact. *See, e.g., Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 597, 257 P.3d 532 (2011); *Joyce v. State, Dep’t of Corrs.*, 155 Wn.2d 306, 322, 119 P.3d 825 (2005); *Griffin v. West RS, Inc.*, 143 Wn.2d 81, 89, 18 P.3d 558 (2001); *Tyner v. State, Dep’t of Soc. & Health Servs.*, 141 Wn.2d 68, 82, 1 P.3d 1148 (2000); *Christen v. Lee*, 113 Wn.2d 479, 507, 780 P.2d 1307 (1989); *Hartley v. State*, 103 Wn.2d 768, 778, 698 P.2d 77 (1985); *Daugert v. Pappas*, 104 Wn.2d 254, 257, 704 P.2d 600 (1985).

At trial, Fife Portal laid out in painstaking detail at least eight actions or inactions by CenturyLink that caused Fife Portal's damages. RP 1001-10.

1. CenturyLink's engineer drawings specified the wrong boundary line for the drilling project. RP 521-22. Those drawings incorrectly identified Fife Portal's boundary line as "nine feet south of the sidewalk"—instead of abutting the southern boundary line of the City's sidewalk. CP 965; Ex. 5 (SH 3 of 9, SH 5 of 9) (perforated red line with the tiny letters "PL" marking Fife Portal's property line).

2. CenturyLink's engineering drawings directed Pacific to install an electrical pedestal on Fife Portal's property without its permission. RP 456, 462, 479, 485-86, 489, 511-12; Ex. 5 (SH 4 of 9).

3. CenturyLink's engineering drawings directed Pacific to dig bore pits on Fife Portal's property without its permission. Ex. 5 (SH 4 of 9); Ex. 6 at 2; RP 456, 462, 511-12, 521-22. The work that CenturyLink proposed for the drilling project was partly on "private property"—that is, Fife Portal's property. RP 489.

4. Before the drilling operation began, Pacific requested CenturyLink to survey the boundary lines of the drilling project to ensure Pacific did not trespass on private property. RP 467, 476-77, 522, 812; Ex. 7. CenturyLink refused to survey the boundary lines. RP 467, 476-77, 522-23. One of Pacific's principals testified that had CenturyLink surveyed the boundary lines, Pacific would not have trespassed on Fife Portal's property and thus would not have caused any damages. RP 523.

5. CenturyLink directed Pacific to install the underground conduit using an inherently dangerous trenchless-drilling method. RP 531; *see also J.J.'s Bar and Grill*, 539 S.W.3d at 858-59 (describing the inherent risks posed by horizontal directional drilling).

6. CenturyLink failed to obtain an easement from Fife Portal as required by “Condition Number One” of the permit. Ex. 8 at 3 (“PROVIDE EASEMENT FOR WORK ON PRIVATE PROPERTY” (emphasis in original)); RP 487-89, 511-12. CenturyLink needed an easement from Fife Portal because the conduit CenturyLink sought to install ultimately had to be connected to the electrical pedestal located on Fife Portal’s property. RP 485, 488, 735, 817-18.

7. A CenturyLink representative visited the project during both a pre-construction site visit and the drilling operation. RP 483, 813-14, 822-23. CenturyLink failed to supervise Pacific to ensure it was safely installing the conduit in the correct area. RP 804, 813-14, 822-23; Ex. 5 at 3 (condition no. 3 requiring CenturyLink to do a site visit).

8. CenturyLink breached several ordinances of the Fife Municipal Code, one of which required CenturyLink to restore the property to its original condition. FMC 11.01.170(H); FMC 12.09.100; FMC 12.09.150. CenturyLink’s failure to promptly restore the property caused the soil near and under Fife Portal’s underground utilities to subside and further damage its property. RP 600, 685-86, 750-53, 792, 835-36, 908, 947-48, 955.

There “may be more than one cause in fact” of a party’s damages as a result of a defendant’s actions and inactions. *Michaels*, 171 Wn.2d at 610-11; CP 1835 (proposed pattern instruction on proximate cause citing WPI 15.01). Here Fife Portal presented substantial evidence to the jury to show that many of CenturyLink’s actions and inactions caused Fife Portal’s damages. Because Fife Portal presented substantial evidence at trial for the jury to conclude or at least reasonably infer that all of CenturyLink’s actions and inactions, when viewed alone or cumulatively, caused Fife Portal’s damages, the trial court erred in granting CenturyLink a directed verdict and dismissing Fife Portal’s negligence claims.¹⁹

B. The trial court erred as a matter of law in granting CenturyLink a directed verdict dismissing Fife Portal’s peculiar-risk vicarious-liability claim against CenturyLink.

At trial, CenturyLink’s peculiar-risk vicarious liability was a critical issue before the jury. Fife Portal submitted a brief on peculiar-risk vicarious liability and proposed an instruction consistent with the *Restatement (Second) of Torts* §§ 416 and 427. CP 1855-67, 2248. Despite substantial evidence supporting Fife Portal’s instructions on vicarious liability, the trial court granted CenturyLink a directed verdict and dismissed Fife Portal’s claim for peculiar-risk vicarious liability against CenturyLink. CP 2557-58; RP 1013.

¹⁹ The issue of the trial court’s refusal to give Fife Portal’s proposed instructions on CenturyLink’s negligence, including various provisions of the Fife Municipal Code, became moot once the trial court dismissed Fife Portal’s negligence claims against CenturyLink—even though RCW 35.99.030(6) requires CenturyLink to comply with “all applicable ordinances” and “state safety laws and standards.” CP 1741-46, 1776-81, 1832-37 (negligence); CP 2249-50 (provisions of the Fife Municipal Code); CP 1748, 1783 (negligent trespass); CP 1759-60, 1794-96, 1850-51 (special-verdict form).

1. Washington recognizes peculiar-risk vicarious liability under *Restatement (Second) of Torts* §§ 416 and 427.

A principal is generally not liable for injuries caused by an independent contractor. *Stout v. Warren*, 176 Wn.2d 263, 269, 290 P.3d 972 (2012); RESTATEMENT (SECOND) OF TORTS § 409 (1965). But when an independent contractor’s work is “inherently dangerous or poses a peculiar risk of harm,” the principal is liable for the damages caused by the independent contractor. *Stout*, 176 Wn.2d at 269 (citing RESTATEMENT (SECOND) OF TORTS §§ 416 and 427 (1965)). In those cases, the principal owes a “nondelegable common law duty” of care. *Sea Farms, Inc. v. Foster & Marshall Realty, Inc.*, 42 Wn. App. 308, 314, 711 P.2d 1049 (1985); *see also Henderson Bros. Stores, Inc. v. Smiley*, 120 Cal. App. 3d 903, 912-13 n.5 (1981) (characterizing the peculiar-risk doctrine “as imposing a species of nondelegable duty.”); RESTATEMENT (THIRD) OF AGENCY § 7.06 (2006).

A “peculiar risk” is a “risk differing from the common risks to which persons in general are commonly subjected by the ordinary forms of negligence which are usual in the community.” RESTATEMENT (SECOND) OF TORTS § 416 cmt. d. Peculiar risk presents a “special, recognizable danger arising out of the work itself.” *Id.* § 413 cmt. b. “It must involve some special hazard resulting from the nature of the work done, which calls for *special precautions*.” *Id.* § 416 cmt. d (emphasis added). When the work by its nature creates some peculiar risk of injury, and the contractor knows or has reason to know of the inherent dangers of the work, the contractor must take reasonable precautions against those dangers. *Kelly v. Howard S. Wright Constr. Co.*, 90 Wn.2d 323, 332, 582 P.2d 500 (1978).

The exceptions for work that poses a peculiar risk or is inherently dangerous are functionally identical. *Stout*, 176 Wn.2d at 269. These sections of the *Restatement* are “two statements of the same principle.” *Id.* at 273 (citing RESTATEMENT (SECOND) OF TORTS § 416 cmt. a, § 427 cmt. a).

The comments to *Restatement* sections 416 and 427 are instructive. To subject a principal to liability, the work need not be of a kind that “cannot be done without a risk of harm to others,” that “involves a high degree of risk of such harm,” or that “call[s] for any special skill or care in doing it.” RESTATEMENT (SECOND) OF TORTS § 427 cmt. b. Nor must “the risk be one of very serious harm.” *Id.*

It is sufficient that work of any kind involves a risk, recognizable in advance, of physical harm to others which is inherent in the work itself, or normally to be expected in the ordinary course of the usual or prescribed way of doing it, or that the employer has special reason to contemplate such a risk under the particular circumstances under which the work is to be done.

Id.

Section 427 lists three situations when the peculiar-risk rule applies:

- the work involves the use of instrumentalities that require constant attention and skillful management so that they may not be harmful to others;
- the work cannot be done safely unless those who do it are highly skilled and act with the utmost attention and care; and
- the work, while not highly dangerous, involves a risk recognizable in advance that danger inherent in the work itself, or in the ordinary or prescribed way of doing it, may cause harm to others.

RESTATEMENT (SECOND) OF TORTS § 427 cmt. c; *see also id.* § 416 cmt. d. The principal is liable when the work poses a risk “the employer should recognize as likely to arise in the course of the ordinary and usual method of doing the work, or the particular method which the employer knows that the contractor will adopt.” *Id.* § 416 cmt. e. And the rule applies when “the harm results from the negligence of the contractor in *failing to take precautions* against the danger involved in the work itself, which the employer should contemplate at the time of his contract.” *Id.* § 427 cmt. d (emphasis added).

Similarly, section 416 applies to the liability of a principal who hires a contractor to do work involving a peculiar risk and *requiring special precautions*, even though the principal stipulates in the contract that the contractor must take special precautions, for harm caused by the contractor’s negligent failure to take such precautions. RESTATEMENT (SECOND) OF TORTS § 416 cmt. c. The fact that the contract between the principal and contractor contains provisions for the taking of adequate precautions and that the contractor agrees to assume all liability for harm caused by his failure to do so “does not relieve his employer from the liability.” *Id.*; *see also id.* § 413 cmt. e.

2. Peculiar-risk vicarious liability applies to actions for property damage.

The peculiar-risk theory of vicarious liability is not limited to bodily harms; it extends equally to claims for damages to real property. Under the Restatement, the phrase “physical harm” denotes “the physical impairment

of the human body, or of land.” RESTATEMENT (SECOND) OF TORTS § 7(3); *id.* cmt. e (“physical harm” denotes physical impairment of “tangible property, which is to say land”); *see also Henderson Bros.*, 120 Cal. App. 3d at 912-13 n.5 (stating that section 416 of the *Restatement* was not limited to bodily injury and applied to claims for property damages). Indeed Division One has applied the peculiar-risk doctrine to cases involving damages to real property. *See Sea Farms*, 42 Wn. App. at 314.

3. Fife Portal presented substantial evidence to the jury that Pacific’s trenchless-drilling operation posed a peculiar risk of harm, inherent in the work itself, absent special precautions as reflected in the right-of-way permit.

For peculiar-risk vicarious liability to apply, “(1) the activity itself must pose a risk of physical harm absent special or reasonable precautions (i.e., the risk must be inherent to the activity), (2) the risk must differ[] from the common risks to which persons in general are commonly subjected (i.e., the risk must be peculiar or special), (3) the principal must know or have reason to know of the risk, and (4) the harm must arise from the contractor’s negligence with respect to the risk that is inherent in the activity.” *Stout*, 176 Wn.2d at 273. Indeed our legislature enacted the Underground Utility Damage Prevention Act to “protect the public health and safety and prevent disruption of vital utility services” due to the inherent dangers posed by trenchless-underground drilling. *See Titan Earthwork*, 200 Wn. App. at 752 (citing RCW 19.122.010).

Peculiar-risk vicarious liability “applies equally” to work that involves a “highly dangerous activity” and work that “involves risks recognizable in advance that danger inherent in the work itself or in the ordinary or prescribed way of doing it may cause harm to others.” RESTATEMENT (SECOND) OF TORTS § 427 cmt. c. Our state Supreme Court in *Stout* held that apprehension of a fugitive, while not abnormally dangerous, was still an activity that posed a peculiar risk of harm absent special precautions.²⁰ *Stout*, 176 Wn.2d at 272-74. To reach this holding, the court cited *one* out-of-state case from the Ohio Court of Appeals. *Id.* at 273-74 (citing *Hayes v. Goldstein*, 697 N.E.2d 224 (Ohio Ct. App. 1997)). The court considered the risk that the force a recovery agent is authorized to employ may be negligently or recklessly exercised, and the risk that a fugitive defendant may respond to apprehension in a manner that may cause harm to others. *Id.* at 274. The court concluded that the risks considered in fugitive apprehension are “peculiar” because the public is generally not subject to such harms. *Id.*

Like in *Stout*, a recent Missouri Court of Appeals decision is instructive and strikingly on all fours with this case. See *J.J.’s Bar & Grill, Inc. v. Time Warner Cable Midwest, LLC*, 539 S.W.3d 849 (Mo. Ct. App. 2017). A communications provider hired a contractor to install underground cable to service a nearby development. *Id.* at 854. The

²⁰ The Supreme Court in *Stout* was careful to note that while it concluded as a matter of law that “the fugitive apprehension aspect of bail bond recovery is a peculiar risk activity,” there “may be cases presenting a question of fact as to whether inherent or peculiar risks exist.” *Stout*, 176 Wn.2d at 274 n.3

provider knew the contractor would use horizontal directional drilling, like here, to install the cable. *Id.* Using an incorrect bore path, the contractor drilled into a natural-gas line that caused gas to escape, ignite, and explode near a restaurant. *Id.* at 855. The restaurant sued the provider for peculiar-risk vicarious liability. A jury found the provider liable. *Id.*

The provider argued on appeal that the trial court improperly instructed the jury on peculiar-risk vicarious liability because no evidence showed that horizontal directional drilling (HDD) presented a peculiar risk of harm. *Id.* at 857-58. The Missouri Court of Appeals rejected this argument:

By its nature, HDD trenchless technology thus carries with it the inherent risk that the drill bore will encounter a buried object that cannot be seen. It is not the improper manner of doing HDD work which creates this risk. Rather, it is the work itself, normally performed, which creates this risk. The risk exists *unless* adequate precautions are taken to insure that pre-existing utility lines and cables are located and avoided by the drill bore.

Based on the evidence, this risk is heightened when HDD work is performed in an urban area. There is an increased prevalence of underground utilities and cables in urban areas. And when HDD work is performed in an area covered by a hard surface (such as asphalt or concrete), escaping gas has nowhere to disperse should a natural gas line be struck, causing gas to migrate along the underground line and into buildings serviced by the line.

Id. at 858.

The court also rejected the argument that the “mere performance of HDD in and of itself does not inevitably lead to harm or injury in the absence of ‘special precautions’” and that “even if a contractor fails to take the routine precaution of having utilities marked before performing HDD,

hitting a facility is not certain, and some utilities that could be hit present no immediate danger at all, such as sewer, water or a fiber optic cable.” *Id.* at 858-59. First, “it is irrelevant that HDD technology can be performed without encountering an underground utility even in the absence of special precautions” because the “essence of inherent danger . . . is the need for special precaution. It is not sufficient for [a] defendant to show that the work can be done safely.” *Id.* at 859. Second, the “severity of potential harm is not relevant to determining whether an activity is inherently dangerous.” *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 427). The court ultimately affirmed the trial court’s “submitting for the jury’s determination whether HDD work in a congested urban area is an inherently dangerous activity.” *Id.* at 859-60.²¹

Like in *J.J.’s Bar*, Pacific used horizontal directional drilling to install conduit on Fife Portal’s property. Pacific’s drilling operation on Fife Portal’s property posed a significant, peculiar, and recognizable risk of physical harm to underground utilities and adjoining property absent “special precautions.” That special precautions were called for here is manifestly clear given the numerous statutes and ordinances governing CenturyLink’s and Pacific’s drilling operation. For instance, OSHA has long recognized the special risks presenting by drilling operations. CP 1861-67. The OSHA circular Fife Portal submitted below illustrates how

²¹ This decision of the Missouri Court of Appeals is out-of-state authority on a common-law issue for which Missouri and Washington have adopted the same rule. It is not binding on this Court as controlling precedent. But this Court should apply it as persuasive authority that resolves the peculiar-risk issue in Fife Portal’s favor.

horizontal directional drilling is an inherently dangerous activity. According to the circular, “it is more difficult to avoid utility lines when using HDD because of the limited visibility inherent to the process.” CP 1862. When using horizontal directional drilling, “it is critical to determine where utility lines are before drilling.” CP 1862. The hazards associated with HDD operations include striking underground utilities, and the risks of striking underground utilities “increases when HDD is used in urban areas.” CP 1863-64.

Indeed CenturyLink knew of the risks inherent in horizontal directional drilling: its right-of-way permit required CenturyLink to take “special precautions.” Ex. 8 at 4 ¶9. That’s because there are “unique risks” “associated with underground [blind] boring,” such as “[s]triking utilities” and “damaging utilities.” RP 526; *see also* CP 1863-64. CenturyLink’s regional operations supervisor testified that he controlled the repairs for “cut cables” and “damaged pedestals,” confirming that CenturyLink knew about the peculiar risks posed by trenchless drilling. RP 447-48. A CenturyLink supervisor testified that the purpose of surveying a property before drilling—something that CenturyLink refused to do despite Pacific’s request—was to avoid the inherent risks of striking underground utilities. RP 811-13. In addition, Fife Portal’s landscape area contained all of the property’s critical infrastructure, including dangerous high-voltage electrical equipment. RP 595. And CenturyLink directed Pacific to drill near a high-voltage electrical pedestal on Fife Portal’s property. Ex. 5 (SH 3 of 9, SH 4 of 9); RP 595, 735.

Pacific failed to take special precautions that would have avoided its trespass on Fife Portal's property. Pacific's trespass caused damage of a kind to be expected for the risk that is inherent in horizontal directional drilling. Because Fife Portal presented substantial evidence to support its peculiar-risk vicarious liability claim against CenturyLink at trial, the trial court erred in granting CenturyLink a directed verdict. *See Henderson Bros.*, 120 Cal. App. 3d at 916-17 (reversing a directed verdict on peculiar-risk vicarious liability because the trial court "erred in refusing to permit the issue of MacDonald's liability on the theory of 'special danger inherent in the work' to go to the jury."). This Court should reverse the directed verdict and remand for a new trial on Fife Portal's peculiar-risk vicarious-liability claim.

C. The trial court erred as a matter of law in granting CenturyLink a directed verdict and dismissing Fife Portal's trespass vicarious-liability claim against CenturyLink.

The trial court granted CenturyLink a directed verdict and dismissed Fife Portal's claim for trespass vicarious-liability against CenturyLink. CP 2557-58; RP 1013. Because Fife Portal presented substantial evidence to the jury that CenturyLink directed Pacific to trespass on Fife Portal's property, the trial court erred in granting CenturyLink a directed verdict on this claim.

1. Washington recognizes trespass vicarious liability under *Restatement (Second) of Torts* § 427B.

Another basis to impose vicarious liability on a principal for its contractor's negligence is when the principal hires a contractor to do work

that the principal knows, or has reason to know, will “likely involve a trespass upon the land of another.” RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 61 (2012); RESTATEMENT (SECOND) OF TORTS § 427B (1965); *Bradley*, 104 Wn.2d at 681.²²

2. Fife Portal presented substantial evidence to the jury that CenturyLink knew or had reason to know that Pacific’s work was likely to involve a trespass on Fife Portal’s property.

As discussed earlier, CenturyLink’s engineering drawings directed Pacific to place an electrical pedestal and to dig bore pits on Fife Portal’s property. Ex. 5 (SH 3 of 9, SH 4 of 9); RP 524, 1002. The conduit, once installed underground, would connect to the electrical pedestal on Fife Portal’s property. Yet CenturyLink refused to obtain an easement from Fife Portal for Pacific to do any work on its property. RP 488, 511; Ex. 5 (SH 3 of 9, SH 4 of 9). CenturyLink thus directed Pacific to trespass on Fife Portal’s property. RP 523-24. Stated differently, even if Pacific had drilled

²² The authorities are nearly uniform on this point. *See, e.g., Sun Sand Co. v. Cty. Court of Fayette Cty.*, 122 S.E. 536, 537-38 (W. Va. 1924) (“The county court cannot absolve itself from liability for damages which necessarily or reasonably flow from the construction of a road through the lands or property of another, by simply letting the construction to contractors. . . . The owner was responsible, although he let the work to a contractor, over whom he exercised no direction or control. The damages were caused from the nature of the work.”); *Budagher v. Amrep Corp.*, 637 P.2d 547, 552 (N.M. 1981); *West v. Nat’l Mines Corp.*, 285 S.E.2d 670, 677-78 (W. Va. 1981); *Mall v. C. & W. Elec. Co-op. Ass’n*, 213 P.2d 993, 995 (Kan. 1950); *Ketcham v. Newman*, 36 N.E. 197, 198-99 (N.Y. 1894); *Reed v. Reid*, 980 N.E.2d 277, 295-96 (Ind. 2012); *Anderson v. United States*, 259 F. Supp. 148, 150 (E.D. Pa. 1966) (“The general rule of law, prevailing in all the American Courts, is that an employer . . . of an independent contractor . . . is liable for a trespass committed by the contractor as a natural consequence of his performing the contract.”); *Horne v. City of Charlotte*, 255 S.E.2d 290, 292 (N.C. Ct. App. 1979) (“It is an established doctrine that when a contractor, whether as an independent contractor or employee, is employed to do an act allegedly unlawful in itself, such as committing a trespass, the municipality is solely liable for the resulting damages.”).

underneath the middle of the sidewalk to install the conduit as required by the right-of-way permit and engineering drawings, the scope of the work proposed by CenturyLink still directed Pacific to trespass on Fife Portal's property. That's why the City conditioned the issuance of the permit to CenturyLink on its obtaining an easement from Fife Portal. And had CenturyLink obtained an easement from Fife Portal, Fife Portal would have been able to take precautionary measures to protect its property, such as warning CenturyLink about the location of Fife Portal's underground utilities.

CenturyLink's vicarious liability under *Restatement (Second) of Torts* § 427B should have been resolved by the jury. This Court should reverse the directed verdict and remand for a new trial on Fife Portal's trespass vicarious-liability claim.

D. The trial court erred as a matter of law in granting CenturyLink a directed verdict and dismissing Fife Portal's vicarious-liability claim based on CenturyLink's principal-agent relationship with Pacific Utility.

The trial court acknowledged before trial that CenturyLink's vicarious liability based on a principal-agent relationship was properly a fact issue for a jury to decide because it had twice denied the parties summary judgment on this claim. CP 355-58, 1248-49 (orders denying partial summary judgment on vicarious liability); RP 68, 991. Yet, at trial, the trial court granted CenturyLink a directed verdict and dismissed Fife Portal's vicarious-liability claim based on CenturyLink's principal-agent relationship with Pacific. This was error.

1. A principal–agent relationship exists if the principal has the right to control the manner and means by which the agent’s work is performed.

One is generally not liable for damages caused by its independent contractor. *Tauscher v. Puget Sound Power & Light Co.*, 96 Wn.2d 274, 290, 635 P.2d 426 (1981). An exception exists when a principal–agent relationship arises. *Massey v. Tube Art Display, Inc.*, 15 Wn. App. 782, 786, 551 P.2d 1387 (1976).

A principal–agent relationship exists if the principal has the right to control the manner and means by which the agent’s work is performed. *Stansfield v. Douglas County*, 107 Wn. App. 1, 18, 27 P.3d 205 (2001); *Chapman v. Black*, 49 Wn. App. 94, 99, 741 P.2d 998 (1987); *O’Brien v. Hafer*, 122 Wn. App. 279, 283, 93 P.3d 930 (2004). The crucial factor is the right to control. *Massey*, 15 Wn. App. at 787; *Chapman*, 49 Wn. App. at 99; *O’Brien*, 122 Wn. App. at 283. The existence of the right of control, and not its exercise, is decisive. *O’Brien*, 122 Wn. App. at 284. The principal need not have the right of control over every aspect of the agent’s operation to incur vicarious liability. *Massey*, 15 Wn. App. at 787.

[I]t should be sufficient that plaintiff present substantial evidence of . . . right of control over those activities from whence the actionable negligence flowed. If the rule were otherwise, then a person wishing to accomplish a certain result through another could declare the other to be an independent contractor generally, and yet retain control over a particularly hazardous part of the undertaking without incurring liability for acts arising out of that part. Such a result would effectively thwart the purpose of the rule of vicarious liability.

Id. Further, a principal may be liable for the tortious acts of his agent, although he may not know or approve of them, if they are done in furthering the principal's business and within the scope of employment. *Titus v. Tacoma Smeltermen's Union Local No. 25*, 62 Wn.2d 461, 469, 383 P.2d 504 (1963).

Washington courts have adopted the *Restatement's* approach to determining if one acts as an agent or independent contractor. *Massey*, 15 Wn. App. at 786-87; *Chapman*, 49 Wn. App. at 98-99. Under that approach, a court must consider ten factors:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in business.

RESTATEMENT (SECOND) OF AGENCY § 220 (1958). These factors need not all be present to establish a principal-agent relationship. *Chapman*, 49 Wn. App. at 99. Nor is any one factor conclusive. *Id.*

The existence of an agency relationship “always depends on the facts and circumstances of each case.” *Yong Tao v. Heng Bin Li*, 140 Wn. App. 825, 831, 166 P.3d 1263 (2007); *see also Stansfield*, 107 Wn. App. at

18. “The existence of a principal–agent relationship is a question of fact unless the facts are undisputed.” *O’Brien*, 122 Wn. App. at 284. “The question of control or right of control is also one of fact for the jury.” *Id.* And if the evidence conflicts whether a principal–agent relationship arose, or if the evidence is reasonably susceptible of more than one inference, “the question is one of fact for the jury” to decide. *Chapman*, 49 Wn. App. at 99 (holding that trial court erred in granting a directed verdict on the issue of agency and control because the evidence was in conflict); *see also O’Brien*, 122 Wn. App. at 284.

2. When a principal owes a nondelegable duty of care to a third party, and hires a contractor to perform that duty, a principal–agent relationship is established as a matter of law.

A principal “who owes a nondelegable duty is permitted to delegate the activity to an independent contractor but will remain vicariously responsible for the contractor’s tortious conduct in the course of carrying out the activity.” *Knutson v. Macy’s W. Stores, Inc.*, 1 Wn. App. 2d 543, 547, 406 P.3d 683 (2017). When a principal has a nondelegable duty to protect others from the hazards of its enterprises and entrusts the performance of that duty to a contractor, the principal is subject to liability for any harm caused by the contractor’s negligence. RESTATEMENT (SECOND) OF AGENCY § 214 (1958); *id.* § 2 cmt. b.

“An inherently dangerous function cannot be delegated because the responsibility to ensure that all reasonable precautions are taken before engaging in a dangerous activity is of such importance to the community

that a principal should not be permitted to transfer its duty to another.” *King v. Lens Creek Ltd. P’ship*, 483 S.E.2d 265, 271 n.9 (W. Va. 1996) (citing PROSSER & KEETON ON THE LAW OF TORTS § 71, at 511-12 (5th ed. 1984)).²³ This principle “reflects the policy judgment that certain obligations are of such importance that employers should not be able to escape liability merely by hiring others to perform them.” *Medley v. N.C. Dep’t of Corrections*, 412 S.E.2d 654, 657 (N.C. 1992). Thus when a principle has a nondelegable duty, one with whom the principal contracts to perform that duty is as a matter of law an agent” *Id.* at 659.

As discussed previously, CenturyLink hired Pacific to install underground conduit using an inherently dangerous drilling technology. The peculiar-risk doctrine imposes a “species of nondelegable duty” on CenturyLink as a matter of law. *Henderson Bros.*, 120 Cal. App. 3d at 912-13 n.5; *see also* RESTATEMENT (SECOND) OF AGENCY § 214 cmt. b (citing RESTATEMENT (SECOND) OF TORTS §§ 416, 427). Our legislature recognized in its legislative findings that underground drilling poses an inherent danger absent special precautions because of the need to “protect health and safety.” RCW 19.122.010. Because CenturyLink owed Fife Portal a nondelegable duty to protect Fife Portal’s property from the inherent hazards of underground-trenchless drilling, Pacific was CenturyLink’s agent as a matter of law, subjecting CenturyLink to liability for Pacific’s negligence.

²³ *See also Kerl v. Dennis Rasmussen, Inc.*, 682 N.W.2d 328, 334 n.2 (Wis. 2004); *Sullivan County v. State*, 528 N.Y.S.2d 227, 230 (N.Y. App. Div. 1988).

3. **Even if this Court concludes that CenturyLink did not owe a nondelegable duty to Fife Portal, Fife Portal presented substantial evidence creating a fact question for the jury to decide whether CenturyLink had the right to control Pacific Utility sufficient to establish a principal–agent relationship.**

Massey v. Tube Art Display, Inc. is instructive. 15 Wn. App. 782, 551 P.2d 1387 (1976). In *Massey*, Tube Art obtained a permit from the City of Seattle to install a sign. Tube Art hired a contractor to dig a hole to install the sign. In digging the hole, the contractor struck a gas line that later caused killed two people and destroyed a building. The building’s tenants sued Tube Art and the contractor. The trial court concluded as a matter of law that an agency relationship existed between Tube Art and the contractor, and the court of appeals affirmed.

The court in *Massey* concluded the evidence adduced at trial was “determinative” in establishing an agency relationship. For instance, the contractor did 90 percent of his work for Tube Art. He dug holes and in dimensions consistent with Tube Art’s instructions. “In fact, [the contractor] was left no discretion with regard to the placement of the excavations that he dug.” *Massey*, 15 Wn. App. at 788. The court concluded that the undisputed evidence reflected Tube Art’s “right to control” the contractor’s work, including the “most significant decisions[:] the size and location of the hole.” *Id.* at 789.

In the present case, Tube Art exercised control over where the hole was to be dug, the day it was to be dug and how deep the hole was to be. Moreover, it was not unreasonable to expect Tube Art to know that gas pipes might very well be lurking in the vicinity of the proposed excavation. In such a case it was incumbent upon Tube

Art to ascertain where other service pipes might be. Failing this, Tube Art cannot now disclaim liability. Rather, where the danger to others is great, a duty is imposed upon an employer to make such provision against negligence as may be commensurate with the obvious danger. It is a duty which cannot be delegated to another so as to avoid liability for its neglect.

Id. at 789-90.

Like in *Massey*, CenturyLink hired Pacific specifically to drill and install conduit underground adjacent to Fife Portal's property to service a nearby residential development. CenturyLink prescribed the process to be used by Pacific to install the conduit: a "bore up across the properties." RP 530-31. CenturyLink also prescribed the method to be used to install the conduit: horizontal directional drilling. RP 531. CenturyLink directed Pacific to install the underground conduit using an inherently dangerous trenchless-drilling method. RP 531. Drilling underground and installing underground conduit poses inherent risks. RP 526, 548.

CenturyLink prepared the engineering draws used to obtain the right-of-way permit for the project. RP 483-84. CenturyLink obtained the permit to install conduit adjacent to Fife Portal's property. RP 529, 535; Ex. 8. CenturyLink's engineering drawings controlled the location for the conduit installation and the means and methods by which Pacific would install the conduit. Exs. 5-6; RP 474.

As the permit holder, CenturyLink had the duty to install and maintain the underground facilities "in full compliance with any and all ordinances" and promptly repair all "private property disturbed or damaged" during the drilling project. FMC 11.01.170(G)(1), (H); *see also*

FMC 11.01.350; FMC 12.09.150. CenturyLink was “responsible for any damage done to any public or private property, by reason of the breaking of any water pipes, sewer, gas pipe, electrical conduit or other utility.” FMC 12.09.100. In addition, CenturyLink had a duty to confine its work within the property lines and limits of easements indicated on the plan submitted with the application for the right-of-way permit. FMC 12.09.160.

The permit required CenturyLink to obtain easements to perform any work on private property. Ex. 5 at 3; RP 487-89; *see* FMC 12.09.110 (requiring the permit holder to obtain an easement to enter on private property). CenturyLink’s own engineering drawings for the permit required Pacific to do work partly on Fife Portal’s property. RP 511-12, 521. For instance, CenturyLink’s engineering drawings directed Pacific to install an electrical pedestal and to dig bore pits on Fife Portal’s property without its permission.

CenturyLink refused to stake the property’s boundary lines before the drilling project began. RP 467, 476-77, 522-23; Ex. 7. CenturyLink staked the project’s boundary lines only after CenturyLink and Pacific damaged Fife Portal’s property. RP 825. CenturyLink, and not its contractors, would normally stake the boundary lines using its own right-of-way survey group. RP 463-65.

CenturyLink had the right to shut down Pacific’s drilling operation at any time. RP 540, 814-15.

A CenturyLink representative “walked” the project with both the City and Pacific before the drilling operation began to determine the scope of work. RP 483. That representative also visited the project site when the

drilling began to inspect Pacific's work and to ensure Pacific was safely performing its work in the correct area. RP 804, 822-23.

Pacific performed "80 percent" of its work for CenturyLink. RP 538. CenturyLink was a "major customer" for Pacific and hired Pacific for all of its "smaller jobs" in 2015. RP 538, 805.

The jury should have determined whether a principal-agent relationship existed between CenturyLink and Pacific because Fife Portal presented substantial evidence at trial creating fact questions on the existence of a principal-agent relationship. This Court should reverse the directed verdict and remand for a new trial on CenturyLink's vicarious liability based on a principal-agent relationship.

E. The trial court erred on partial summary judgment by precluding Fife Portal from recovering all of its restoration and investigative costs spent on investigating and restoring the damaged property under RCW 4.24.630.

Shortly before the first trial, the trial court ordered on partial summary judgment that Fife Portal could not recover all of its restoration and investigative costs under RCW 4.24.630 for the time spent by First Corps in leading, directing, and overseeing the investigation, restoration, and emergency-repair-and-mitigation work on Fife Portal's property as the general contractor. CP 580-81. The court specifically precluded Humphrey, who acted through First Corps, from recovering his so-called "personal time" spent in investigating and mitigating the damages and restoring the property. CP 581; RP 16-17. The trial court seemingly viewed the notion of "costs of restoration" and "investigative costs" under RCW

4.24.630 literally, equating it and limiting the right to recover to out-of-pocket costs paid by an injured party to a third party.

The trial court refused to revisit that interlocutory ruling at trial. Fife Portal thus submitted, as an offer of proof, evidence of the services rendered by First Corps that Fife Portal would have proffered at trial to support its restoration and investigative costs under RCW 4.24.630. CP 1799-1800; RP 283-84, 324-25. Fife Portal would have sought \$180,332.50 in damages “for the services rendered by First Corps in leading and directing the repairs” of the property. CP 1800. This amount was “not duplicative” of any damages Fife Portal would have been seeking at trial. CP 1800.

Because RCW 4.24.630 plainly allows a party to recover all “costs of restoration” in repairing his damaged property and all “investigative costs,” the trial court erred as a matter of law by taking this issue away from the jury on partial summary judgment.

1. The goal of awarding compensatory damages is to make the injured party whole.

“In making any compensatory award, the court should use a measure of damage that makes the injured party as whole as possible without conferring a windfall.” *Pugel v. Monheimer*, 83 Wn. App. 688, 692, 922 P.2d 1377 (1996). The injured party “should be fully indemnified for his loss[.]” DAN B. DOBBS & CAPRICE L. ROBERTS, *LAW OF REMEDIES: DAMAGES–EQUITY–RESTITUTION* § 3.1, at 215 (3d ed. 2018). “The purpose of awarding damages in cases involving injury to real property is to return the injured party as nearly as possible to the position he would have been in

had the wrongful act not occurred.” *Thompson v. King Feed & Nutrition Serv., Inc.*, 153 Wn.2d 447, 459, 105 P.3d 378 (2005). “Damages must be assessed in the manner most appropriate to compensate the injured party for the loss sustained in the particular case.” *Kelly v. CB&I Contractors, Inc.*, 102 Cal. Rptr. 3d 32, 40 (Ct. App. 2009). Landowners “should not be forced either to sell property they wish to keep or to make repairs partly out of their own pockets.” *Osborne v. Hurst*, 947 P.2d 1356, 1359 (Alaska 1997); *Roman Catholic Church of Archdiocese of New Orleans v. La. Gas Serv. Co.*, 618 So.2d 874, 877 (La. 1993) (stating that a party should not be forced “to make repairs partly out of his own pocket”).

2. The time First Corps spent to lead, direct, and oversee the investigation and restoration of Fife Portal’s property is recoverable as both a “cost of restoration” and an “investigative cost” under RCW 4.24.630.

This Court reviews a trial court’s interpretation of a statute de novo. *Pendergrast v. Matichuk*, 186 Wn.2d 556, 568, 379 P.3d 96 (2016). The scope of available damages under RCW 4.24.630 presents a question of statutory interpretation. *See, e.g., Segura v. Cabrera*, 184 Wn.2d 587, 591, 362 P.3d 1278 (2015); *Shoemake ex rel. Guardian v. Ferrer*, 168 Wn.2d 193, 198, 225 P.3d 990 (2010); *Otani ex rel. Shigaki v. Broudy*, 151 Wn.2d 750, 753-54, 92 P.3d 192 (2004).

The goal of statutory interpretation is “to determine the legislature’s intent and to apply it.” *Segura*, 184 Wn.2d at 591. Legislative intent is derived “solely from the statute’s plain language, considering the text of the

provision at issue, the context of the statute, related provisions, and the statutory scheme as a whole.” *Id.*

Statutory interpretation begins with the plain meaning of the statute. *Sligar v. Odell*, 156 Wn. App. 720, 727, 233 P.3d 914 (2010). If the statute is unambiguous, a court may not look beyond the statute’s plain language or consider legislative history but must apply the statute as written. *Riofta v. State*, 134 Wn. App. 669, 680, 142 P.3d 193 (2006).

The trespass statute, RCW 4.24.630, expressly permits recovery of restoration and investigative costs against anyone who trespasses and wrongfully causes injury to another person’s land. The statute states:

Every person who goes onto the land of another and who . . . wrongfully causes . . . injury to the land . . . is liable to the injured party for treble the amount of the damages caused by the . . . injury. . . . ***Damages recoverable under this section include, but are not limited to, damages*** for the market value of the property . . . 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***

RCW 4.24.630(1) (emphasis added).²⁴ The legislature thus intended that the measure of damages for injury to real property under the statute included, but would not be limited to, restoration costs. *See Pugel*, 83 Wn. App. at 691.

²⁴ In enacting RCW 4.24.630, our legislature effectively adopted the Restatement’s approach to damages “for harm to land resulting from a past invasion and not amounting to a total destruction of value[.]” RESTATEMENT (SECOND) OF TORTS § 929(1) (1979); *see also id.* cmt. b (“*Restoration*. Even in the absence of value arising from personal use, the reasonable cost of replacing the land in its original position is ordinarily allowable as the measure of recovery. Thus if a ditch is wrongfully dug upon the land of another, the other normally is entitled to damages measured by the expense of filling the ditch, if he wishes it filled.”).

RCW 4.24.630 does not expressly exclude any damages arising out of a defendant's wrongful trespass and injury to property. *See Pendergrast v. Mattituck*, 189 Wn. App. 854, 875, 355 P.3d 1210 (2015) (stating in dicta that RCW 4.24.630 “does not expressly exclude noneconomic damages”), *aff'd*, 186 Wn.2d 556, 379 P.3d 96 (2016). Nor does the statute define the terms “costs of restoration” or “investigative costs.”

The plain meaning of a statute may be determined from a standard English dictionary. *State v. Barnes*, 189 Wn.2d 492, 496, 403 P.3d 72 (2017). The dictionary defines “restoration” broadly as “an act of restoring or the condition or fact of being restored as [in] . . . a bringing back to or putting back into a former position or condition[.]” WEBSTER’S THIRD NEW INT’L DICTIONARY 1936 (2002). One court has defined restoration costs as the amount of money a party “will be forced to spend to restore his property to its previous condition.” *McEwen v. MCR, LLC*, 291 P.3d 1253, 1261 (Mont. 2012). The dictionary defines “investigative” broadly too as “characterized by or having a tendency toward investigation” or “of or relating to investigation.” WEBSTER’S THIRD NEW INT’L DICTIONARY 1189. The dictionary also defines “cost” as “the expenditure or outlay of money, time, and labor.” *Id.* at 515.²⁵

²⁵ *See also* WEBSTER’S THIRD NEW INT’L DICTIONARY 515 (defining “costs” as “expenses incurred in litigation” such as “those given by the law or the court to the prevailing against the losing party in equity and frequently by statute”); *cf. Ford Motor Co. v. Mich. Consol. Gas Co.*, No. 08–CV–13503–DT, 2010 WL 3419502, at *3 (E.D. Mich. Aug. 27, 2010) (concluding that “investigative costs” are recoverable as “necessary costs of response” under CERCLA).

These definitions unambiguously demonstrate that “costs of restoration” and “investigative costs” under RCW 4.24.630 permit a party to recover all of its costs spent in investigating and restoring his property to its former condition. *See Pugel*, 83 Wn. App. at 690-91 (holding that a landowner who himself repairs his property, after his neighbor’s excavation of an adjoining lot caused his property to subside and crack, could recover all “reasonable and necessary restoration costs”).²⁶

The context of the statute confirms this plain meaning of restoration and investigative costs. Chapter 4.24 RCW is entitled “Special Rights of Action and Special Immunities.” The statute permits a person to recover treble the amount of damages to his land wrongfully caused by another’s trespass. The legislature accorded special status to persons whose land was wrongfully injured. Indeed the purpose of allowing parties to recover treble damages is not only to redress the injury but to punish the wrongdoer and to discourage persons from wrongfully causing injury to land “on the gamble that the enterprise will be profitable if actual damages only are incurred.” *Seal v. Naches-Selah Irrigation Dist.*, 51 Wn. App. 1, 4, 751

²⁶ Courts around the country uniformly hold that the cost of repair is the proper measure of damages for a party to be fully compensated in restoring his property to its pre-injury condition. *See, e.g., Brooks v. City of Huntington*, 768 S.E.2d 97, 104-05 (W. Va. 2014); *State v. La. Land & Expl. Co.*, 110 So.3d 1038, 1047 (La. 2013); *Martin v. Design Constr. Servs., Inc.*, 902 N.E.2d 10, 13-15 (Ohio 2009); *Felton Oil Co., LLC v. Gee*, 182 S.W.3d 72, 78-81 (Ark. 2004); *Bd. of Cty. Comm’rs of Weld Cty. v. Slovek*, 723 P.2d 1309, 1316-17 (Colo. 1986); *Ridley v. Turner*, 778 S.E.2d 844, 846-47 (Ga. Ct. App. 2015); *Kelly*, 102 Cal. Rptr. 3d at 38-39, 41; *Nischke v. Farmers & Merchs. Bank & Trust*, 522 N.W.2d 542, 551-52 (Wis. Ct. App. 1994); *Gross v. Jackson Township*, 476 A.2d 974, 976 (Pa. Super. Ct. 1984).

P.2d 873 (1988) (interpreting Washington’s timber-trespass statute); *see also Gardner v. Lovegren*, 27 Wash. 356, 362, 67 P. 615 (1902) (same).²⁷

Because of the public-safety issues and continuing damages to Fife Portal’s property, Fife Portal looked to CenturyLink and Pacific to promptly restore the property as required by the Fife Municipal Code and chapter 19.122 RCW. CP 423, 478-79, 483-88. CenturyLink refused. CP 462, 478-79. So Fife Portal retained First Corps—the original property developer, designer, and general contractor—to lead, direct, and oversee remediation of the property. CP 385, 390, 393, 395, 402-03, 475, 477. First Corps in turn hired Humphrey to perform this work. CP 385, 396, 403, 433.

First Corps and Humphrey knew the property better than anyone else, having “intimate knowledge of all matters of its design, construction, and reasons for all decisions made” on the property. CP 402, 475. Indeed, as a condition of Fife Portal’s loan to buy the property, the lender’s trustee required First Corps to handle all development and construction of the property. CP 475. Fife Portal was thus ordered to hire First Corps to help perform the remediation efforts on Fife Portal’s behalf. The “institutional knowledge of the site and its buildings, including not known through any

²⁷ Because the plain meaning of “costs of restoration” is clear and unambiguous, this Court need not resort to the statute’s legislative history. But even if the legislative history were analyzed, it shows that the legislature intended to benefit *all land* wrongfully injured. While the legislature found that “forest lands and agricultural lands are particularly vulnerable to property damages,” it made clear that the statutory amendment intended to cover “any land, not just timber or agricultural land.” Senate Bill Report 6080; *see also* House Bill Report (SB 6080) (“Civil damages provisions similar to those enacted in 1993 with respect to public lands are enacted with respect to all lands.”). That legislative history is attached as Appendix C.

plans, require[d] access to [Humphrey's] personal knowledge and the records and emails in First Corps['] possession.” CP 475.

Humphrey, acting through First Corps, led and directed the remediation of the property as the general contractor by hiring many contractors to perform the work. CP 403-10, 458-60, 479. First Corps performed the same role in remediating the damages caused by CenturyLink and Pacific as it did in developing the property from 2007 to 2013. CP 478. For instance, First Corps retained engineers that prepared the technical specifications for the remediation work; retained engineers to monitor the remediation work; and hired contractors to perform the remediation work. CP 395, 477-78. The engineers that First Corps hired for the remediation work were the same engineers that Fife Portal hired to prepare the original property-development drawings. CP 478. Humphrey was intimately involved in all aspects of remediating the property, including identifying and inspecting the damages, issuing reports, and attending numerous meetings with the City, CenturyLink, Pacific, and the Safety Commission. CP 407, 415-23, 433, 435-39, 449.

The trial court precluded Fife Portal from recovering the restoration costs incurred by First Corps because it believed the “personal time of corporate leaders, corporate owners, is [not] compensable” under RCW 4.24.630. RP 16-17. But Fife Portal was not seeking to recover so-called “personal time” as compensable restoration-cost damages. Nor was Fife Portal engaged in self-dealing seeking to recover a windfall. Humphrey and First Corps did not have any direct ownership or financial interest in Fife

Portal's property. CP 387-88, 390, 393, 474-75. Because Humphrey performed the investigation and remediation of the property's damages through First Corps, the trial court disregarded First Corps' status as a separate entity and shifted the financial responsibility to investigate and mitigate the damages and restore the property from CenturyLink to Fife Portal. The trial court erroneously treated First Corps as the same entity as Fife Portal, even though First Corps was a separate entity hired by Fife Portal.

In addition, the trial court's ruling is tantamount to holding that a property owner cannot recover restoration costs for performing his own repairs, but if that same property owner hired a contractor to perform the repairs, then the property owner could recover the costs of those repairs. But property owners "should not be forced . . . to make repairs partly out of their own pockets," especially when those self-repairs are made for emergency health and safety reasons. *Osborne*, 947 P.2d at 1359. The following quotations from case law show that a property owner's restoration costs include the costs of repair that he himself performed:

Had it been necessary for an outside company to repair the damage, the cost of such repairs would include similar charges. There is no reason to free respondent of these costs simply because the injured party is in a position to make the repairs itself.²⁸

If Dillingham had hired an independent contractor to repair the damages caused by the explosion, the cost of such repair work undoubtedly would have reflected the independent contractor's

²⁸ *Bultema Dock & Dredge Co. v. S.S. David P. Thompson*, 252 F. Supp. 881, 886 (W.D. Mich. 1966) (permitting recovery of labor and material costs for a party's self-repair of its underwater-construction project).

overhead expenses. We see no reason why Dillingham should not be reimbursed for its overhead expenses because it decided to undertake the repair work itself. . . . Were Dillingham to be denied a profit it would result in unrecoverable damage to Dillingham since it would be deprived of the normal profit it would earn on those assets and resources.²⁹

Had it been necessary for an outside company to repair the damage, the cost of such repairs would include similar charges. There is no reason to free respondent of these costs simply because the injured party is in a position to make the repairs itself. . . . [A] party which repairs property tortiously damaged by another should be permitted to recover indirect expenses incurred in making such repairs if its calculation of overhead is shown to be a fair and reasonable measure of actual costs.³⁰

The cost of repairs performed internally by the injured party, including overhead, are recoverable in a negligence action. The district court properly concluded that Freeport was entitled to recover its in-house engineering costs.³¹

In our opinion, overhead and supervisory costs may be recovered. . . . The rationale for this approach is that a self-repairing plaintiff is entitled to be compensated for its losses and expenses as a result of (repairing the damaged vehicle)[.]³²

²⁹ *Dillingham Shipyard v. Associated Insulation Co., Ltd.*, 649 F.2d 1322, 1326-28 (9th Cir. 1981) (permitting recovery of overhead expenses and profits for a party's self-repair of a vessel following an explosion caused by a gas leak).

³⁰ *Curt's Trucking Co. v. City of Anchorage*, 578 P.2d 975, 978-79 (Alaska 1978) (permitting recovery of overhead expenses for a party's self-repair of its damaged telephone cable and citing the principle that "an injured person is entitled to be placed as nearly as possible in the position he would have occupied had it not been for the defendant's tort").

³¹ *Freeport Sulphur Co. v. S/S Hermosa*, 526 F.2d 300, 304 (5th Cir. 1976) (permitting recovery of engineering expenses incurred by a party's self-repairing engineering team).

³² *Miller Pontiac, Inc. v. Osborne*, 622 P.2d 800, 803 (Utah 1981) (permitting recovery of the cost of repairs made by the injured party to a damaged vehicle).

These cases reflect the overwhelming majority rule that a person may recover the costs incurred in self-repairing his property caused by another's negligence.³³

Fife Portal should have been allowed to present to the jury its restoration and investigative costs incurred in hiring First Corps to lead, direct, and oversee the remediation efforts. If the rule were otherwise, a party could never be made whole in repairing his own property damaged by a defendant's tortious conduct.

3. Refusing to award Fife Portal all of its restoration and investigative costs under RCW 4.24.630 would sanction CenturyLink's and Pacific's egregious conduct and unjustly enrich them, at Fife Portal's expense.

Unjust enrichment is the method of recovery for the value of a benefit retained absent any contractual relationship because notions of fairness and justice require it. *Young v. Young*, 164 Wn.2d 477, 484, 486, 191 P.3d 1258 (2008). To recover in unjust enrichment, the defendant must

³³ See also *Columbus & S. Ohio Elec. Co. v. J.P. Sand & Gravel Co.*, 489 N.E.2d 830, 830-31 (Ohio Ct. App. 1985) (permitting recovery of repair costs, including overhead expenses, for a party's self-repair of its transmission tower); *Bd. of Pub. Utils. of City of Springfield v. Fenton*, 669 S.W.2d 612, 614-17 (Mo. Ct. App. 1984) (permitting the recovery of repair costs, including material, labor, and overhead, for a party's self-repair of a telephone pole); *Pub. Serv. Elec. & Gas Co. v. Stone*, 446 A.2d 578, 579-82 (N.J. Super. Ct. App. Div. 1982) (permitting the recovery of repair costs, including overhead expenses, for a party's self-repair of a public-utility pole); *Ford Motor Co. v. Bradley Transp. Co.*, 174 F.2d 192, 196-98 (6th Cir. 1949) (permitting recovery of repair costs, including overhead expenses, for a party's self-repair and demolition of damaged property); *Baltimore & O.R. Co. v. Commercial Transp., Inc.*, 273 F.2d 447, 448-49 (7th Cir. 1960) (permitting recovery of repair costs, including labor, materials, and overhead, for a party's self-repair of its property and equipment); *James D. Hinson Elec. Contracting Co., Inc. v. BellSouth Telecomms., Inc.*, 796 F. Supp. 2d 1341, 1349-50 (M.D. Fla. 2011) (action brought under the Florida Underground Facility Damage Prevention and Safety Act) (permitting recovery of repair costs, including overhead expenses, for a party's self-repair of its damaged facilities).

receive a benefit, the received benefit is at the plaintiff's expense, and the circumstances make it unjust for the defendant to retain the benefit without payment. *Id.* at 484-85.

CenturyLink refused to accept responsibility for the damages it caused to Fife Portal's property, forcing Fife Portal to self-repair its own property. Absent Fife Portal's self-repairs, the costs incurred to remediate the property would have been borne by CenturyLink. By not repairing Fife Portal's property, CenturyLink received a benefit at Fife Portal's expense. Thus the circumstances here would make it manifestly unjust for CenturyLink to retain the benefit it received without having to account for paying all of Fife Portal's reasonable restoration costs.

In addition, the trial court here effectively shifted financial responsibility to pay for the damages caused by CenturyLink's negligence over to Fife Portal, and converted Fife Portal's time and labor to the economic benefit of the party who damaged Fife Portal's property. The trial court's ruling would affect any property owner who has minimal resources to pay for the cost of repairs caused by a negligent party who refuses to repair the property. This perverse ruling incentivizes any company to stiff an injured party who cannot afford to hire a third party to make the necessary repairs to damaged property. That cannot be the law. Nor should it ever be.

4. RCW 4.24.630 permits Fife Portal to recover damages for the money it paid First Corps to perform emergency mitigation work on its property.

A party is “entitled to recover the reasonable costs of minimizing damages.” DOBBS & ROBERTS § 3.9, at 274. “Inasmuch as the law denies recovery for losses that can be avoided by reasonable effort and expense, justice requires that the risks incident to such effort should be carried by the party whose wrongful conduct makes them necessary.” *Brandon & Tibbs v. George Kevorkian Accountancy Grp.*, 277 Cal. Rptr. 40, 51 (Ct. App. 1990). The most common form of minimizing damages is “to repair harm done that would otherwise have consequential losses[.]” DOBBS & ROBERTS § 3.9, at 276. If a party “actually expends funds in a reasonable effort to minimize damages, the expenditures are recoverable . . . as a form of consequential damages.” *Id.* at 276; *see also Brandon & Tibbs*, 277 Cal. Rptr. at 51 (“[L]osses that a party incurs in a reasonable effort to avoid losses resulting from a breach are recoverable as damages.”). “So the recovery for reasonable costs is appropriate, even if the effort to minimize was not successful and even if the costs incurred outran the savings.” DOBBS & ROBERTS § 3.9, at 276.

The Restatement provides that a party “is not prevented from recovering damages for a particular harm resulting from a tort if the tortfeasor intended the harm or was aware of it and was recklessly disregardful of it[.]” RESTATEMENT (SECOND) OF TORTS § 918(2) (1979). “[O]ne who intends a particular harmful result or who is aware of the result

and is recklessly indifferent to its happening, is required to pay damages for it[.]” *Id.* cmt. a.

RCW 4.24.630 contains no limitation of recoverable damages caused by another’s trespass. The rule of *ejusdem generis* is instructive. By using the phrase “[d]amages recoverable under this section include, but are not limited to,” the legislature made clear that the two express measures of damages listed in the statute—market value of the property and costs of restoration—were not intended to be exhaustive. *See, e.g., State v. Larson*, 184 Wn.2d 843, 849, 365 P.3d 740 (2015) (explaining that the “statutory language ‘including, but not limited to’ . . . [provides] illustrative examples rather than an exhaustive list”); *Rhea v. Grandview Sch. Dist. No. JT 116-200*, 39 Wn. App. 557, 562, 694 P.2d 666 (1985) (same); *Colbert v. City of Cleveland*, 790 N.E.2d 781, 784 (Ohio 2003) (“The phrase ‘including, but not limited to,’ indicates that what follows is a *nonexhaustive* list of examples.”). Indeed, under a similar statute allowing treble damages for timber trespass, our Supreme Court has allowed a party to recover emotional-distress damages even though the statute does not expressly provide for such damages. *Birchler v. Castello Land Co., Inc.*, 133 Wn.2d 106, 112-17, 942 P.2d 968 (1997).

The work First Corps and Humphrey did in January 2016 “was an emergency repair for health and safety issues strictly, to protect the tenants and to protect any additional damage, so it was strictly a mitigation process.” RP 670-71; *see also* RP 647-48, 783, 1139. The invoices First Corps submitted reflect that Humphrey’s work occurred between October

2016 and June 2016—while Fife Portal was mitigating the damages to its property. CP 435-39. Fife Portal should have been allowed to recover these mitigation damages under RCW 4.24.630.

5. Whether the amount of time spent by First Corps in leading, directing, and overseeing the restoration efforts on Fife Portal’s property is reasonable presents a fact question for the jury.

Like all compensatory-damages awards, an award of restoration costs for injury to real property must be “reasonable.” *Brooks*, 768 S.E.2d at 105; *Allyn v. Boe*, 87 Wn. App. 722, 734, 943 P.2d 364 (1997); *cf. Hase v. City of Seattle*, 57 Wash. 230, 233-34, 107 P. 515 (1910) (“Although damages in actions for personal injuries are to be determined by juries, there must be some reasonable limit to the awards they are permitted to make. Such damages are to be allowed for compensation only[.]”). “Whether the restoration costs are reasonable is a question for the trier of fact.” *Kelly*, 102 Cal. Rptr. 3d at 39. Hence the specific tasks performed by First Corps to remediate the property or the number of hours billed by Humphrey is a fact question and not appropriate for summary judgment. *Bunch v. King Cty. Dep’t of Youth Servs.*, 155 Wn.2d 165, 179, 116 P.3d 381 (2005) (“The amount of damages presents a question of fact.”).

This Court should reverse the trial court’s partial-summary-judgment order and remand for a new and limited trial on damages to allow Fife Portal to present all of the damages supporting its mitigation, restoration, and investigative costs to the jury under RCW 4.24.630.

- F. The trial court erred as a matter of law by barring Fife Portal from presenting any evidence on its future, contingent damages for “unknown conditions” as restoration costs under RCW 4.24.630 and by refusing to instruct the jury on those recoverable damages.**

During Fife Portal’s investigation and remediation of the property damages, Fife Portal discovered that CenturyLink and Pacific had caused additional, unforeseen damages to its property. RP 659, 1124, 1134, 1137. Fife Portal presented multiple iterations of a spreadsheet outlining all of the damages it sought to recover at trial. *See* Exs. 20, 20A, 20B, 20C, 20D. The spreadsheets put the damages into two categories: original-mitigation damages and adjusted damages to fully restore Fife Portal’s property to its original condition. Among those adjusted damages was a line item for “unknown conditions” valued at \$25,000. Ex. 20 (not admitted); RP 304-05, 308, 719.

The trial court refused to allow Fife Portal to present testimony on “unknown condition” damages and thus precluded the jury from awarding any damages for unknown conditions as a contingency line item for future remediation work on Fife Portal’s property. RP 314, 623, 718-19, 727. This was error.

- 1. Once a party has established the fact of damages, the amount of damages—even if they cannot be exactly ascertained—must be determined by the jury.**

The “controlling rule of law,” which is an “ancient one,” is that “elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.” *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265, 66 S.

Ct. 574, 580, 90 L. Ed. 652 (1946) (a treble-damages action under the antitrust laws) (cited and quoted by *Wenzler & Ward Plumbing & Heating Co. v. Sellen*, 53 Wn.2d 96, 98-99, 330 P.2d 1068 (1958)).

A party who has established the fact of damages will not be denied recovery on the basis that the amount of damages cannot be exactly ascertained. *Eagle Point Condo. Owners Ass'n v. Coy*, 102 Wn. App. 697, 703, 9 P.3d 898 (2000); *see also Sellen*, 53 Wn.2d at 99-100 (“A party who has . . . committed a tortious act is generally not permitted to escape his liability in damages therefor simply by reason of difficulty in the ascertainment of the damage.”). That’s because damages “need not be shown with mathematical certainty” to be recoverable. *Interlake Porsche & Audi, Inc. v. Bucholz*, 45 Wn. App. 502, 510, 728 P.2d 597 (1986). Once the fact of damages is shown, “a liberal rule is applied with respect to determining the amount of that damage.” *Sellen*, 53 Wn.2d at 100.

Where it is established . . . that damage has been incurred for which a defendant should be held liable the plaintiff may be accorded the benefit of every reasonable presumption as to the loss suffered. Thus the court, or a jury, doing the best that can be done with insufficient material, may have to form conclusions on matters on which there is no evidence, and *to make allowance for contingencies even to the extent of making a pure guess*[.]

Id. at 100 n.4 (emphasis added) (holding that the trial court erred in denying plaintiffs any recovery). Indeed uncertainty as to the amount or damages is not fatal to a party’s right to recover damages. *Id.* at 99.

The plaintiff is entitled to damages which will compensate him for all the consequences which naturally follow the breach This is no different in principal from allowing a plaintiff in an action of tort for personal injuries to recover the damages he will probably suffer

in the future. If the cause of action has accrued, the fact that the damages or all of them have not yet been suffered is no bar in any form of action to the recovery of damages estimated on the basis of full compensation.

McFerran v. Heroux, 44 Wn.2d 631, 641, 269 P.2d 815 (1954).

Evidence of damages is sufficient if it affords a reasonable basis for estimating the loss and does not subject the trier of fact to speculation or conjecture. *Eagle Point*, 102 Wn. App. at 704. The quantum of proof necessary to show the *fact* of damage must be distinguished from the *amount* of damage; “the burden as to the former is the more stringent one”—once the fact of damage is established, “the jury is allowed to estimate the amount of damage.” *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 392 (9th Cir. 1957).

The Montana Supreme Court approved the use of a contingency factor as a basis to determine the plaintiffs’ ultimate recovery for property damages. *Chandler v. Madsen*, 642 P.2d 1028, 1030, 1033-34 (Mont. 1982). The plaintiffs’ contractor testified that his estimate for the cost of repair to the plaintiffs’ home was \$65,000, which included a 12 percent contingency factor. The contractor further testified that because of the complicated and uncertain nature of the repairs, he would charge \$97,500 for the total repair cost, “considering the contingencies of the work.” *Id.* at 1030. The trial court awarded damages of \$97,500. *Id.* at 1033. Similar to what CenturyLink and Pacific argued below, the defendant argued that the \$97,500 estimate was speculative. The Montana Supreme Court rejected this argument and affirmed:

An estimate, by its very nature, is speculative, particularly where, as here, the job is complicated and subject to revision as it progresses. It would be of questionable value to the Chandlers to receive \$65,000 for repairs only to discover, once into the project, the cost would be significantly more. Given the nature of the damage to the Chandler home and the repairs required, we affirm the District Court's award for repairs.

Id. at 1034.

Similarly, the Texas Court of Appeals approved the use of future repair costs as recoverable damages. *City of Alton v. Sharyland Water Supply Corp.*, 402 S.W.3d 867, 885 (Tex. App. 2013). The court rejected the argument that the plaintiff's engineering expert had no basis for his estimate of future repair costs because he relied on a "single price quote, not competitively bid," and that was "randomly inflated." *Id.* The court also rejected the argument that the jury "had no basis for determining whether the future repair costs were reasonable." *Id.* Concluding that the cost estimate provided legally sufficient evidence, the court noted that the engineering expert testified that he (1) used his past experience, (2) used past projected costs and other information on how to repair these lines, and (3) applied a price increase factor to determine what a "current figure would be to hire a contractor and have it done." *Id.* The court affirmed the jury's award of \$1,125,000 "in future damages." *Id.* at 887-88.

2. Fife Portal presented substantial evidence sufficient for a reasonable jury to award Fife Portal damages for future, contingent unknown conditions as restoration costs.

Fife Portal should not be barred from recovering its reasonable future or contingent damages for unknown conditions on the property that

had yet to develop at the time of trial and that CenturyLink and Pacific had undisputedly caused. No authority supports that future or contingent damages are, per se, unrecoverable as a matter of law.

Fife Portal uncovered additional damages during the investigation and restoration of the property, some of which included unknown soil conditions. Fife Portal submitted a summary budget of its restoration damages at trial. Ex. 20. That summary reflected a contingency line item for \$25,000 in “unknown conditions.” Ex. 20. Humphrey testified that he had prepared thousands of construction budgets in his career, and in each of those budgets, there would be a contingency line item for unknown conditions, “especially on soil conditions.” RP 686. He testified that he based his estimate of contingent damages on his experience in the commercial-construction industry, through leading, directing, and overseeing the property’s restoration efforts, and in discussions with RV Associates and a soil engineer. RP 308-10, 683-86. He testified that the necessary work to fully restore Fife Portal’s property involved unknown soil conditions—an element that inherently creates additional risk and uncertainty—because Fife Portal could not determine the extent of the damages by the time of trial. RP 683-86.

Humphrey further testified that none of his contractors were willing to prepare a bid on unknown conditions because one cannot bid work for conditions that have yet to develop. RP 732, 794-95. So Humphrey, using his extensive experience developing commercial properties and his intimate knowledge of Fife Portal’s property, prepared a cost estimate for the

unknown soil conditions. In any project to remediate damages to a property, a landowner “always run[s] into conditions that are unknown.” RP 764. A contingency line item ensures that the landowner will be made whole for unknown damages that later develop in “worst case scenarios.” RP 764.

When remediating a property includes costs estimates for unknown conditions, a contractor must be able to provide an educated estimate factoring in unknown conditions that may be encountered. RP 849-51 (describing a contingency as “adding extra moneys to cover risk” for “unknown conditions” that “may come up during the work”). Humphrey explained that a minimum 5-10 percent contingency factor is standard practice in preparing costs bids for unknown conditions. *E.g., Chandler*, 642 P.2d at 1030, 1034 (permitting a contractor to use a contingency in a cost-of-repair estimate). These contingency factors must be included in cost estimates to avoid the very real danger of underbidding, cost overruns, and the encounter of additional, unknown damages. This standard industry practice does not demonstrate speculation or conjecture. This is indeed the very nature of a cost-repair estimate, and not a basis for the wholesale exclusion of one of Fife Portal’s claimed damages—as the trial court did here. *Id.* at 1033-34.

Because the trial court erred in refusing to allow Fife Portal to recover cost-of-repair damages for future, unknown conditions to the soil, this Court should remand for a new trial on damages.

VI. RAP 18.1 REQUEST FOR FEES

When a statute allows an award of attorney fees to the prevailing party at trial, the appellate court has inherent authority to make such an award on appeal. *Standing Rock Homeowners Ass'n v. Misich*, 106 Wn. App. 231, 247, 23 P.3d 520 (2001). As previously discussed, RCW 4.24.630 allows an award of attorney fees, investigative costs, and other litigation expenses. Because this Court should reverse the trial court's partial-summary-judgment order and the trial court's decision barring Fife Portal from recovering its cost-of-repair damages for future, unknown conditions to the soil, this Court should award Fife Portal its reasonable attorneys' fees in pursuing those issues on appeal. *Id.* (awarding fees on appeal under RCW 4.24.630 and RAP 18.1).

VII. CONCLUSION

This Court should reverse the trial court's order granting CenturyLink a directed verdict on Fife Portal's negligence and vicarious-liability claims and remand for a new trial on CenturyLink's liability. CenturyLink, as the right-of-way permit holder, owed Fife Portal duties of care as a matter of law, and Fife Portal presented substantial evidence supporting that (1) CenturyLink's acts and omissions caused Fife Portal's damages; (2) CenturyLink's drilling operation using an inherently dangerous trenchless-drilling technology posed a peculiar risk of harm absent special precautions; and (3) CenturyLink had a right to control Pacific's drilling operation sufficient to establish a principal-agent

relationship.³⁴ Because the trial court erred in granting CenturyLink a directed verdict, this Court should reverse the judgment and order awarding CenturyLink attorney fees and costs.

This Court should reverse the trial court's partial summary judgment order that precluded Fife Portal from recovering all of its restoration costs under RCW 4.24.630 against CenturyLink and Pacific. This Court should affirm the final judgment against Pacific awarding Fife Portal \$852,972.98 in damages and attorneys' fees but remand for a new and limited trial on the damages the trial court barred Fife Portal from recovering. That remand should direct the trial court to allow Fife Portal to recover and present evidence on future, contingent damages for unknown conditions relating to the soil on its property.

Respectfully submitted: April 12, 2019.

CARNEY BADLEY SPELLMAN, P.S.

By Michael B. King
Michael B. King, WSBA No. 14405
Jason. W. Anderson, WSBA No. 30512
Rory D. Cosgrove, WSBA No. 48647
Attorneys for Appellants/Cross-Respondents

³⁴ While Fife Portal is not asking this Court to grant it judgment as a matter of law on its negligence and vicarious-liability claims against CenturyLink, Fife Portal is asking this Court to state in its decision that whether Fife Portal is entitled to a resolution of those claims as a matter of law, as opposed to having to take those claims to verdict, remains open on remand. The factual record at the time of trial in 2018 was more fully developed than at the time of the various pre-trial rulings issued in 2016 and 2017 denying summary judgment. And because the trial court granted Century Link a directed verdict at the close of Fife Portal's case-in-chief, Fife Portal was foreclosed from seeking a directed verdict against Century Link at the close of all the evidence.

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 attorney(s) of record by the method(s) noted:

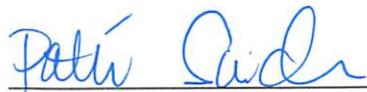
Email to the following:

Dennis M. Strasser
Strasser Law and Resolution LLC
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Bothell WA 98011-8000
dstrasser@lawandresolution.com

Steven G. Wraith
Kyle J. Rekofke
Dirk J. Muse
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701 Pike St Ste 1800
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Bradley S. Wolf
Christine L. Becia
Law Office of Bradley S. Wolf
811 First Avenue, Suite 350
Seattle, WA 98104
Telephone: (206) 264-4577
bwolf@wolflaw.us
cbecia@wolflaw.us

DATED: April 12, 2019.



Patti Saiden, Legal Assistant

APPENDIX

A

PROCEDURAL HISTORY

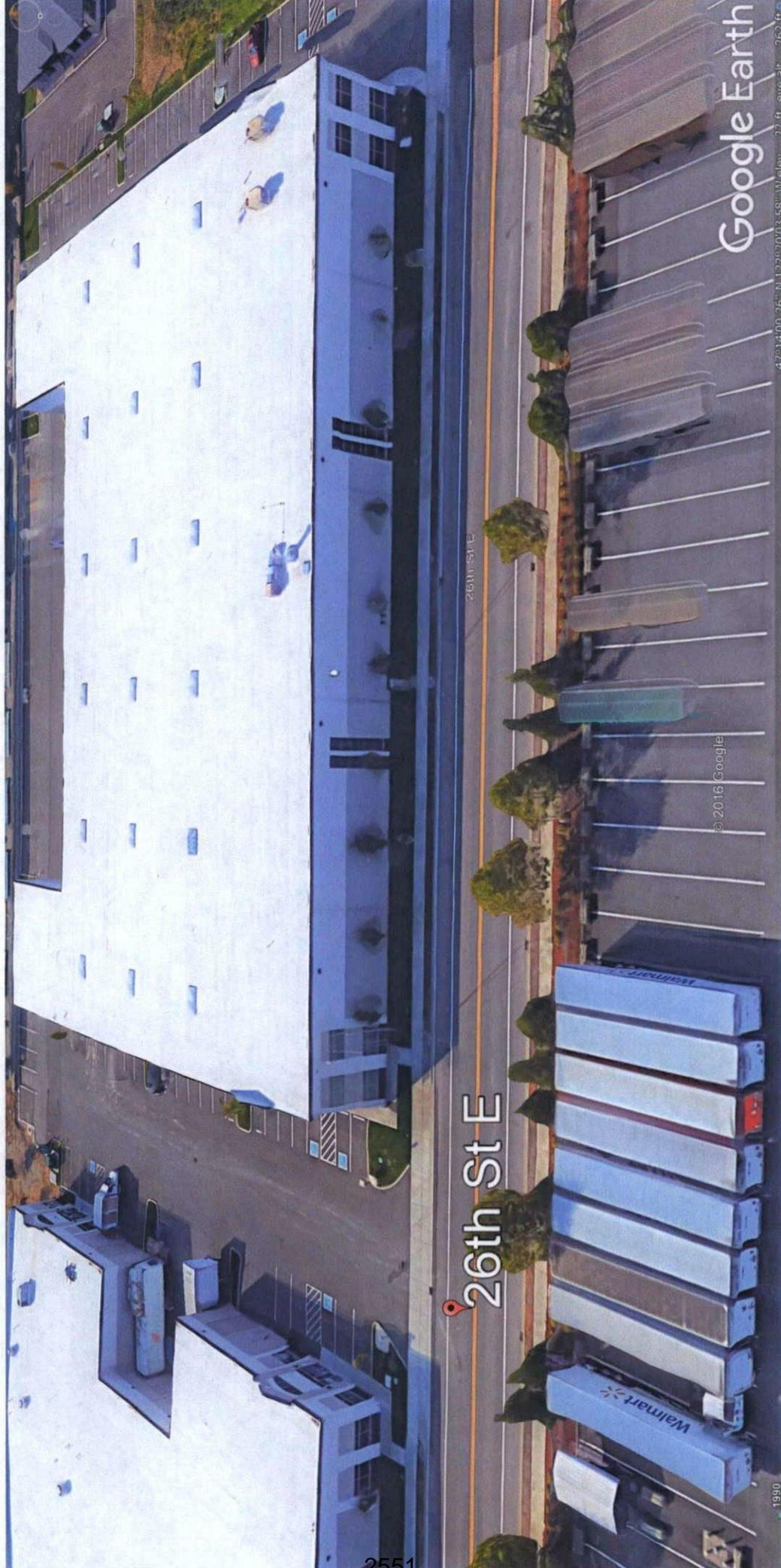
DATE	EVENT	CITE
12/18/2015	Fife Portal files complaint against CenturyLink and Pacific Utility.	CP 1-4
5/26/2016	Fife Portal seeks partial summary judgment against Pacific on liability: statutory trespass under RCW 4.24.630, common-law trespass, and violations of chapter 19.122 RCW.	CP 48-66
6/24/2016	Trial court grants Fife Portal partial summary judgment and establishes Pacific's liability as a matter of law.	CP 195-98
7/1/2016	CenturyLink seeks summary judgment on principal-agent relationship.	CP 199-204
7/8/2016	Fife Portal files cross-motion for summary judgment on principal-agent relationship and CenturyLink's negligence.	CP 228-39
8/19/2016	Trial court denies both parties' motion for summary judgment.	CP 355-58
3/10/2017	CenturyLink and Pacific seek summary judgment on measure of damages under RCW 4.24.630.	CP 359-75
4/21/2017	Trial court grants CenturyLink and Pacific summary judgment on measure of damages under RCW 4.24.630.	CP 580-81
4/24/2017	Fife Portal seeks reconsideration of trial court's summary-judgment order on measure of damages under RCW 4.24.630.	CP 582-87
5/1/2017	Trial court denies Fife Portal reconsideration of measure-of-damages summary-judgment order.	CP 722
5/9/2017	Trial court orders a mistrial and imposes monetary sanctions against Fife Portal for purported discovery violations.	CP 846-48
5/19/2017	Fife Portal seeks reconsideration of the ruling on discovery sanctions.	CP 877-81
5/26/2017	Trial court denies Fife Portal reconsideration on discovery-sanctions ruling.	CP 1072
6/8/2017	Fife Portal seeks partial summary judgment on CenturyLink's peculiar-risk vicarious liability.	CP 1073-87
8/16/2017	Trial court denies Fife Portal partial summary judgment on CenturyLink's peculiar-risk vicarious liability	CP 1248-49
11/3/2017	Trial court enters order imposing monetary sanctions on Fife Portal for purported discovery violations in May 2017.	CP 1361-64
5/21/2018	Fife Portal files proposed jury instructions.	CP 1727-95
5/22/2018	Fife Portal files supplemental proposed jury instructions.	CP 1796-98
5/22/2018	Fife Portal files declaration of George Humphrey as offer of proof for services rendered by First Corps Inc. to support recoverable restoration and investigative costs under RCW 4.24.630.	CP 1799-1800
5/23/2018	Fife Portal files brief regarding the recovery of prospective and ongoing property damage.	CP 1810-16
5/24/2018	Fife Portal files proposed jury instructions.	CP 1817-54
5/24/2018	Fife Portal files brief regarding peculiar-risk vicarious liability and proposed jury instruction no. 17A on peculiar risk.	CP 1855-67

DATE	EVENT	CITE
5/29/2018	Fife Portal files brief on jury instructions regarding the distinction between agents and independent contractors.	CP 2239-45
5/29/2018	Fife Portal files proposed jury instructions.	CP 2246-50
5/29/2018	CenturyLink and Pacific file motion for judgment as a matter of law on Fife Portal's negligence claims.	CP 2251-54
5/29/2018	CenturyLink and Pacific file motion for judgment as a matter of law on Fife Portal's vicarious-liability claims.	CP 2255-59
5/30/2018	Fife Portal's files third supplemental proposed jury instructions for special-verdict form.	CP 2553-54
5/30/2018	Trial court enters orders granting CenturyLink a directed verdict and dismisses Fife Portal's negligence and vicarious-liability claims.	CP 2555-60
5/31/2018	Fife Portal files fourth supplemental proposed jury instructions.	CP 2806-12
6/1/2018	Trial court's instructions to the jury and special-verdict form.	CP 2825-39
7/27/2018	Trial court grants CenturyLink's motion for attorneys' fees and enters judgment for CenturyLink.	CP 3737-40
7/27/2018	Trial court grants Fife Portal's motion to treble the jury's damages award.	CP 3741-43
7/27/2018	Trial court enters final judgment against Pacific.	CP 3744-46
7/30/2018	Trial court grants Fife Portal's motion for attorneys' fees and costs.	CP 3747-49
8/6/2018	Trial court enters corrected final judgment against Fife Portal.	CP 3750-51
8/6/2018	Trial court enters corrected final judgment against Pacific.	CP 3752-53

APPENDIX

B

6/4/2018 5969 0156



26th St E

Google Earth

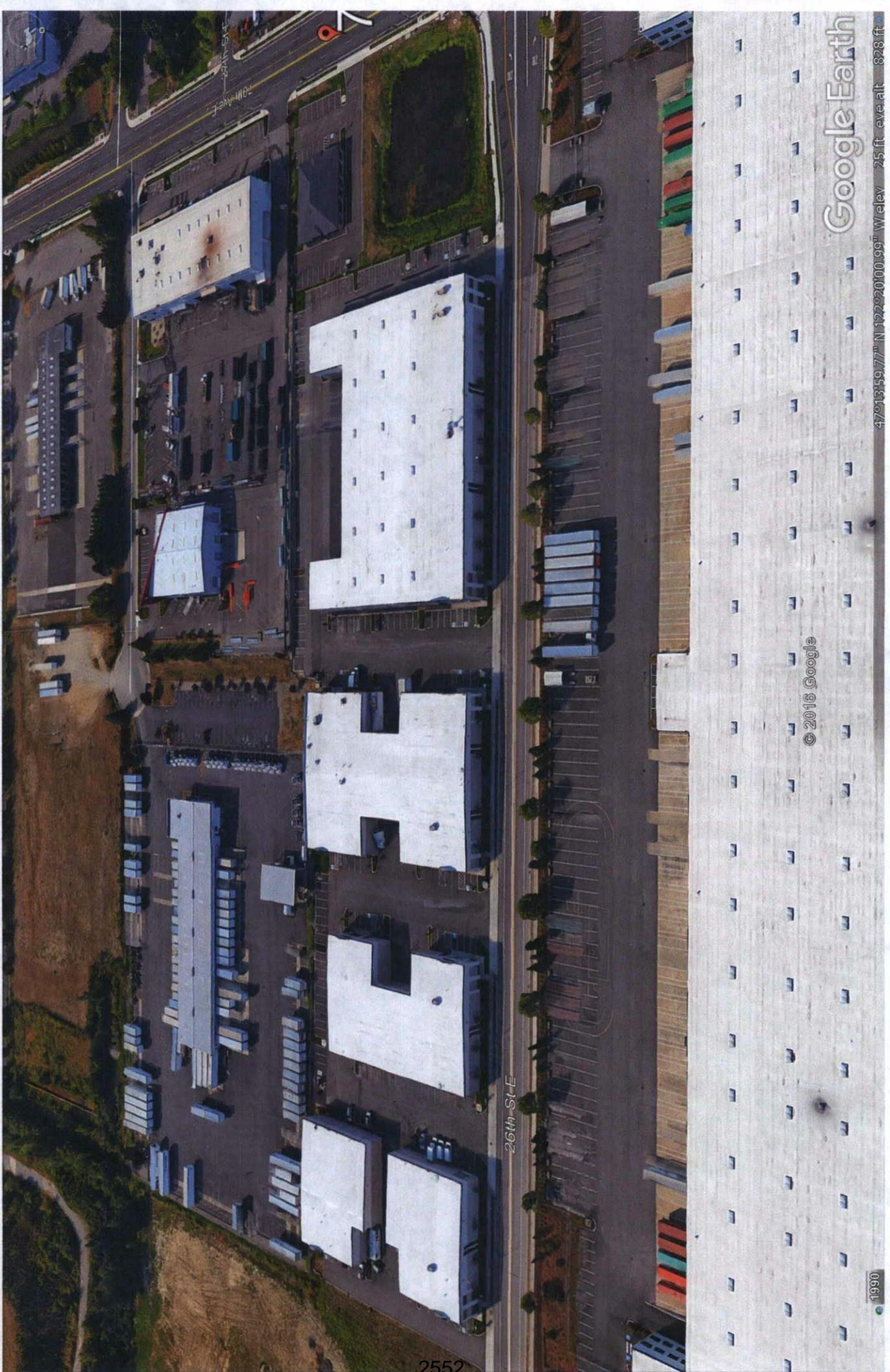
© 2016 Google

47°14'00.26" N 122°20'03.58" W Elev. 72 ft. Elev. alt. 262 ft.

1990

2551

6/4/2018 5969 0157



2552

© 2016 Google

Google Earth

47°13'59.77" N 122°20'00.99" W elev 25 ft ever alt 828 ft

1990

APPENDIX

C

HOUSE BILL REPORT

SB 6080

As Passed House - Amended
March 3, 1994

Title: An act relating to wrongful property damage to agricultural and forest lands.

Brief Description: Prohibiting wrongful property damage to agricultural and forest lands.

Sponsors: Senators Owen, Oke, Hargrove, Amondson, Haugen, Snyder, Morton, M. Rasmussen and Roach.

Brief History:

Reported by House Committee on:

Judiciary, February 25, 1994, DPA.

Passed House - Amended, March 3, 1994, 91-4.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: Do pass as amended. Signed by 17 members: Representatives Appelwick, Chair; Johanson, Vice Chair; Padden, Ranking Minority Member; Ballasiotes, Assistant Ranking Minority Member; Campbell; Chappell; Eide; Forner; J. Kohl; Long; Morris; H. Myers; Riley; Schmidt; Scott; Tate and Wineberry.

Staff: Bill Perry (786-7123).

Background: Under a law enacted in 1993, the Department of Natural Resources is authorized to recover treble damages from a person who, without authorization, uses or occupies public lands, removes anything of value from public lands, or causes waste or damage to public lands. Liability is for single, rather than treble, damages if the department determines or the person proves that he or she did not know or have reason to know that he or she lacked authorization. In addition to damages, the person is also liable for reimbursing the state for reasonable costs, including administrative costs, survey costs, and attorney fees.

This law does not apply in instances where liability for damages is provided under other statutes dealing with the unauthorized removal of timber and Christmas trees.

The law also does not apply to private property.

Summary of Bill: Civil damages provisions similar to those enacted in 1993 with respect to public lands are enacted with respect to all lands.

A person whose wrongful act causes injury to the land of another, or injury to personal property or improvements on that land, is liable to the injured party for treble the amount of injury caused. Wrongful acts for which treble damages may be recovered include wrongful removal of timber, crops, or minerals from the land, wrongful injury to personal property or improvements, and wrongful waste or injury to the land. Damages that may be trebled include damages for the market value of the things removed, as well as for the value of injury to the property, improvements, or land, including the costs of restoration. The person is also liable for reimbursing the injured party for the party's reasonable investigative and attorney fees and other litigation-related costs.

A person acts "wrongfully" if he or she intentionally and unreasonably commits an act while knowing or having reason to know that he or she lacks authority to so act.

The 1993 law with respect to public lands is amended to limit the kind of property removal of which leads to treble damages. Only removal of materials such as forest products, crops, stone, sand and peat. The 1993 law is also amended to allow treble damages for injury to personal property or improvements on public lands.

Fiscal Note: Not requested.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Testimony For: Vandalism and dumping, in particular, are increasingly serious problems for landowners.

Testimony Against: None.

Witnesses: Tim Boyd, Washington Forest Protection Association (pro); Monte Martinsen, Longview Fibre Company (pro); Bryon Loucks, Weyerhaeuser Company (pro); and Nels Hanson, Washington Farm Forestry Association (pro).

SENATE BILL REPORT

SB 6080

AS PASSED SENATE, JANUARY 28, 1994

Brief Description: Prohibiting wrongful property damage to agricultural and forest lands.

SPONSORS: Senators Owen, Oke, Hargrove, Amondson, Haugen, Snyder, Morton, M. Rasmussen and Roach

SENATE COMMITTEE ON NATURAL RESOURCES

Majority Report: Do pass.

Signed by Senators Owen, Chairman; Hargrove, Vice Chairman; Amondson, Erwin, Franklin, Haugen, Sellar, L. Smith, Snyder and Spanel.

Staff: Kari Guy (786-7464)

Hearing Dates: January 14, 1994

HOUSE COMMITTEE ON JUDICIARY

BACKGROUND:

The incidence of property trespass and vandalism is increasing on forest and agricultural lands. Last year legislation was passed to establish liability for damages to Department of Natural Resources lands, to be compensated at treble damages. Currently, no similar provisions for private agricultural or forest lands exist.

SUMMARY:

Legislative findings are made that forest lands and agricultural lands are particularly vulnerable to wrongful property damage, especially vandalism and theft.

Every person who wrongfully uses or occupies agriculture or forest lands is liable to the injured party for treble the amount of damages caused by the use. Damages may include damages for the market value of the use, occupancy, or things removed; and for injury to the land, including the costs of restoration. The person is also liable for reimbursing the injured party for the party's reasonable investigative and litigation-related costs.

The act applies to all agricultural and timber land with current use classification, all forest land with forest land valuation, and any land designated as agricultural lands or forest lands under the Growth Management Act.

Appropriation: none

Revenue: none

Fiscal Note: none requested

TESTIMONY FOR:

Illegal dumping and vandalism are causing increasing costs to private landowners. This bill would provide a deterrent for violators and help finance costs of cleanup.

TESTIMONY AGAINST: None

TESTIFIED: PRO: Tim Boyd, WA Forest Protection Assn.; Steve Gano, Plum Creek Timber; Monty Martinson, Longview Fiber; Greg De Jarlais, Champion International Corp.; Dan Coyne, WA Dairy Federation, WA Council of Farmer Cooperatives

HOUSE AMENDMENT (S) :

The coverage of the bill is expanded to any land, not just timber or agricultural land. "Occupying" or "using" land is removed as the basis for treble damages. Treble damages for property removal is limited to the removal of timber, crops, minerals, and other similar valuable property.

Provisions for liability for damages to public lands are amended to include damages to public property and improvements as well as public lands.

APPENDIX

D

516,000
F51C

PLAN REVIEW ROUTING

ROW15-0061
QWEST #E.743972
70TH AVE E, 26TH ST E
& FREEMAN RD E

QWEST ENGINEERING
YVONNE 597-5172
5-22-15

DESCRIPTION:

COMMENTS		INITIALS DATE	YES	NO
LANNING				
Zone _____				
SEPA/Traffic				
Landscape				
PUBLIC WORKS				
<input checked="" type="checkbox"/> ROW BOND REQUIRED? <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO <input type="checkbox"/> WTR GFC <input type="checkbox"/> SWR GFC <input type="checkbox"/> LID		KUB 6-3-15	<input checked="" type="checkbox"/>	
PLAN REVIEW <input checked="" type="checkbox"/> HRS				
PLAN REVIEW _____ HRS				
ENGINEERING * <u>RISK</u> IN OUTSIDE IMPERSON <input checked="" type="checkbox"/> PROVIDE ESTIMATE FOR WORK ON PRIVATE PROPERTY <input checked="" type="checkbox"/> SCHEDULE AFTER A PERSON DATE WITH JEFF FAVINCE.				
PLAN REVIEW _____ HRS				
PLAN REVIEW _____ HRS				
BUILDING				
CERTIFICATE OF OCCUPANCY REQUIRED? YES NO				
REDLINES	3 CONDITIONS	R/P		

Exhibit 4
 Witness Gill
 Date 2-11-16
 Buell Realtime Reporting
 (206) 287-9066

City of Fife
RIGHT OF WAY PERMIT APPLICATION

REQUIRED AT TIME OF SUBMITTAL:

- Complete application
- Detailed drawings and a site plan/location
- Traffic Control Plan

Project Number E. 743972 Permit Number Row15-0061

Applicant's Name <u>QWEST dba Century Link QC</u>		Phone Number <u>(253) 597-5172</u>	
<u>2510 South 84th Street, Suite 18,</u>	<u>Lakewood</u>	<u>WA</u>	<u>98499</u>
<small>Address</small>	<small>City</small>	<small>State</small>	<small>Zip Code</small>
Address or Area of Work: <u>70th Ave E, 26th St E. and Freeman Rd E.</u>			
Permit request to trench and bore to place a 2" duct structure from pedestal at			
70th Ave E. & 26th St E. Along 26th St to provide service for a future 300 home			
subdivision off Freeman Rd. See attached sketch and TCP's for additional information			
<u>S 8 T20N R4E Engineer Darius Sparks 253-597-7772</u>			
Starting Date <u>ASAP</u>		Ending Date _____	
Information on Contract Name _____		Phone Number _____	
Address _____		City _____ State _____ Zip Code _____	
Contractor's License Number _____			
Expiration Date _____			
Performance Bond: \$10,000 or 125 percent of the cost of improvements being built in the public right of way, whichever is greater. Improvement Cost \$ _____			
Bond Amount \$ <u>10,000</u>		Bond Number <u>905-010-537</u>	
Date Bond received <u>continuing until cancelled</u>			
Date Bond received _____			

<u><i>Yvonne Weigman</i></u>	<u>5/22/2015</u>
<small>Signature of Owner/Contractor/or Authorized Agent</small>	<small>Date</small>



Right of Way Permit

City of Fife

Fife Public Works

3725 Pacific Hwy E.

Phone (253) 922-9315 / Fax (253) 922-5355 / www.cityoffife.org

Project Information

Permit # ROW15-0061
Project Name QWEST #E.743972
Parcel #

Permit Type Right of Way Permit

Site Address 70TH AVE E, 26TH ST E & FREEMAN RD E

Project Description TRENCH & BORE TO PLACE 2" DUCT STRUCTURE FROM PEDESTAL AT 70TH AVE E & 26TH ST E ALONG 26TH ST E TO PROVIDE SERVICE FOR FUTURE 300 HOME SUBDIVISION OFF FREEMAN RD E

Names Associated with this Project

Type	Name	Contact	Phone #	License #	Exp Date
Applicant	QWEST ENGINEERING	YVONNE WIGGINS	253-597-5172		
Contractor	PACIFIC UTILITY CONTRACTORS INC		253-536-3317	PACIFUC186DQ	02/01/2017

Fee Information

Project Details

Contract Inspection	\$5,000.00
Total Fees Paid:	\$5,000.00

Conditions

1. PROVIDE EASEMENT FOR WORK ON PRIVATE PROPERTY
2. SCHEDULE A PRECON ONSITE W/JEFF FAUNCE
3. All ditch excavations will be back-filled full depth with crushed surfacing base course using 95% compaction on one foot lifts.
4. If any of the excavated areas settle, you will repair to the satisfaction of the City of Fife Public Works Department.
5. If in the future it becomes necessary to move your improvement, as determined by the City of Fife, to accommodate any City of Fife utilities or street improvements, it will be at the expense of your firm.
6. This office must be notified at least forty-eight (48) hours prior to construction.

**** CALL (253) 922-9315 BEFORE 4:00 PM FOR NEXT DAY INSPECTION ****

Print Name

Date Issued: 06/19/2015

Issued By: Melissa Pattee

Signature

Date

Date Expires: 12/16/2015



Right of Way Permit

City of Fife

Fife Public Works

3725 Pacific Hwy E.

Phone (253) 922-9315 / Fax (253) 922-5355 / www.cityoffife.org

Project Information

Permit # ROW15-0061

Permit Type Right of Way Permit

Project Name QWEST #E.743972

Site Address 70TH AVE E, 26TH ST E & FREEMAN RD E

Parcel #

Project Description TRENCH & BORE TO PLACE 2" DUCT STRUCTURE FROM PEDESTAL AT 70TH AVE E & 26TH ST E ALONG 26TH ST E TO PROVIDE SERVICE FOR FUTURE 300 HOME SUBDIVISION OFF FREEMAN RD E

7. If future excavations are made by the City of Fife, you will expose the improvements when requested by the City Engineer or Maintenance Supervisor.
8. Your firm will supply this office with an "as built" drawing, in detail, of this project.
9. When excavating near the City's water mains or sewer mains, special precautions must be taken as determined by the City. You will protect the integrity of our systems, as directed by the Maintenance Supervisor.
10. If you abandon any poles or anchors, these must be removed completely.
11. The City of Fife will have the right to change any or all of the requirements of this permit as field conditions warrant, as determined by the City Engineer.
12. There will be no open cuts in the road or in paved driveways UNLESS APPROVED BY THE CITY ENGINEER / PUBLIC WORKS DIRECTOR.
13. An approved traffic control plan is required prior to ROW work.
14. Lane closures shall be between 9:00 AM and 3:00 PM ONLY, unless otherwise approved by the City Engineer / Public Works Director (schools have an impact). An approved traffic control plan is required prior to any lane closures.
15. Temporary traffic control signage shall be installed 24 hours prior to a road closure. VMS boards shall be installed 48 hours prior to a road or lane closure.

**** CALL (253) 922-9315 BEFORE 4:00 PM FOR NEXT DAY INSPECTION ****

Print Name

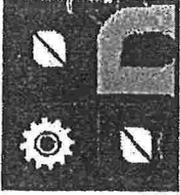
Date Issued: 06/19/2015

Signature

Date

Issued By: Melissa Pattee

Date Expires: 12/16/2015



RIGHT OF WAY PERMIT

City of Fife

Community Development Department

5411 23rd Street East

Phone (253) 922-9624 / Fax (253) 922-5355 / www.cityoffife.org

Project Information

Permit # ROW15-0061

Permit Type Right of Way Permit

Project Name QWEST #E.743972

Site Address 70TH AVE E, 26TH ST E & FREEMAN RD E

Parcel #

Project Description

TRENCH & BORE TO PLACE 2" DUCT STRUCTURE FROM PEDESTAL AT 70TH AVE E & 26TH ST E ALONG 26TH ST E TO PROVIDE SERVICE FOR FUTURE 300 HOME SUBDIVISION OFF FREEMAN RD E

Names Associated with this Project

Type	Name	Contact	Phone #	License #	Exp Date
Applicant	Qwest Engineering		(253) 597-5172		

Fee Information

Contract Inspection	5,000.00
Total Fees Paid	\$5,000.00

Conditions

1. SCHEDULE A PRECON ONSITE W/JEFF FAUNCE
2. PROVIDE EASEMENT FOR WORK ON PRIVATE PROPERTY
3. Your firm will supply this office with an "as built" drawing, in detail, of this project.
4. All ditch excavations will be back-filled full depth with crushed surfacing base course using 95% compaction on one foot lifts.

*** SEE ATTACHED CONDITIONS ***

Permits expire 180 days after issuance if no work has begun. I certify that the information furnished by me in this application is true and correct to the best of my knowledge and that all applicable codes will be met. I further certify that I am the owner of the above forementioned property or I am authorized to act in the owner's behalf with regard to the application of this permit. FINAL INSPECTION REQUIRED.

Print Name _____

Date Issued: 06/19/2015

Signature **ISSUED ELECTRONICALLY** _____

Issued By: BRUSHMEIER

Date _____

Date Expires: 12/16/2015

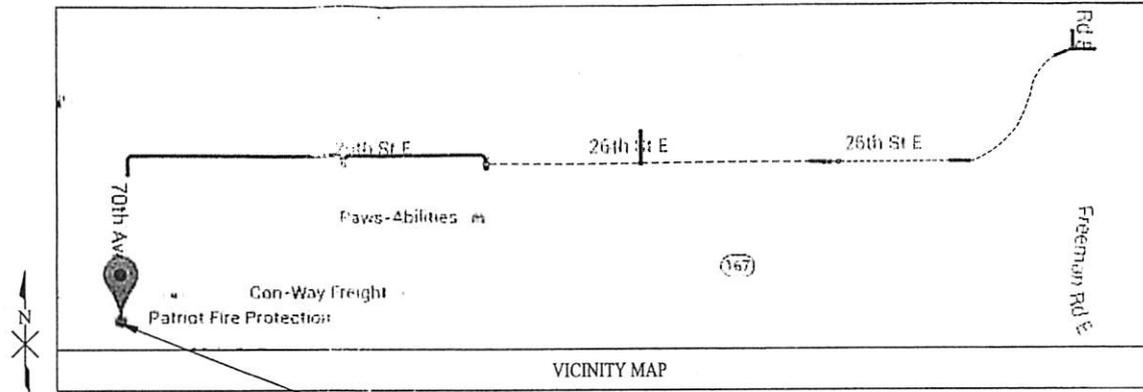
APPENDIX

E

CONSTRUCTION NOTES:

1. CALL UTILITY LOCATE AT 811 72 HOURS PRIOR TO TRENCHING OR DIGGING.
2. THE EXISTENCE AND LOCATION OF ANY UNDERGROUND UTILITY PIPES OR STRUCTURES SHOWN ON THESE PLANS WERE OBTAINED BY FIELD INSPECTION AND A SEARCH OF THE AVAILABLE CITY OR COUNTY RECORDS. SINCE THE ACTUAL LOCATION AND NATURE OF THE UNDERGROUND FACILITIES MAY BE SOMEWHAT DIFFERENT FROM THAT SHOWN, THE CONTRACTOR IS REQUIRED TO VERIFY PRIOR TO EXCAVATION.
3. FOR UNDERGROUND ACTIVITY: TEST AND VENTILATE MANHOLE/UTILITY VAULT PRIOR TO ENTRY, PLACE WARNING DEVICES AND WORK AREA PROTECTION AS REQUIRED, AND USE EYE AND HEAD SAFETY PROTECTION PER FEDERAL, STATE, AND LOCAL REGULATIONS.
4. ALL EXCAVATION, TRENCHING, AND SHORING IS TO ADHERE TO THE CODE OF FEDERAL REGULATIONS (CFR) 1926.650 SUBPART P.
 - a. PROVIDE ALL PITS WITH 1"x1" SLOPE AT ONE END OF EXCAVATION FOR TECHNICIAN INGRESS/EGRESS.
 - b. EXCAVATED SPOILS ARE TO BE NO LESS THAN 24" FROM EDGE OF PIT OR TRENCH.
 - c. BARRICADE ALL OPEN PITS AND TRENCHING FOR PUBLIC SAFETY. ALL BARRICADES MUST BE EQUIPPED WITH FLASHING LIGHTS FOR NIGHT VISIBILITY.
 - d. FOR PITS GREATER THAN 4' IN DEPTH, USE APPROPRIATE SHORING FOR WALL STABILITY.
5. TRENCH COVER IS TO BE 36" MINIMUM AND FREE OF ROCKS, DEBRIS, AND CLODS. THE TRENCH IS TO BE A MINIMUM OF 36" COVER IN DEVELOPED AREAS AND A MINIMUM OF 48" OF COVER IN UNDEVELOPED AREAS (ANY VARIANCE FROM THESE STANDARDS WILL BE SPECIFIED ON THE PLANS).
6. ALL ASPHALT/CONCRETE AND LANDSCAPING REMOVED, DISTURBED, OR DAMAGED AS A RESULT OF CONSTRUCTION SHALL BE RESTORED TO ORIGINAL CONDITION OR BETTER.
7. NORMAL/GUIDED-BORING METHOD RECOMMENDED WHEN BORING.
8. ADHERE TO AIRTIGHT GUIDELINES UNLESS OTHERWISE NOTED.
9. BOND BURIED/AERIAL FACILITIES AS REQUIRED BY JURISDICTIONAL AGENCY(S).
10. AERIAL FACILITIES ARE TO BE TESTED PRIOR TO BEGINNING WORK PER STATE AND LOCAL REGULATIONS.
11. ALL WORK AREA PROTECTIONS FOR TRAFFIC CONTROL IS TO BE WITH APPROVED WARNING DEVICES AND PLACED PER STATE DEPARTMENT OF TRANSPORTATION AND/OR PUBLIC WORKS ENGINEERING DEPARTMENT STANDARDS AND SPECIFICATIONS. IF REQUIRED, A TRAFFIC CONTROL PLAN SHALL BE SUBMITTED TO THE REQUESTING PERMITTING AGENCY. PRIOR TO BEGINNING WORK, PERMITTING AGENCIES MUST BE NOTIFIED 48 HOURS IN ADVANCE OF CONSTRUCTION ACTIVITIES.
12. EXISTING PEDESTRIAN CROSSWALKS AND WALKING AREAS SHALL BE MAINTAINED AT ALL TIMES. AS NECESSARY, TEMPORARY PEDESTRIAN CROSSWALKS AND WALKING AREAS SHALL BE PROVIDED AND MAINTAINED PER STATE DEPARTMENT OF TRANSPORTATION AND/OR PUBLIC WORKS ENGINEERING DEPARTMENT STANDARDS AND SPECIFICATIONS.
13. THE FOLLOWING FOOTAGES ARE ESTIMATES. FOOTAGES TO BE VERIFIED PRIOR TO CONSTRUCTION.

ROW15-0061
 QWEST #E.743972
 70TH AVE E, 26TH ST E
 & FREEMAN RD E



2602 70th AVE E.
 FIFE, WA 98424

ESTIMATED TOTALS

TOTAL EXISTING CONDUIT USED:	0 L.F.
TOTAL NEW BORE:	1861 L.F.
TOTAL NEW DIRT TRENCH:	1671 L.F.
TOTAL NEW S/W TRENCH:	0 L.F.
TOTAL NEW ASPHALT TRENCH:	0 L.F.
TOTAL NEW AERIAL:	0 L.F.
SIDEWALK (PCC) R&R:	86 S.F.
ASPHALT (AC) R&R:	0 S.F.

SCOPE OF WORK:

PLACE A 2 DUCT STRUCTURE FROM PEDESTAL @ 70th AVE & 26th STREET.
 ALONG 26th STREET TO PROVIDE FUTURE SERVICE FOR A 300 HOME
 SUBDIVISION OFF OF FREEMAN ROAD.

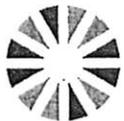
Exhibit	3
Witness	008
Date	2-19-16
Buell Realtime Reporting (206) 247-9066	

RECEIVED
 MAY 22 2015

COMMUNITY DEVELOPMENT DEPT.

CTL ENGINEER: JOY BATEMAN PHONE NO: (253) 597-5100 EMAIL: joy.bateman@centurylink.com	FIELD ENGINEER: GLENN ALEXANDER PHONE NO: (575) 405-1266 EMAIL: modularman2@hotmail.com	TOWN: 20N	RNGE: 04E	SECT: 08
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NOTICE-NOT FOR DISCLOSURE OUTSIDE OF CENTURYLINK AND AFFILIATES EXCEPT UNDER WRITTEN AGREEMENT



CenturyLink



2602 70TH AVE E.
 FIFE, WA 98424
 drafted by: MOUNTAIN LTD/SL 05/13/15

JOB: E.743972
 GEO CODE: W26922
 WC CLLI: TACMWAWA
 SH 1 OF 9



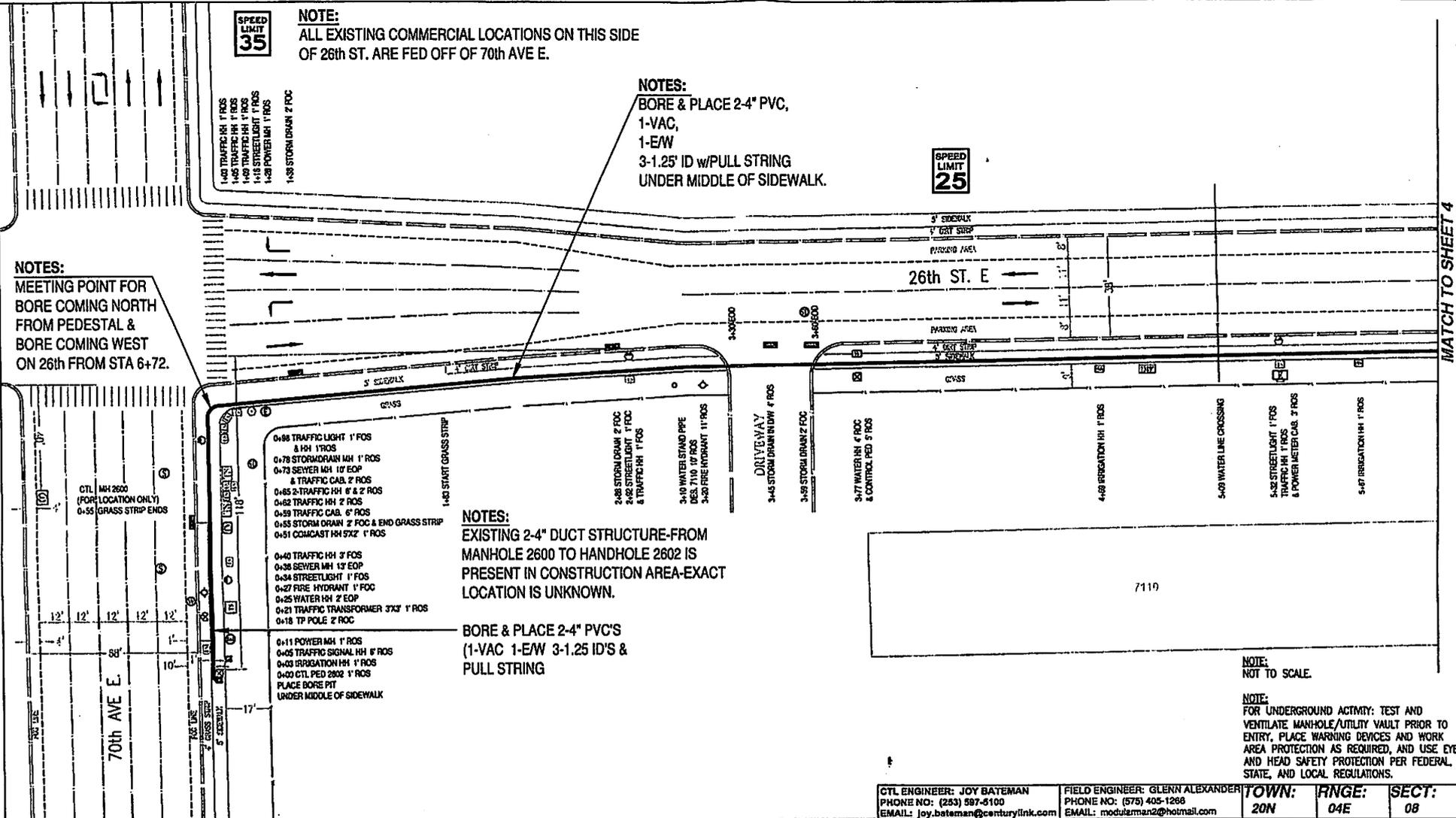
NOTE:
ALL EXISTING COMMERCIAL LOCATIONS ON THIS SIDE OF 26th ST. ARE FED OFF OF 70th AVE E.

NOTES:
BORE & PLACE 2-4" PVC,
1-VAC,
1-E/W
3-1.25" ID w/PULL STRING
UNDER MIDDLE OF SIDEWALK.



NOTES:
MEETING POINT FOR
BORE COMING NORTH
FROM PEDESTAL &
BORE COMING WEST
ON 26th FROM STA 6+72.

MATCH TO SHEET 4



NOTES:
EXISTING 2-4" DUCT STRUCTURE FROM
MANHOLE 2600 TO HANDHOLE 2602 IS
PRESENT IN CONSTRUCTION AREA-EXACT
LOCATION IS UNKNOWN.

BORE & PLACE 2-4" PVC'S
(1-VAC 1-E/W 3-1.25 ID'S &
PULL STRING

NOTE:
NOT TO SCALE.

NOTE:
FOR UNDERGROUND ACTIVITY: TEST AND
VENTILATE MANHOLE/UTILITY VAULT PRIOR TO
ENTRY, PLACE WARNING DEVICES AND WORK
AREA PROTECTION AS REQUIRED, AND USE EYE
AND HEAD SAFETY PROTECTION PER FEDERAL,
STATE, AND LOCAL REGULATIONS.

CTL ENGINEER: JOY BATEMAN
PHONE NO: (253) 597-5100
EMAIL: joy.bateman@centurylink.com

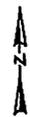
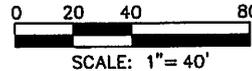
FIELD ENGINEER: GLENN ALEXANDER
PHONE NO: (575) 405-1268
EMAIL: modularman2@hotmail.com

TOWN:	RNGE:	SECT:
20N	04E	08

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CALL TWO WORKING DAYS
BEFORE YOU DIG

811

2602 70TH AVE. E.
FIFE, WA 98424

JOB: E.743972
GEO CODE: W26922
WC CLLI: TACMWAWA

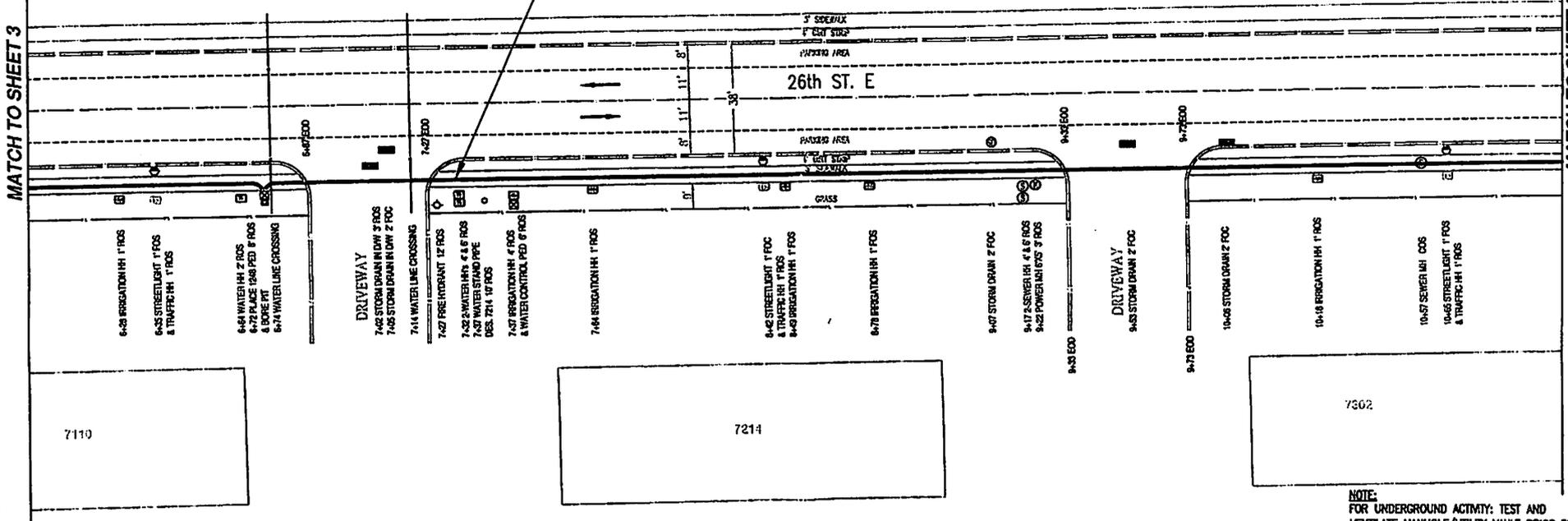
drafted by: MOUNTAIN LTD/SL 05/13/15

SH 3 OF 9

MATCH TO SHEET 3

MATCH TO SHEET 5

NOTES:
 BORE & PLACE 2-4" PVC,
 1-VAC,
 1-EW
 3-1.25" ID w/PULL STRING
 UNDER MIDDLE OF SIDEWALK.



NOTE:
 FOR UNDERGROUND ACTMITY: TEST AND VENTILATE MANHOLE/UTILITY VAULT PRIOR TO ENTRY, PLACE WARNING DEVICES AND WORK AREA PROTECTION AS REQUIRED, AND USE EYE AND HEAD SAFETY PROTECTION PER FEDERAL, STATE, AND LOCAL REGULATIONS.

NOTE:
 NOT TO SCALE.

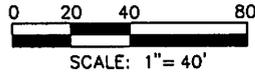
CTL ENGINEER: JOY BATEMAN PHONE NO: (253) 597-5100 EMAIL: joy.bateman@centurylink.com	FIELD ENGINEER: GLENN ALEXANDER PHONE NO: (575) 405-1266 EMAIL: modularman2@hotmail.com	TOWN: 20N	RNGE: 04E	SECT: 08
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2602 70TH AVE E. FIFE, WA 98424	JOB: E.743972 GEO CODE: W26922 WC CLLI: TACMWAWA SH 4 OF 9
drafted by: MOUNTAIN LTD/SL 05/13/15	



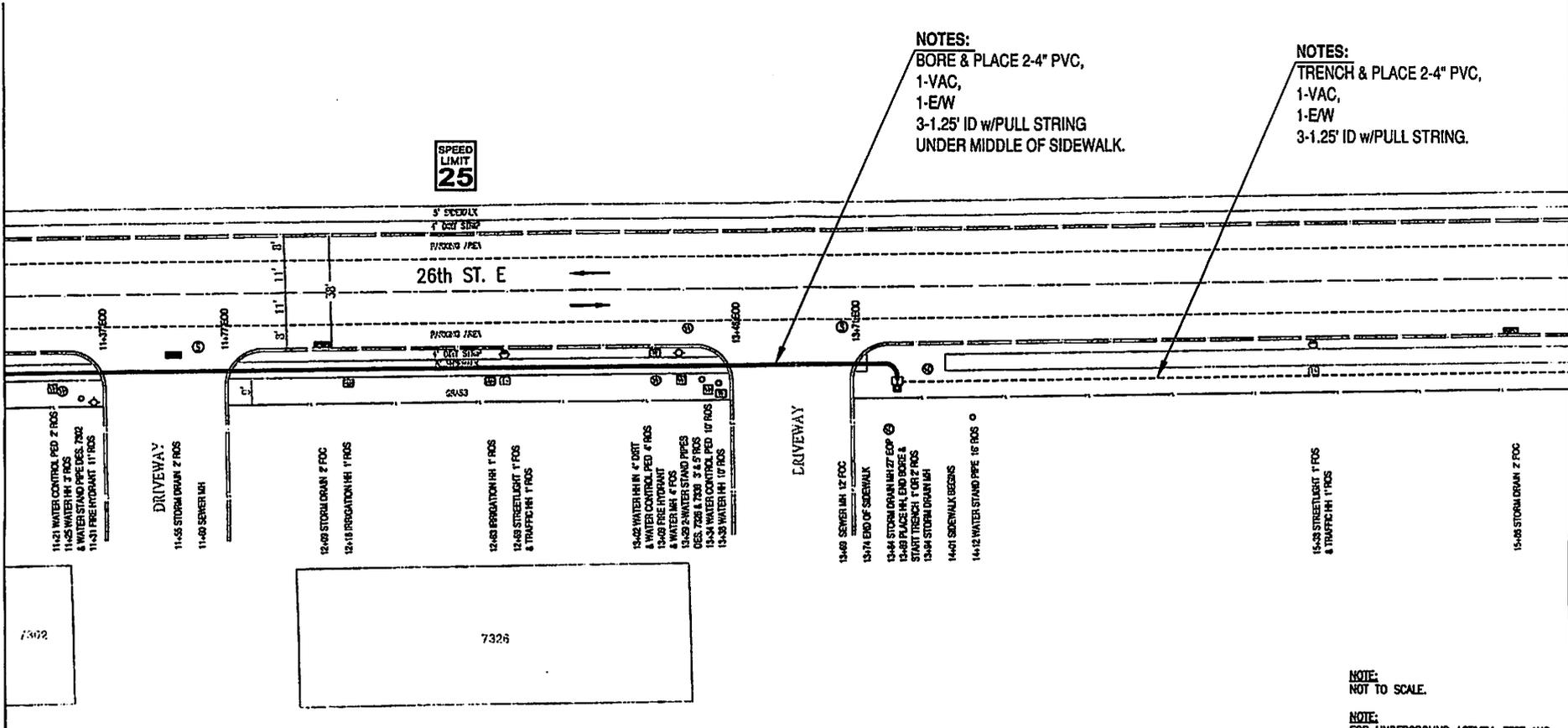
CenturyLink



CALL TWO WORKING DAYS BEFORE YOU DIG

MATCH TO SHEET 4

MATCH TO SHEET 6



NOTE:
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NOTE:
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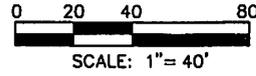
CTL ENGINEER: JOY BATEMAN FIELD ENGINEER: GLENN ALEXANDER
 PHONE NO: (253) 597-6100 PHONE NO: (575) 405-1288
 EMAIL: joy.bateman@centurylink.com EMAIL: modusman2@hotmail.com

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TOWN: 20N RNGE: 04E SECT: 08	
2602 70TH AVE. E. FIFE, WA 98424	
JOB: E.743972 GEO CODE: W26922 WC CLI: TACMWAWA SH 5 OF 9	



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CALL TWO WORKING DAYS
BEFORE YOU DIG

811

MATCH TO SHEET 5

MATCH TO SHEET 7

NOTES:
TRENCH & PLACE 2-4" PVC,
1-VAC,
1-E/W
3-1.25' ID w/PULL STRING.

NOTES:
BORE 74' ACROSS ROAD,
PLACE 1-4" PVC,
3-1.25' ID w/PULL STRING.
PLACE STAND PIPE 9' ROS

NOTES:
TRENCH & PLACE 2-4" PVC,
1-VAC,
1-E/W
3-1.25' ID w/PULL STRING.

SPEED
LIMIT
25

26th ST. E

CAUTION:
WATER LINES
CROSSING STREET

TEMP. DRIVEWAY
TO BUSINESS PARK

16-40 IRRIGATION HH 1" FOS

16-82 SEWER MH 18" FOC
& SEWER STAND PIPE 18" ROS
16-84 SEWER MH 18" FOC
& SEWER STAND PIPE 18" ROS

17-18 WATER STAND PIPE 2" FOS
17-22 WATER STAND PIPE 2" FOS

17-28 STREETLIGHT 1" FOS
& TRAFFIC MH 1" FOS

17-48 PLACE 140' RED. # ROS,
BORE ACROSS STREET
& PLACE STAND PIPE

17-42 IRRIGATION MH 1" FOS
17-42 WATER LN & STAND PIPE 1/2" FOS
& WATER LINE CROSSING STREET

18-68 IRRIGATION MH 1" FOS

18-57 STREETLIGHT 1" FOS
& TRAFFIC MH 1" FOS

19-70 IRRIGATION MH 1" FOS

20-12 SEWER MH 8" FOC
20-23 STORM DRAIN MH 8" FOC
& STORM DRAIN STAND PIPE 18" ROS
20-27 FIRE HYDRANT 1" FOS
20-32 WATER MH 1" FOS

20-23 WATER LINE CROSSING

21-93 STREETLIGHT 1" FOS
& TRAFFIC MH 1" FOS

NOTE:
NOT TO SCALE.

NOTE:
FOR UNDERGROUND ACTIVITY: TEST AND
VENTILATE MANHOLE/UTILITY VAULT PRIOR TO
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AND HEAD SAFETY PROTECTION PER FEDERAL,
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EMAIL: joy.bateman@centurylink.com

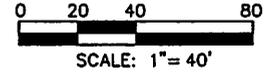
FIELD ENGINEER: GLENN ALEXANDER
PHONE NO: (575) 405-1268
EMAIL: modularman2@hotmail.com

TOWN: INNGE: SECT:
20N 04E 08

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CALL TWO WORKING DAYS
BEFORE YOU DIG
811

2602 70TH AVE. E.
FIFE, WA 98424

JOB: E.743972
GEO CODE: W26922
WC CLLI: TACMWAWA
SH 6 OF 9

drafted by: MOUNTAIN LTD/SL 05/13/15

NOTES:
 TRENCH & PLACE 2-4" PVC,
 1-VAC,
 1-E/W
 3-1.25' ID w/PULL STRING.

**SPEED
 LIMIT
 25**

MATCH TO SHEET 6

MATCH TO SHEET 8

26th ST. E

- 24-18 IRRIGATION HI 1" FOS
- 24-15 STORM DRAIN 2" FOC
- 24-41 STREETLIGHT 1" FOS & TRAFFIC HI 1" FOS
- 24-41 SEWER UN. 18" FOC & SEWER STAND PIPE 18" FOC
- 24-54 STORM DRAIN HI 1.07 FOC & STORM DRAIN STAND PIPE 18" FOS
- 24-37 WATER STAND PIPE 3" FOS & WATER LINE CROSSING
- 24-15 WATER STAND PIPE 18" FOS & WATER LINE CROSSING
- 24-41 STREETLIGHT 1" FOS & TRAFFIC HI 1" FOS
- 24-41 SEWER STAND PIPE 18" FOC & SEWER LINE CROSSING TRENCH PATH
- 24-51 IRRIGATION HI 1" FOS
- 24-52 STREETLIGHT 1" FOS
- 24-53 TRAFFIC HI 1" FOS

NOTE:
 NOT TO SCALE.

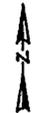
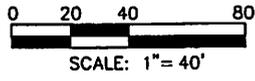
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CTL ENGINEER: JOY BATEMAN PHONE NO: (253) 597-5100 EMAIL: joy.bateman@centurylink.com	FIELD ENGINEER: GLENN ALEXANDER PHONE NO: (575) 405-1266 EMAIL: modusman2@hotmail.com	TOWN: 20N	RANGE: 04E	SECT: 08
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 FIFE, WA 98424
 drafted by: MOUNTAIN LTD/SL 05/13/15

JOB: E.743972
 GEO CODE: W26922
 WC CLLI: TACMWAWA
 SH 7 OF 9

NOTE:
 PARCEL B=FED EX HAS
 SERVICE OFF FREEMAN RD.

MATCH TO SHEET 9

NOTE:
 BORE 126' UNDER DRIVEWAY.

**SPEED
 LIMIT
 25**

MATCH TO SHEET 7

26+78 START BORE ACROSS DM
 27+05 TRAFFIC LIGHT 1" FOS
 27+12 STREETLIGHT 1" FOS
 27+51 FIRE HYDRANT 1" FOS

27+61 SEWER MH 18" FOS
 DRIVEWAY
 TO BUSINESS PARK

27+03 LINK STAND PIPE 12" FOS
 28+41 END BORE CROSSING BORE PT
 28+42 TRENCH
 28+47 PLACE 12x8 RED 8" FOS
 28+54 STORM DRAIN 2" FOS

28+01 2x4 OVERSTREET LIGHT
 28+01 INTERFERE W/PIPE

26th ST. E

28+0 STREET LIGHT 1" FOS
 & TRAFFIC LIGHT

NOTES:
 TRENCH & PLACE 2-4" PVC,
 1-VAC,
 1-E/W
 3-1.25" ID W/PULL STRING.

30x40 LINK STAND PIPE 3" FOS
 30x40 STORM DRAIN 2" FOS
 28x45 PRECASTION MH 1" FOS

30x24 WATER MH 18" FOS
 30x24 WATER LINE CROSSING
 30x24 WATER STAND PIPE
 30x24 WATER METER

NOTE:
 PARCEL A=BUSINESS PARK

NOTE:
 THE 506' + OR - @ STA 21+58 TO 26+84 + OR - IS
 OWNED BY THE WSDOT & IS THE FUTURE EXT. OF
 STATE HIGHWAY 167 (WHICH SOMEDAY WILL BE
 BUILT).

NOTE:
 PARCEL B=FED EX HAS
 SERVICE OFF FREEMAN RD.

NOTE:
 NOT TO SCALE.

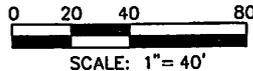
NOTE:
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 ENTRY, PLACE WARNING DEVICES AND WORK
 AREA PROTECTION AS REQUIRED, AND USE EYE
 AND HEAD SAFETY PROTECTION PER FEDERAL,
 STATE, AND LOCAL REGULATIONS.

GTL ENGINEER: JOY BATEMAN PHONE NO: (253) 597-6100 EMAIL: joy.bateman@centurylink.com	FIELD ENGINEER: GLENN ALEXANDER PHONE NO: (575) 405-1266 EMAIL: modlarman2@hotmail.com	TOWN: 20N	RANGE: 04E	SECT: 08
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CenturyLink



CALL TWO WORKING DAYS
 BEFORE YOU DIG
811

2602 70TH AVE E. FIFE, WA 98424	JOB: E.743972 GEO CODE: W26922 WC CLLI: TACMWAWA SH 8 OF 9
drafted by: MOUNTAIN LTD/SL 05/13/15	

NOTES:
 BORE ACROSS 26th ST. E FOR 74'.
 PLACE 2-4" PVC E/W 1-1.25" ID & PULL STRING.
 PLACE STAND PIPE 16'. ALSO BORE ACROSS 114'
 & PLACE 1-4" PVC E/W 1-1.25" ID & PULL STRING.
 PLACE STAND PIPE @ 15' OFF EOP OF 25th ST.
 (26th BECOMES 25th @ INTERSECTIONS) & 25' OFF
 THE EOP OF FREEMAN RD.

NOTES:
 BORE 74' ACROSS ROAD,
 PLACE 1-4" PVC,
 3-1.25" ID w/PULL STRING.
 PLACE STAND PIPE 16' ROS

NOTES:
 FUTURE USE DUE TO WIDENING OF
 FREEMAN RD. (45' WEST OF C/L) - ALL
 EXISTING OSP WILL BE RELOCATED.

NOTES:
 BORE 114' ACROSS FREEMAN RD.
 PLACE 1-4" PVC,
 3-1.25" ID w/PULL STRING.
 PLACE STAND PIPE 15' EOP 25TH ST. & FREEMAN RD.

FYI:
 ANOTHER 1062' PLACEMENT OF 2-4" PVC 1-VACANT &
 E/W 3-1.25" ID'S & PULL STRING WILL BE REQUIRED TO
 PLACE A HANDHOLE (AT PRESENT WOULD BE
 PEDESTAL 2626 FREEMAN RD.) BUT SINCE FREEMAN
 RD. WILL BE UPGRADED TO 3 LANES WITH C & G, DIRT
 SPACE FOR TREES, SIDEWALK, ETC. ONLY ON THE
 WEST (FIFE) SIDE. ROAD WORK WILL INVOLVE 45' FROM
 PRESENT C/L TOWARD THE WEST. ALL EXISTING
 UTILITIES WILL REQUIRE RELOCATION. THEREFORE IT
 IS NOT PRACTICAL AT THIS TIME TO ATTEMPT A
 DESIGN OF 1062' TO WHAT WOULD BE STA 43+32.

NOTE:
 FOR UNDERGROUND ACTMITY: TEST AND
 VENTILATE MANHOLE/UTILITY VAULT PRIOR TO
 ENTRY, PLACE WARNING DEVICES AND WORK
 AREA PROTECTION AS REQUIRED, AND USE EYE
 AND HEAD SAFETY PROTECTION PER FEDERAL,
 STATE, AND LOCAL REGULATIONS.

NOTE:
 NOT TO SCALE.

NOTE:
 VACANT LAND-
 THIS LAND AREA IS FENCED OFF AND NOT
 ACCESSIBLE.

3" Ø STREETLIGHT 1" FOS
 & TRAFFIC LIGHT 1" FOS
 26" Ø SEWER MAIN 16" FOC

MATCH TO SHEET 8

NOTE:
 BORE 84' UNDER
 WALL BLOCKING
 TRENCH PATH.

NOTES:
 TRENCH & PLACE 2-4" PVC,
 1-VAC,
 1-E/W
 3-1.25" ID w/PULL STRING.

PLACE STAND PIPE
 & BORE ACROSS
 26th ST. E

3" Ø STREETLIGHT 1" FOS
 & TRAFFIC LIGHT 1" FOS
 26" Ø SEWER MAIN 16" FOC

3" Ø STREETLIGHT 1" FOS
 & TRAFFIC LIGHT 1" FOS
 26" Ø SEWER MAIN 16" FOC

FUTURE 2-4" TO 300 HOUSING DEVELOPMENT @ 2727 FREEMAN RD.

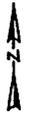
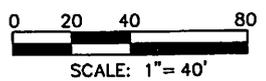
FREEMAN RD.

SPEED
 LIMIT
 25

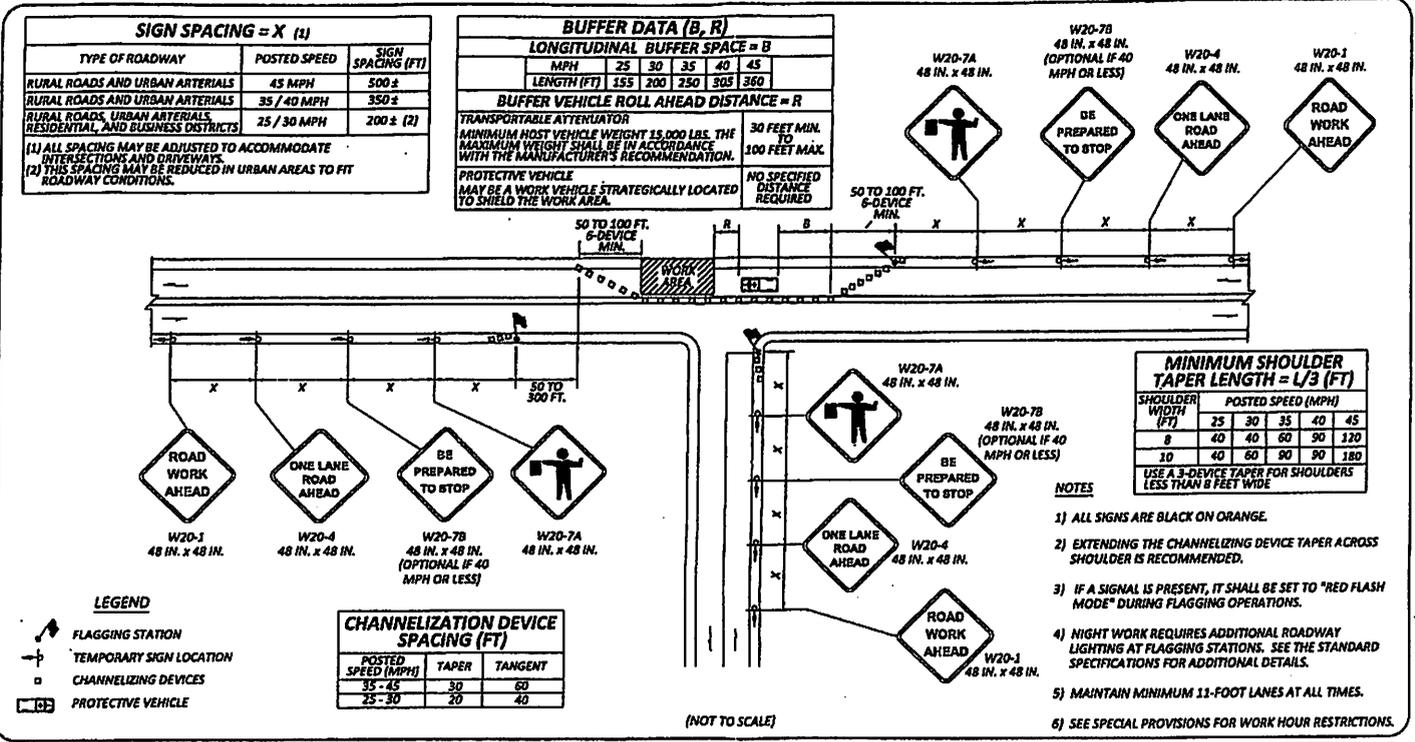
CTL ENGINEER: JOY BATEMAN PHONE NO: (253) 597-6100 EMAIL: joy.bateman@centurylink.com	FIELD ENGINEER: GLENN ALEXANDER PHONE NO: (575) 405-1266 EMAIL: modularman2@hotmail.com	TOWN: 20N	RANGE: 04E	SECT: 08
NOTICE-NOT FOR DISCLOSURE OUTSIDE OF CENTURYLINK AND AFFILIATES EXCEPT UNDER WRITTEN AGREEMENT				
2602 70TH AVE. E. FIFE, WA 98424		JOB: E.743972 GEO CODE: W26922 WC CLLI: TACMWAWA SH 9 OF 9		
drafted by: MOUNTAIN LTD/SL 05/13/15				



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Tacoma, Washington 98409
An APWA Accredited Agency

BRIAN D. STACY, P.E.
COUNTY ENGINEER

Office of the County Engineer

2-23-15

**ONE LANE, TWO-WAY TRAFFIC CONTROL
WITH FLAGGERS**

PC.K4.1

CARNEY BADLEY SPELLMAN

April 12, 2019 - 4:12 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52415-5
Appellate Court Case Title: Fife Portal, LLC, Appellant/Cross-Respondent v. Centurylink, Inc.,
Respondent/Cross-Appellant
Superior Court Case Number: 15-2-14644-6

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