

FILED
Court of Appeals
Division II
State of Washington
7/26/2019 4:36 PM
NO. 52415-5-II

COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

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

Plaintiffs/Appellants,

v.

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

Defendants/Respondents.

***BRIEF OF RESPONDENTS CENTURYLINK, INC. and
PACIFIC UTILITY CONTRACTORS, INC.***

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TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. CENTURYLINK AND PUCI’S STATEMENT OF THE ISSUES	6
III. CENTURYLINK AND PUCI STATEMENT OF THE CASE.....	9
A. The contract required PUCI to dig and place conduit directly below the center of the sidewalk in the City of Fife right of way; and PUCI trespassed on Fife Portal property because it did not do so.....	9
B. Humphrey is the managing member of Fife Portal LLC, the sole officer of the Fife Portal 140 Owners Association, and the President of First Corps, Inc.. ..	11
C. PUCI offered to perform repairs, but Fife Portal declined that offer and proceeded to retain engineers, other consultants, vendors and contractors to perform the repair work.	11
D. PUCI’s liability was established before trial on Fife Portal’s motion for partial summary judgment.	12
E. The trial court denied cross-motions for summary judgment on the issue of CenturyLink’s alleged vicarious liability.	13
F. The trial court dismissed the claims for “admin” and “legal” time of Fife Portal personnel Humphrey and Wooding on summary judgment prior to the first trial.	13
1. 1..Fife Portal claimed that it had retained Humphrey to perform legal work at \$350 an hour; and that his fees were recoverable as damages subject to trebling under RCW 4.24.630.....	14
2. Fife Portal claimed it had retained Humphrey, also at \$350 an hour, to “administer” the engineering and construction work to repair the damaged storm drain pipe and other damaged property, despite having contracted with competent, independent licensed engineers, contractors and other professionals to perform the work.	15

3.	Mistrial	19
G.	After causing a mistrial, Fife Portal was permitted to amend its complaint prior to a second trial.....	19
H.	With the trial still set for February 20, 2018, the trial court permitted Fife Portal to add additional damages to its claim on January 12, 2018.	20
I.	At the close of Fife Portal’s case-in-chief during the second trial in May 2018, the trial court dismissed all claims against CenturyLink.	20
J.	Fife Portal commenced this appeal seeking to bring CenturyLink back into the lawsuit and to pursue additional damages; PUCI has paid the underlying judgment.....	21
IV. ARGUMENT AND AUTHORITIES		23
A.	Remand is unnecessary because the judgment has been paid in full and no additional damages are recoverable; and the liability claims against CenturyLink have been rendered moot.	23
B.	The trial court properly declined to allow Fife Portal’s claim for time its owner/officers spent in pursuit of its damages claims as costs to “investigate” and “restore” property damage that can be recovered and trebled under RCW 4.24.630.	28
1.	Washington courts have held that personal time is not compensable under other statutes that provide for treble damages or other punitive damages.	29
2.	The trespass statute should not be construed and applied to permit Fife Portal and its related entities to generate profitable business and realize a windfall engaging in litigation, and “overseeing” work performed by professionals, for which Fife Portal sought and obtained a treble damages award.	30
3.	The trial court properly applied a common sense construction of the trespass statute when it dismissed the claim for damages based on Humphrey’s “time log.”	32

C.	The trial court properly declined to allow Fife Portal’s claim for “future contingent damages for unknown conditions” to go to the jury.....	35
D.	The trial court properly granted CenturyLink’s motion for judgment as a matter of law to dismiss Fife Portal’s direct negligence claims.....	42
1.	The trial court did not decide the question whether Fife Portal’s cited statutes and ordinances imposed a duty of care on CenturyLink, and instead granted judgment as a matter of law because there was no evidence a breach of any such duty was a proximate cause of Fife Portal’s damage.....	42
E.	The trial court properly dismissed Fife Portal’s “peculiar risk” vicarious liability claim against CenturyLink.	47
1.	Use of boring equipment to lay underground conduit was not an inherently dangerous activity in this case.....	48
2.	CenturyLink did not know or have reason to know that PUCI would deviate from the drawings.....	53
3.	The harm did not arise from an inherent risk in performing boring operations, but from a collateral risk -- PUCI’s failure to do what CenturyLink retained it to do: bore and lay conduit directly below the sidewalk, which posed little or no risk to persons or property.	53
4.	The negligence for which PUCI was found liable prior to trial was collateral to the risk of doing the work.	55
F.	The trial court properly dismissed Fife Portal’s trespass vicarious liability claim against CenturyLink.	57
1.	PUCI was required to verify the drawings in the field.	57
2.	Fife Portal’s “trespass vicarious liability” claim failed because it was based on speculation about what could have occurred if the work had progressed – and it failed, like the other negligence	

	claims, for want of substantial evidence of proximate cause.	58
G.	The trial court properly dismissed Fife Portal’s principal-agent vicarious liability claim against CenturyLink.	60
1.	The Master Services Agreement between CenturyLink and PUCI established that the companies were not engaged in a principal agent relationship.....	60
2.	The evidence of the parties’ conduct established that PUCI acted as an independent contractor, not as CenturyLink’s agent.....	62
H.	This court should not award attorney fees, but if it does, the amount should be determined by the trial court pending the outcome on remand.....	64
V.	CONCLUSION.....	65

TABLE OF AUTHORITIES

Page(s)

Table of Cases

Aceves v. Regal Pale Brewing Co., supra, 24 Cal.3d at p. 510; Prosser, supra, § 71, at pp. 515-516..... 56

Afoa v. Port of Seattle, 176 Wn.2d 460, 476, 296 P.3d 800 (2013) 60

Anderson v. L. C. Smith Construction Co. (1969) 276 Cal. App. 2d 436, 81 Cal. Rptr. 73..... 51

Bain v. California Teachers Ass’n, 891 F.3d 1206 (9th Cir.2018)..... 24

Ballinger v. Gascosage Elec. Co-op., 788 S.W.2d 506, 511 (Mo.1990).. 53

Brown v. Spokane County Fire Prot. Dist. No. 1, 100 Wn.2d 188, 196, 668 P.2d 571 (1983)..... 44

Brown v. Superior Underwriters, 30 Wash.App. 303, 306, 632 P.2d 887 (1980) 42

Chandler v. Madsen, 642 P.2d 1028 (Mont. 1982) 39, 40

Cito v. Rios, 3 Wn. App.2d 748, 758, 418 P.3d 811 (2018) 32

City of Alton v. Sharyland Water Supply Corp., 402 S.W.3d 867, 885 (Tex. App. 2013)..... 40, 41

Eagle Point Condo. Owners Ass’n v. Coy, 102 Wn. App. 697, 702, 9 P.3d 898 (2000)..... 24

Estate of Bunch v. McGraw Residential Center, 174 Wn.2d 425, 433, 275 P.3d 1119 (2012)..... 32

Fife Portal, LLC, et al. v. Eric L. Kotulan, et al., Superior Court of Pierce County No. 18-2-11920-6..... 5, 22

First Cash Ltd. V. J-Q Parksdale, LLC, 538 S.W.3d 189, 204 (Ct.App.Texas)..... 41

Flinkote Co. v. Lysfjord, 246 F.2d 368, 392 (9th Cir.) 37, 38, 29

Fonseca v. County of Orange (1972) 28 Cal. App. 3d 361, 104 Cal. Rptr. 566 51

FutureSelect Portfolio Management, Inc. v. Tremont Group Holdings, 175 Wn. App. 840, 879, 309 P.3d 555 (2013)..... 60

Guijosa v. Wal-Mart Stores, Inc., 144 Wn.2d 907, 915, 33 P.3d 250 (2001) 42

<i>Hansen v. West Coast Wholesale Drug Co.</i> , 47 Wn.2d 825, 826-27, 289 P.2d 718 (1955).....	24
<i>Hatch v. V.P. Fair Foundation, Inc.</i> , 990 S.W.2d 126, 134 (Mo. App. E.D. 1999).....	52
<i>Interlake Porsche & Audi, Inc. v. Bucholz</i> , 45 Wn. App. 502, 510, 728 P.2d 597 (1986).....	35
<i>J.J.'s Bar & Grill, Inc. v. Time Warner Cable Midwest, LLC</i> , 539 S.W.3d 849 (Mo. Ct. App. 2017).....	8, 25, 48, 49, 50, 51, 52
<i>Kamla v. Space Needle Corp.</i> , 147 Wn.2d 114, 121, 52 P.3d 472 (2002)....	60, 62
<i>Kappelman v. Lutz</i> , 167 Wn.2d 1, 5, 217 P.3d 286 (2009).....	36
<i>Morehouse v. Taubman</i> (1970) 5 Cal. App. 3d 548, 85 Cal. Rptr. 308)...	51
<i>Morris v. Vaagen Bros. Lumber, Inc.</i> , 130 Wn. App. 243, 251, 125 P.3d 141 (2005).....	61, 63
<i>Nast v. Michels</i> , 107 Wn.2d 300, 308, 730 P.2d 54 (1986).....	28
<i>Patterson v. Horton</i> , 84 Wn.App. 531, 541-44, 929 P.2d 1125 (1997)....	33
<i>Pepper v. J.J. Welcome Const. Co.</i> , 73 Wn. App. 523, 543-44, 871 P.2d 601 (1994).....	31
<i>Phillips v. Kaiser Aluminum & Chemical Corp.</i> , 74 Wn. App. 741, 749, 875 P.2d 1228 (1994).....	60
<i>Phillips v. King County</i> , 87 Wn. App. 468, 943 P.2d 306 (1997)	31
<i>Privette v. Superior Court</i> , 5 Cal. 4th 689, 696, 854 P.2d 721 (1993)	52, 56
<i>Pugel v. Monheimer</i> , 83 Wn. App. 688, 692, 922 P.2d 1377 (1996)	31
<i>Ranger Ins. Co. v. Pierce County</i> , 164 Wn.2d 545, 552, 192 P.3d 886 (2008).....	42
<i>Redding v. Virginia Mason Med. Ctr.</i> , 75 Wn.App. 424, 426, 878 P.2d 483 (1994).....	28
<i>Reed v. Streib</i> , 65 Wn.2d 700, 709, 399 P.2d 338 (1965).....	28
<i>Rounds v. Nellcor Puritan Bennett, Inc.</i> , 147 Wn. App. 155, 162, 194 P.3d 274 (2008).....	44
<i>Sea Farms, Inc. v. Foster & Marshall Realty, Inc.</i> , 42 Wn. App. 308, 314, 711 P.2d 1049 (1985).....	49

<i>Standing Rock Homeowners Ass'n v. Misich</i> , 106 Wn. App. 231, 23 P.3d 520 (2001).....	64
<i>State v. Powell</i> , 126 Wn.2d 244, 259, 893 P.2d 615 (1995).....	37
<i>State v. Ross</i> , 152 Wn.2d 220, 95 P.3d 1225 (2004).....	24, 25
<i>Stout v. Warren</i> , 176 Wn.2d 263, 272-73, 290 P.3d 972 (2012)	47, 48, 49, 50, 53
<i>Thompson v. King Feed & Nutrition Service, Inc.</i> , 153 Wn.2d 447, 459, 105 P.3d 378 (2005).....	31
<i>Ur-Rahman v. Changchun Dev., Ltd.</i> , 84 Wn. App. 569, 928 P.2d 1149 (1997).....	64
<i>Van Arsdale v. Hollinger</i> (1968) 68 Cal. 2d 245, 66 Cal. Rptr. 20, 437 P. 2d 508	51
<i>Walker v. Capistrano Saddle Club</i> (1970) 12 Cal. App. 3d 894, 90 Cal. Rptr. 912	51
<i>Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.</i> , 122 Wn.2d 299, 858 P.2d 1054 (1993).....	29
<i>Widman v. Rossmoor Sanitation, Inc.</i> (1971) 19 Cal. App. 3d 734, 97 Cal. Rptr. 52	52
<i>Woolen v. Aerojet General Corp.</i> (1962) 57 Cal. 2d 407, 20 Cal. Rptr. 12, 369 P. 2d 708	51
<i>Zueck v. Oppenheimer Gateway Properties, Inc.</i> , 809 S.W.2d 384 (Mo.1991).....	53
Statutes	
RCW 19.122	3, 4, 13, 21, 22, 23, 25, 27, 64
RCW 19.86	29
RCW 19.86.090	29
RCW 2.48.180	15
RCW 4.24.630	3, 6, 12, 14, 15, 18, 19, 21, 25, 27, 28, 29, 32, 64
RCW 4.24.630(1).....	32

Other Authorities

RESTATEMENT (SECOND) OF TORTS § 426 (1965)
..... 47, 51, 53, 54, 55, 56, 57, 59

RESTATEMENT (SECOND) OF TORTS § 427, cmt. d. 53, 54

RESTATEMENT (SECOND) OF TORTS § 427B 59

Underground Utility Damage Prevention Act 3, 13, 26

Rules

GR 24..... 15

RAP 18.1(i)..... 64

I. INTRODUCTION

The appeal in a nutshell

Although the appellants' voluminous 85-page opening brief and 3800 pages of designated clerks papers might lead a reader to believe otherwise, this is not an unusually complicated claim or an unusually complex appeal, and it certainly does not arise out of "catastrophic" damage to persons or property.

This case already has gone to trial twice. At the end of the second trial, the jury awarded the appellants (collectively "Fife Portal") \$195,074.79 in damages, including past and estimated future repair costs, against Pacific Utility Contractors, Inc. ("PUCI"), because PUCI damaged a PVC plastic underground stormwater drain pipe and other property, located just beyond a city right-of-way along a roadside parking strip, during the course of its construction work as an independent contractor for Qwest Corporation d/b/a CenturyLink, Inc. ("CenturyLink"). The trial court trebled the actual damages, which meant Fife Portal received \$585,224.37 for the "consequences of PUCI's actions." Together with an award of \$256,748.61 in attorneys' fees and costs, the trial court entered judgment against PUCI for \$852,972.98.

PUCI has paid the judgment, with accrued interest for a total of over \$900,000, for under \$200,000 in actual damages.

Fife Portal now asks the Court to remand for a third trial, more than four years after the damage occurred and should have been long ago repaired, so it may pursue (1) additional alleged damages for “future contingent unknown conditions” and (2) for its own time, which as presented to the trial court, included many hours of amateur legal work, and still more hours of watching as retained outside contractors and engineers investigated and repaired the damaged property. Fife Portal’s President decided to “bill” himself and a colleague at \$250 to \$350 an hour; then sought to have those alleged damages trebled once again, with an award of still more attorney fees. This could mean Fife Portal aims eventually to recover in the neighborhood of \$2,000,000, for property damage the jury found it should not cost Fife Portal over \$200,000 to repair.

Apparently that is what Fife Portal means when it says “actions have consequences.” In this responding brief, PUCI and CenturyLink will show that the actions and property damage at issue here should not and do not have such disproportionate, well-nigh extortionate consequences under Washington law.

Brief chronology of events, related litigation against employees and current procedural posture of this appeal

CenturyLink is a nationwide telecommunications company. CenturyLink paid an independent contractor, PUCI, to lay underground

conduit to serve a new housing development in Fife, Washington. The contract documents required PUCI to bore and lay the conduit directly below the center of a public sidewalk, located in the City of Fife right of way, at the perimeter of an industrial park that belongs to Fife Portal, LLC and other closely related, closely held entities.

Acting independently, PUCI excavated some distance away from the sidewalk. During its work, in October 2015, PUCI struck portions of an unregistered, unmarked, underground PVC stormwater drain pipe owned by Fife Portal, LLC. It also struck a City of Fife water main.¹

In December 2015, the plaintiffs/appellants Fife Portal 140 Owners Association, Fife Portal, LLC, and Z.V. Company sued CenturyLink and PUCI under the trespass statute, RCW 4.24.630, and the Underground Utility Damage Prevention Act, Ch. 19.122 RCW. The statutes allow recovery of treble damages and attorney fees in the event of an intentional violation.²

In June 2016, the trial court ruled on summary judgment that PUCI had intentionally violated both statutes.³

¹ CenturyLink, PUCI and the City quickly resolved the problem *inter se*.

² CP 1-4.

³ CP 195-198. PUCI believes that “intent” should have been for the jury, CP 151-60; but as explained below, in hopes of achieving a final resolution of this litigation without further delay and expense, it will not ask this Court to reverse the summary judgment order and remand for yet another trial to address its intent under the statutes.

In May 2017, the first trial in this case ended in a mistrial, as a result of Fife Portal's discovery violations.⁴ Following the mistrial, Fife Portal was permitted to amend its Complaint to add additional claims.

In May 2018, the parties went to trial a second time. At the close of Fife Portal's case-in-chief, the trial court dismissed the claims against CenturyLink for its "direct negligence liability" and vicarious liability, as a matter of law.⁵ After CenturyLink's dismissal, Fife Portal's damages went to the jury against PUCI alone, with liability already decided against it prior to trial.

The jury found that Fife Portal had incurred \$195,074.79 in damages, in a detailed verdict that included separate awards for numerous engineering consultants, contractors and specific construction tasks. The trial court later trebled the damage award and awarded attorney fees and costs of \$267,748.61, entering judgment against PUCI for \$852,972.98.⁶ The Court also awarded CenturyLink prevailing party attorney fees of \$14,435.83 under Ch. 19.122 RCW.⁷

Fife Portal commenced this appeal in August 2018. To preserve its rights, PUCI filed a notice of cross-appeal and posted a *supersedeas* bond

⁴ CP 846-48.

⁵ CP 2259-60; 2257-58.

⁶ CP 3744-46

⁷ CP 3737-3740

of \$1,055,000 to stay execution on the judgment until resolution of its cross-appeal.⁸

In October 2018, Fife Portal brought suit against numerous individual employees of PUCI, notwithstanding the doctrine of *res judicata* and the judgment already entered against PUCI, *Fife Portal, LLC, et al. v. Eric L. Kotulan, et al.*, Superior Court of Pierce County No. 18-2-11920-6. That matter is the subject of a motion for discretionary review in No. 53444-4-II.

In June 2019, PUCI tendered payment in full for the judgment amount, including accrued interest into the court registry and moved for entry of satisfaction of judgment.⁹ PUCI also has moved, or shortly will move to voluntarily withdraw review under its notice of cross-appeal – before submitting its assignments of error and opening brief on that cross-appeal. Additionally, CenturyLink has waived and tendered the trial court’s prevailing party attorney fee award back to Fife Portal, with interest.¹⁰

⁸ Supp. CP _____. *See Appendices A and B.* All “Supp. CP _____.” Cites are being included in the Supplemental Designation of Clerk’s Papers and appropriate CP numbers will be provided in an errata sheet as soon as available.

⁹ As the Court is aware, Fife Portal repeatedly has declined to accept the payment; to agree to entry of a satisfaction of the judgment; or to release the bond. *See Motion to Continue in No. 53444-4-II, filed 6/25/2019.* On July 26, 2019, the court disbursed the funds and directed entry of a full satisfaction of the judgment entered against PUCI. Supp. CP _____. *See Appendix C.*

As a result, unless there is to be a third trial to permit Fife Portal to pursue “future contingent damages for unknown conditions” and recovery for time its owner/officers’ entered in a log and unilaterally assigned a value of \$250 to \$350 an hour – never billed or paid -- this Court need not and should not consider Fife Portal’s vicarious liability and “direct negligence liability” claims against CenturyLink.

Furthermore, even if the Court *does* consider the merits of Fife Portal’s liability theories as to CenturyLink, this Court should conclude the trial court properly dismissed them as a matter of law and affirm. PUCI was not CenturyLink’s agent; and CenturyLink is not vicariously liable for the conduct of its independent contractor, PUCI. Furthermore, PUCI’s choice not to bore under the sidewalk, contrary to the contract’s requirements, was the “but for,” proximate cause of the damage to Fife Portal’s property.

II. CENTURYLINK AND PUCI’S STATEMENT OF THE ISSUES

1. Did the trial court properly bar Fife Portal’s claim for recovery of “admin/legal” time Fife Portal members George Humphrey and Peter Wooding “logged” at \$250 to \$350 per hour?

Yes. Time spent by Fife Portal’s owners, officers and personnel in connection with this litigated claim is not recoverable as damages under RCW 4.24.630; and in any event, Fife Portal has already claimed and recovered treble damages for the cost of the qualified outside engineering and contracting consultants it retained to investigate, design, construct and oversee the repair of the damage to its

property. Furthermore, Humphrey - not a licensed attorney or an engineer- improperly sought to recover for “legal work” and engineering tasks at premium rates, and to characterize the hours in his “log” – not billed or paid -- as “damages” subject to trebling under the statute. This translated into an effective hourly rate over \$1000 an hour; and was neither a cost to “investigate” or “restore” damaged property nor attorney fees recoverable under the statute.

2. Did the trial court properly exercise its discretion to exclude George Humphrey’s proposed testimony, in support of Fife Portal’s claim for an additional \$25,000 for unspecified repair costs that could be incurred for “future contingent damages for unknown conditions”?

Yes. The claimed “future contingent damages for unknown conditions” was based on the mere *ipse dixit* of Fife Portal’s principal, George Humphrey, unsupported by a reasoned methodology and competent expert testimony; and likely duplicative of contingencies included in contractor bids the jury did consider, and for which it awarded damages.

3. If the trial court properly declined to send Fife Portal’s claimed “admin/legal” time and its claim for “future contingent damages for unknown conditions” to the jury, should this Court address the merits of its various liability theories against CenturyLink?

No. Fife Portal put on a single damages case against PUCI and CenturyLink in the May 2018 trial; it received a money judgment for the damage to its property; and that judgment has been paid in full on behalf of PUCI. Unless Fife Portal is entitled to seek an award of additional damages not subsumed in the judgment, the question of CenturyLink’s alleged liability is moot and any alleged error was harmless, not outcome determinative, reversible error.

The Court need not reach the following issues, *unless* it finds that the judgment against PUCI failed to fully compensate Fife Portal for all

damages supported by substantial admissible evidence and recoverable under its causes of action:

4. Did the trial court properly dismiss Fife Portal's "direct negligence" claim against CenturyLink?

Yes. The sole proximate cause of the damage to Fife Portal's underground stormwater drain pipe (and the City's water main) was PUCI's independent decision not to bore under the middle of the sidewalk as its contract with CenturyLink plainly required.

5. Did the trial court properly dismiss Fife Portal's "peculiar risk vicarious liability" claim against CenturyLink?

Yes. Under the "peculiar risk" doctrine, Fife Portal was required to produce substantial evidence that *in this particular case*, the nature of the work PUCI was called upon to perform posed "a peculiar risk of physical harm to others," and it made no such showing.

Furthermore, Fife Portal had to show that the damage to its storm drain pipe "arose from the contractor's negligence *with respect to the risk that is inherent in the activity.*" However, the harm that resulted from PUCI's work was not "inherent in the activity" and arose only because of PUCI's collateral negligence -- it did not bore under the sidewalk, where it could not have struck and damaged Fife Portal's pipe or any other underground utility.

Finally, the Court should decline Fife Portal's invitation to make new law by adopting the Missouri court's holding in the *J.J.'s Bar and Grill* case -- the only case that has found "peculiar risk" liability for a contractor's use of similar boring methods, and which did so on very different facts, in a case involving not only a theoretical risk of bodily injury, but where the contract called for work in close proximity to pressurized gas lines, and the work resulted in an explosion that caused catastrophic property damage and a number of injuries and fatalities.

6. Did the trial court properly dismiss Fife Portal's "principal-agent vicarious liability" claim against CenturyLink?

Yes. The record established that CenturyLink did not control the manner in which PUCI performed its work; and thus PUCI was an independent contractor, not an "agent" of CenturyLink.

7. Did the trial court properly dismiss Fife Portal's "vicarious liability trespass" claim against CenturyLink?

Yes. CenturyLink did not direct PUCI to trespass on Fife Portal's property. Furthermore, although the contract may have called for PUCI to "connect to conduit on Fife Portal's property," that never occurred here, because PUCI did not complete its work; and that contract provision was not causally related in any way to the damage to Fife Portal's storm drain at issue here.

III. CENTURYLINK AND PUCI STATEMENT OF THE CASE

- A. **The contract required PUCI to dig and place conduit directly below the center of the sidewalk in the City of Fife right of way; and PUCI trespassed on Fife Portal property because it did not do so.**

This case arises out of damage to an unmarked, underground PVC plastic storm water drain pipe owned by Fife Portal Industrial Park. CP 2; 57. CenturyLink contracted with PUCI to install underground conduit beneath a sidewalk located in the City of Fife's right-of-way. Ex. 9. PUCI struck and damaged Fife Portal's underground drain pipe in the process of performing the underground boring work. CP 162.

CenturyLink obtained a permit for the work. CP 1144-57. Prior to commencing work, PUCI called the "Utility Notification one-number

locator service.” CP 165-69. PUCI described the nature and location of the underground work it was going to perform. *Id.* Utilities with underground facilities were notified and marked their locations. *Id.* Notably, neither Fife Portal nor its owner/manager George Humphrey (“Humphrey”), are or were subscribers to the one-number locator service. Supp. CP _____. As a result, the underground stormwater drain pipe and any associated equipment or structures were not located and marked. CP 165-69.

PUCI began its field work on October 5, 2015. CP 162. The City of Fife had an inspector onsite on the day work began. CP 163. The inspector told PUCI’s foreman that the City of Fife’s right-of-way included the space between the sidewalk and the nearby electrical and utility boxes. *Id.* However, the plans CenturyLink provided to PUCI directed PUCI to bore *under the sidewalk*. RP 474; RP 511; RP 819-20

PUCI decided to bore *away from the sidewalk*. On October 7, 2015, PUCI’s boring equipment struck a portion of an unmarked, underground PVC plastic stormwater drain pipe owned by Fife Portal. CP 162-63. *Id.*

Then, on October 8, 2015, PUCI’s equipment struck a City of Fife water main; and another portion of the Fife Portal stormwater drain pipe. *Id.*

It was not until October 12, 2015, that PUCI understood that it was performing some of its work on private property. CP 163; 172-74.

After the incident, City Engineer Ken Gill confirmed that PUCI would not have hit the storm drain pipe and water main, if PUCI simply had done the boring *under the middle of the sidewalk* as the plans and the contract with CenturyLink plainly directed PUCI to do. RP 489.

B. Humphrey is the managing member of Fife Portal LLC, the sole officer of the Fife Portal 140 Owners Association, and the President of First Corps, Inc.

Plaintiff Fife Portal 140 Owners Association (the “Association”) is comprised of the two other named plaintiffs in this action, Fife Portal, LLC and Z.V. Company, Inc. CP 391. Humphrey is the managing member of Fife Portal, LLC and also the sole officer of the Association. CP 394. Humphrey also is the President of First Corps, Inc. (“First Corps”). CP 382. Peter Wooding (“Wooding”) is a non-officer member of the Association in his capacity as a representative of plaintiff Z.V. Company, Inc. *Id.*

C. PUCI offered to perform repairs, but Fife Portal declined that offer and proceeded to retain engineers, other consultants, vendors and contractors to perform the repair work.

Damage occurred to both City property and private property. After the damage occurred, PUCI first entered into discussions with the City to repair the damage to the City property. RP 542. PUCI also offered to repair the damage to the Fife Portal property, but was told Fife Portal would be using its own contractors to investigate and repair the damage. RP 543. After reaching a small works agreement with the City, PUCI

began the repair work; but that work was shut down at Fife Portal's direction. RP 543. George Humphrey "retained" First Corp's President, himself, to "lead" the repair work. CP 402.

First Corps entered nearly 770 hours of time in a "log" – time Humphrey and Wooding allegedly spent on the claim. CP 393. There was never a formal retention agreement between the Association and First Corps. CP 403. Humphrey "billed" the Association at \$350 per hour, while Wooding "billed" time at \$250 per hour. CP 433.¹¹

The repair work for both the City and Fife Portal properties was performed by RV Associates in 2016. RP 838-39. RV Associates is a licensed general contractor; and Fife Portal selected and retained RV Associates as the general contractor. RP 653. RV Associates intended its work to be a permanent repair of the water main and the storm drain. RP 853.

D. PUCI's liability was established before trial on Fife Portal's motion for partial summary judgment.

In June 2016, the court granted Fife Portal's motion for partial summary judgment against PUCI. CP 195-98. The trial court's order recited that PUCI intentionally trespassed in violation of RCW 4.24.630 and willfully violated several provisions of the Underground Utility

¹¹ However, there is no evidence in the record that any "billed" time was invoiced or paid; or that these "billings" ever appeared as 'work in progress,' an account receivable or as an amount owed in the records of any of the Fife Portal entities.

Damage Prevention Act, Ch. 19.122 RCW. *Id.* The trial court found that although PUCI had notified the one-number locator service it would be working in the area, *it did not disclose that it would be boring "south of the sidewalk,"* as PUCI later did. *Id.*

E. The trial court denied cross-motions for summary judgment on the issue of CenturyLink's alleged vicarious liability.

Prior to trial, CenturyLink moved for summary judgment dismissal of Fife Portal's vicarious liability claim, contending that it retained PUCI as an independent contractor and had no such liability. CP 199-204. Fife Portal cross-moved for summary judgment, contending CenturyLink and PUCI had a principal-agent relationship. CP 228-230. The trial court denied both motions, finding there were questions of fact concerning that relationship. CP 355-58.

F. The trial court dismissed the claims for "admin" and "legal" time of Fife Portal personnel Humphrey and Wooding on summary judgment prior to the first trial.

During the course of discovery, Fife Portal produced numerous, ever-changing iterations of spreadsheets and "logs" purporting to summarize its damages. *See, e.g.*, CP 435-439; 449. The "logs" concerning Humphrey's time spent on the litigated claim described the work as "admin[istrative]" and "legal." CP 449. Fife Portal also produced a spreadsheet claiming damages for time spent on the litigated claim. CP

433. Prior to the first trial in March 2017, PUCI and CenturyLink moved for summary judgment dismissal of these claimed damages. CP 359-375

1. **Fife Portal claimed that it had retained Humphrey to perform legal work at \$350 an hour; and that his fees were recoverable as damages subject to trebling under RCW 4.24.630.**

At the time the summary judgment motion was filed, Fife Portal's claim for compensation for time in Humphrey's "log" included hundreds of hours of "legal time" at \$350 an hour, twice the hourly rates charged by the experienced trial attorneys representing CenturyLink and PUCI. CP 3034-3037. Humphrey apparently believed that the defendants should be required to pay for his "legal work" under the trespass statute because "*I run my lawsuits... not my attorneys.*" CP 417 (emphasis added).

Humphrey logged copious amounts of time on his amateur legal work, but this time was never actually invoiced, billed out and paid by anyone.¹² As just one of many representative examples, Fife Portal filed its Complaint in December 2015. The attorney who prepared and signed that Complaint, which was shy of 4 pages long, was Dennis Strasser. This was the only pleading filed with the Court that month. However, Fife Portal sought to recover for 14 hours of Humphrey "legal work" which appeared in his log as "Complaint," CP 436; and sought damages for 46 hours of

¹² And for good reason – if this had been an arm's length transaction, and the Associates had in fact retained and paid Humphrey for this "legal" work, he

Humphrey's "legal work" in the month of December 2015 at \$350 an hour. *Id.* In the same month of December 2015, Mr. Strasser, Fife Portal's attorney of record, billed only 5.8 hours, at \$300 per hour. CP 444.

All told, Fife Portal's claim for Humphrey's "legal" work, which it sought to recover as costs to investigate and restore property damage, subject to trebling under RCW 4.24.630, totaled \$67,900.00 for Humphrey¹³ and \$10,000.00 for Wooding. CP 433. The combined trebled total of this attempted recovery for corporate officers/laypersons allegedly performing "legal work" would have been \$233,700.00. *Id.*

2. **Fife Portal claimed it had retained Humphrey, also at \$350 an hour, to "administer" the engineering and construction work to repair the damaged storm drain pipe and other damaged property, despite having contracted with competent, independent licensed engineers, contractors and other professionals to perform the work.**

Humphrey is not a licensed geotechnical, structural, or civil engineer. CP 405. He is not a licensed architect. *Id.* Nevertheless, Fife Portal sought to recover tens of thousands of dollars for time he allegedly spent performing work that already was being performed by outside

would have been engaged in the illegal, unlicensed practice of law. CP 407 (Humphrey has no legal training); RCW 2.48.180; GR 24.

¹³ Much of this time was for time spent preparing to attend hearings and observing other proceedings in the litigation. *See, e.g.*, CP 436, "item 55," 10 hours for "Legal research and review of facts to date"; CP 437, "items 79-80," 7 hours for "Review over hearing for tomorrow" and "Hearing in Tacoma"; CP 438, "item 94," 8.25 hours, "Deposition of Ken Gill, went exactly as we planned

professionals, and for which PUCI also was asked to pay. CP 436. As a representative example, layperson and company owner/officer Humphrey produced a “Log on Fife Portal site damage” reflecting he spent 13.25 hours to perform a “structural inspection,” “building footing inspection,” and “footing inspection,” work a competent engineer should and did perform, for a fee, to investigate and restore the damaged property. *Id.*

In fact Fife Portal did retain qualified, licensed outside engineers to perform the investigation and design work required to restore the damaged stormwater drain pipe and related property. The bill for those services went to the jury; and Fife Portal was awarded a total of \$27,532.23 for the services provided by three separate, licensed engineering firms. CP 2838-39. The engineering firms retained included: Contour Engineering (the jury awarded \$11,729.13 for their services), GeoResources, LLC (the jury awarded \$6,049.75 for their services), and Poe Engineering (the jury awarded \$3,053.35 for their services). CP 2838-39.

Brett Allen, a licensed civil engineer, performed the work on behalf of Contour Engineering. CP 408. He handled “central information” and “all the engineers would go through him.” *Id.* He provided civil engineering services for damage investigation, scope of repair, and observation of the repair work. RP 942; 944. Allen described his role as “to review and

it out...”; CP 439, “item 191,” 10 hours, “Follow up” and item 220, 4.5 hours, “Hearing partial summary judgment.”

inspect the work that was done; advise them on what I thought needed to be done; assemble a team of professionals....” RP 944. He “investigated the site.” RP 945. Allen billed his time at \$130 per hour, unlike the \$350 an hour that layperson Humphrey unilaterally decided to claim as the value of the time he put in his log. Ex. 37.

Dana Biggerstaff of GeoResources, LLC performed geotechnical work to investigate and restore the damage to Fife Portal’s property. RP 885. A licensed geotechnical engineer, Bickerstaff described his role as providing recommendations for construction materials, and “direction” on how to construct the repair so that it would function properly. CP 888. Biggerstaff billed his time at \$120, unlike the \$350 an hour that layperson Humphrey unilaterally decided to claim as the value of the time he put in his log. Ex. 34, 35.

Finally, Alan Poe of Poe Engineering performed the original site development engineering services for the repair work. CP 403. He was also working on the repair of the Fife Portal property. *Id.*

Additionally, Fife Portal retained a licensed general contractor, RV Associates. Ex. 18. RV managed the construction and performed the work required to repair and restore the property damage that resulted from PUCI’s trespass on the Property. RV’s hourly rate for construction supervision was \$67.27 per hour – not the \$350 an hour Humphrey

unilaterally decided to claim as the value of the time he put in his log, allegedly for “leading” the repair. *Id.*

The cost of all of the work performed by qualified professionals went to the jury; and the jury awarded damages sufficient to pay for all of the professional work. The award was subsequently trebled. CP 3741-43.

Nevertheless, Humphrey, wearing his Fife Portal/Association hat, allegedly retained Humphrey, wearing his First Corps hat, to “lead” the lawsuit and the repair of the property damage. CP 402. However, before the trial court considered and decided a motion for partial summary judgment to exclude the damages claim based on Humphrey’s “logs,” no bills had actually been issued to or paid by the Association or anyone else. CP 403.

All told, prior to the first trial, Fife Portal “logged” 768.95 hours of personal time -- “logged” but not billed or paid -- on matters related to this lawsuit. CP 433. Furthermore, Fife Portal sought to have the hourly rates trebled under RCW 4.24.630, as a cost to “investigate” or “restore” property damage, even though as with all of Fife Portal’s damages calculations, its characterization of these charges and their amount was a moving target.

As noted above, PUCI and CenturyLink moved for partial summary judgment on the measure of damages under RCW 4.24.630. CP 359-75. The trial court agreed the “logged” time was not recoverable under the

statute; and dismissed the claim for Humphrey and Wooding's "logged" time. CP 580-81.

3. Mistrial

On the first day of the first trial, held in 2016, the court heard argument on a motion *in limine* filed by PUCI and CenturyLink to exclude Mr. Humphrey as an expert witness. RP 43. The primary concern was Mr. Humphrey's failure to disclose the grounds for Fife Portal's "diminution in value" claim. RP 46-59. After Fife Portal presented one valuation formula on the first day of trial; and then disclosed an entirely new and different valuation formula on day two of trial, the court declared a mistrial. RP 158; RP 137-52. In doing so the court noted:

[b]ut this is a critical factor; this is a critical part of your damages, It just seems to me – it feels to me like it wasn't put forward in good faith. And I'm not going to cast aspersions on the lawyers or Mr. Humphrey for that matter, but there is part of it that feels willful.

RP 167. The court also imposed monetary sanctions on Fife Portal as a result of its willful and prejudicial discovery violation. CP 846-848. Trial was continued for approximately three weeks to May 30, 2017. *Id.*

G. After causing a mistrial, Fife Portal was permitted to amend its complaint prior to a second trial.

Between the May 9, 2017 mistrial and the continued trial date of May 30, 2017, Fife Portal was permitted to amend its complaint to add a negligence claim against CenturyLink. CP 947-50. The trial date was

continued a second time, to allow CenturyLink to prepare a defense to the newly asserted direct negligence claim against it. RP 199. Shortly thereafter, Fife Portal filed another summary judgment motion, this time attempting to establish CenturyLink's vicarious liability pursuant to the "peculiar risk" doctrine. CP 1073-87. The trial court denied the motion. CP 1248-49.

H. With the trial still set for February 20, 2018, the trial court permitted Fife Portal to add additional damages to its claim on January 12, 2018.

Over the objection of CenturyLink and PUCI, the trial court permitted Fife Portal to assert new and additional damage claims they alleged developed between the mistrial in May 2017 and January 2018. RP 240. The trial also was continued again until May 21, 2018. RP 241.

I. At the close of Fife Portal's case-in-chief during the second trial in May 2018, the trial court dismissed all claims against CenturyLink.

At the close of Fife Portal's case-in-chief, CenturyLink moved for judgment as a matter of law on all claims asserted against it. CP 2251-59. The trial court granted judgment as a matter of law and dismissed the direct negligence claim and the vicarious liability claim asserted against CenturyLink. CP 2557-60.

Fife Portal's property damage claims went to the jury against PUCI – its statutory liability having been established prior to trial. CP 2838-39. Fife Portal asked the jury to award \$446,785.05 in damages, which

included \$79,262.74 in undisputed damages for work bid or completed by professional engineers and contractors. RP 1406. In addition to the undisputed damages, Fife Portal sought recovery for substantial disputed damages, largely based on estimates of past and projected future costs generated by Humphrey himself, for which the jury awarded Fife Portal \$115,812,05. CP 2838-39. The damage award was trebled pursuant to RCW 4.24.630 and Ch. 19.122 RCW. CP 3741-43. Under the same statutes, the court awarded Fife Portal attorney fees and costs in the amount of \$267,748.61. CP 3747-48. With treble damages and attorney fees, a judgment for Fife Portal and against PUCI was entered in the amount of \$852,972.98 – more than four times the jury’s award of the reasonable cost of investigation and restoration of the property by paid professionals retained by Fife Portal and Fife Portal estimates of future repair costs. CP 3752-53.

J. Fife Portal commenced this appeal seeking to bring CenturyLink back into the lawsuit and to pursue additional damages; PUCI has paid the underlying judgment.

After the second trial, PUCI was fully prepared to pay the judgment and close the book, but Fife Portal wanted still more damages for the damage to its PVC plastic underground storm drain and parking strip. Fife Portal commenced this appeal in August 2016. CP 3754-55. PUCI timely filed a notice of cross-appeal, in order to preserve its right to challenge the trial court’s summary judgment ruling that it intentionally violated the

trespass statute and willfully violated the Underground Utilities Damage Prevention Act as a matter of law.

In October 2018, Fife Portal commenced a second lawsuit arising out of the same damage, caused by the same work performed by PUCI, under the same contract with CenturyLink, naming PUCI's individual owners and employees and their marital communities as defendants. *Fife Portal, LLC, et al. v. Eric L. Kotulan, et al.*, Superior Court of Pierce County No. 18-2-11920-6.

The *Fife Portal v. Kotulan* matter is before this Court on the defendants' motion for discretionary review in No. 53444-4-II.¹⁴

In hopes of limiting the scope, burden and expense of this expanding and seemingly never-ending litigation over a straightforward property damage claim, PUCI advised Fife Portal in writing, in early June 2019, that it would: (1) pay the judgment against it in full, with all accrued interest, and would also tender back and waive the attorney fees (of approximately \$14,500) awarded to CenturyLink as the prevailing party under Ch. 19.122 RCW; and (2) withdraw its cross-appeal, prior to filing

¹⁴ Despite having asserted the unpaid judgment against PUCI as the pretext for the second lawsuit and in order to avoid *res judicata* as a bar to that lawsuit, Fife Portal has declined to dismiss the suit as a consequence of payment of the judgment in full; and argues that is a question for the trial court to resolve. *See, e.g.*, Petitioners' Motion to Continue in No. 53444-4-II, filed 6/25/2019; Respondent's Answer to Petitioners' Motion to Continue in No. 53444-4-II, filed 6/6/2019.

an opening brief and assignments of error that would require Fife Portal to incur legal fees to respond.¹⁵

Fife Portal repeatedly rejected PUCI's tender of funds to satisfy the judgment and, as a result, PUCI has deposited the funds in the trial court registry, and has moved for entry of an order of satisfaction of the judgment and for release of the *supersedeas* bond posted to stay execution on the judgment. CenturyLink also deposited the funds, with interest, previously paid against the award of prevailing party fees following dismissal of Fife Portal's claims against it, including claims under Ch. 19.122 RCW, and has waived its recovery of prevailing party fees associated with that dismissal.¹⁶

IV. ARGUMENT AND AUTHORITIES

A. Remand is unnecessary because the judgment has been paid in full and no additional damages are recoverable; and the liability claims against CenturyLink have been rendered moot.

Fife Portal has asked the Court to affirm the trial court's judgment on the jury's verdict. Fife Portal then seeks a remand for a third trial seeking an additional damages award for "future contingent damages for unknown conditions" and for time "logged" but not billed or paid by Fife Portal's owner/officers in connection with this litigated claim, arbitrarily valued at

¹⁵ See PUCI's Motion to Extend Time, 6/25/2019; and Motion for Voluntary Withdrawal of Review (to be filed on or shortly after the date of this Brief of Respondents).

¹⁶ *Id.*

\$250 to \$350 an hour. (Brief of Appellants at 85). Unless the Court remands to allow Fife Portal to ask a jury to award those additional damages, the question of CenturyLink's liability, whatever the theory, is moot – and need not and should not be addressed.

The property damage is the property damage. Once PUCI has satisfied the judgment reflecting those damages, Fife Portal may not recover them again, whether from CenturyLink in this action or from the employees of PUCI in the lawsuit it filed after obtaining a judgment in this case. *See, e.g., Eagle Point Condo. Owners Ass'n v. Coy*, 102 Wn. App. 697, 702, 9 P.3d 898 (2000) (“It is a basic principle of damages, both tort and contract, that there shall be no double recovery for the same injury”).

Fife Portal cannot recover for the same damages twice, and because the damages have already been paid, with interest, CenturyLink's liability or non-liability is moot – unless additional damages are in play.

A case is moot when the issues raised need not be resolved in order to grant relief. *State v. Ross*, 152 Wn.2d 220, 95 P.3d 1225 (2004). A controversy may become moot during the time it takes to reach the appellate court. *Hansen v. West Coast Wholesale Drug Co.*, 47 Wn.2d 825, 826-27, 289 P.2d 718 (1955); *see also, Bain v. California Teachers Ass'n*, 891 F.3d 1206 (9th Cir.2018) (change in circumstances during pendency of the appeal may render the issues on appeal moot).

Moreover, Washington courts “will not consider a question that is purely academic.” *State v. Ross*, 152 Wn.2d at 228. Fife Portal has urged this Court to make new law, by adopting and broadly applying the holding in a Missouri Court of Appeals decision, *J.J.’s Bar & Grill, Inc. v. Time Warner Cable Midwest, LLC*, 539 S.W.3d 849 (Mo. Ct. App. 2017). That question is purely academic if the judgment against PUCI is affirmed and no further damages are available.

And as we will show below, the additional monetary award that Fife Portal seeks should not be available, whether under RCW 4.24.630 and Ch. 19.122 RCW, or any other theory. When the Legislature passed these statutes, providing for treble damages and attorney fees, it never intended to permit a plaintiff to retain himself as an amateur attorney, “log” his time at premium rates, and recover the putative value of his time – not as “prevailing party attorney fees”; much less as a recoverable cost of “investigation” or “restoration” of property damage subject to trebling, for which a defendant must pay over \$1000 an hour for legal work allegedly performed by an unlicensed amateur who cannot charge for legal services without violating the law.

Nor did the Legislature intend to permit a party who is not a licensed engineer, architect or general contractor – and who has retained qualified, licensed professionals to perform such functions and seeks to recover and treble the fees for *their* services – to log hundreds of hours of personal

time purporting to “lead” and observe the effort of the professionals, also at premium rates, and then attempt to recover treble damages for his amateur efforts *and* the work of the retained professionals.

The trespass statute and the Underground Utility Damage Prevention Act do not grant an injured plaintiff the right to print money as Fife Portal has attempted to do here. It allows recovery for the reasonable and necessary cost to investigate and restore damaged property – without double dipping and self-dealing; to treble those damages; and to recover reasonable attorney fees for legal work performed by duly licensed attorneys – not hundreds of hours of the layperson plaintiffs’ attendance at hearings and depositions, review of pleadings, ‘legal research’ and similar activities.

The jury awarded Fife Portal a generous sum for the damage done to its underground PVC plastic stormwater drain pipe and related property. PUCI has paid for the “consequences of its conduct” to the full extent required by law, and to the full extent of the jury verdict, along with the trial court’s award of treble damages and attorney fees, including interest accrued prior to the payment of the judgment.

Fife Portal has by this point created a veritable cottage industry of litigation, and already has indicated it intends to keep going as long as a court will allow, asserting it intends to recover over \$325,000 in fees and

costs in this appeal alone,¹⁷ while pursuing a second lawsuit based on the very same damage, against numerous individuals, where it also asserts it is entitled to recover treble damages and attorney fees.¹⁸ This is not an effort to recover damages to investigate and restore damaged property but instead an attempt to use the treble damages statutes as a cudgel and a lucrative profit center.

This is by no means what the Legislature envisioned or intended when it enacted RCW 4.24.630 and Ch. 19.122 RCW. This court should affirm the trial court's dismissal of Fife Portal's claim for personal time; affirm the exclusion of speculative evidence of "future contingent damages for unknown conditions"; and affirm the final judgment, *in toto*. PUCI has paid the judgment in full; there is no need to address the putative liability of CenturyLink for the very same damages, and this litigation should come to an end.

Fife Portal says "actions have consequences." The Respondents say "the consequences have been accepted and the damages have been paid." We say one more thing: Fife Portal's multiple lawsuits, the mounting legal expenses, the burden on the trial and appellate courts, and Fife Portal's needless pursuit of PUCI's working class employees must come to an end.

¹⁷ See Motion for Voluntary Withdrawal of Review at Exhibit 1.

¹⁸ See Appendix to Motion for Discretionary Review in No. 53444-4-II at A000001- 9; and at A000184-194 (arguing that Fife Portal should be permitted to

The trial court did not commit outcome determinative, reversible error; the judgment in this case is final; and that judgment should be affirmed.¹⁹

B. The trial court properly declined to allow Fife Portal's claim for time its owner/officers spent in pursuit of its damages claims as costs to "investigate" and "restore" property damage that can be recovered and trebled under RCW 4.24.630.

The trial court's grant of summary judgment is reviewed *de novo*. This Court may affirm the trial court's decision granting summary judgment on any correct ground supported by the record and presented to the trial court, whether or not that ground was expressly considered or relied upon by the court below. *Redding v. Virginia Mason Med. Ctr.*, 75 Wn.App. 424, 426, 878 P.2d 483 (1994); *Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986), citing *Reed v. Streib*, 65 Wn.2d 700, 709, 399 P.2d 338 (1965).

Aside from the fact that the "retention" of Humphrey to perform legal, engineering and construction management services for \$350 an hour – which were never billed or paid by anyone – is unquestionably a sham transaction, there is no right under Washington law to recover monetary damages for a party's personal time spent building a litigated claim. That is exactly what the "logs" represent.

aggressively pursue discovery from PUCI employees, despite prior finding of PUCI liability and entry of judgment against PUCI).

The Association retained *four* competent, licensed engineering consultants and a general construction contractor to repair the damaged property. CP 416 (emphasis added). The evidence of that work and its cost was presented to the jury, and the jury awarded Fife Portal damages to cover those costs. The trial court trebled the damages under RCW 4.24.630. Humphrey's "legal work" in pursuit of claims against the defendants and the time he spent "leading" the repair work is not recoverable under the statute.

1. **Washington courts have held that personal time is not compensable under other statutes that provide for treble damages or other punitive damages.**

There are very few statutes in the State of Washington that permit recovery of treble damages or other punitive damage awards. One such statute is the Consumer Protection Act ("CPA") RCW 19.86 et seq., which allows for treble damages and attorney fees. RCW 19.86.090. While the CPA, just like RCW 4.24.630, does not expressly *exclude* damages for personal time spent on a lawsuit, the Supreme Court noted in *Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993) that a party may not be compensated for the value of time spent attending depositions, preparing for trial and other litigation

¹⁹ And concurrently, the vexatious litigation against the PUCI employees should be dismissed in No. 53444-4-II.

related pursuits. *Id.* at 316. These are among the damages that Fife Portal sought in this lawsuit.

The *Fisons* court vacated the award the plaintiff had recovered relating to personal time, accepting the trial court's conclusion that personal time was "not recoverable under any of the legal theories advanced." *Id.* at 332-33.

The physician testified that because of his unavailability due to this trial, he missed some consultations he otherwise would have done; these consultations were all foregone because of time spent in or preparing for trial. The trial court had disallowed damages based upon income lost due to time spent for the lawsuit. The trial court recognized that "all of the losses of consultation ... were because he was unavailable" due to trial matters. However, the trial court later reduced the consultation award from \$150,000 to \$2,250. **In light of the trial court's unchallenged conclusion that damages for time lost due to trial preparation were not recoverable, we conclude there was no evidence to support an award for loss of consultations.**

Id. (emphasis added).

Here, the court should adopt the same approach of the *Fisons* Court to affirm the trial court's summary judgment order. By taking this approach, not only will the court be following the only real guidance on this issue law, but will also insure that plaintiffs are not awarded a windfall.

- 2. The trespass statute should not be construed and applied to permit Fife Portal and its related entities to generate profitable business and realize a windfall engaging in litigation, and "overseeing" work performed by professionals,**

for which Fife Portal sought and obtained a treble damages award.

The Court should also be guided by the basic principles and purposes of awarding damages. “One should not recover any *windfall* in the award of damages, but should receive an award which does no more than put the plaintiff in his or her right position.” *Pepper v. J.J. Welcome Const. Co.*, 73 Wn. App. 523, 543-44, 871 P.2d 601 (1994), *abrogated on other grounds by Phillips v. King County*, 87 Wn. App. 468, 943 P.2d 306 (1997). In making a determination of damages the court should compensate the injured party in a manner which makes it whole without conferring a windfall. *Thompson v. King Feed & Nutrition Service, Inc.*, 153 Wn.2d 447, 459, 105 P.3d 378 (2005); *Pugel v. Monheimer*, 83 Wn. App. 688, 692, 922 P.2d 1377 (1996).

Here, an award of damages, subject to trebling, for the time Humphrey “logged,” arbitrarily valued at \$350 an hour, and never billed, would merely confer a massive windfall on Fife Portal. As discussed above, Fife Portal had four engineers and a general contractor to investigate the damage, conditions, perform design work to restore the stormwater drain system and perform the physical repairs. A general contractor “coordinated” and “led” the work. PUCI and CenturyLink stipulated to the full amounts claimed for the work of three of the engineers and the general contractor. The trial court properly concluded that the statute does not permit Fife Portal to recover treble damages, at an

artificially inflated hourly rate that was never actually invoiced, for time an owner/officer of the plaintiff spends looking over the shoulder of his attorneys and the professionals retained and paid to perform the investigation and restoration of damaged property.

3. The trial court properly applied a common sense construction of the trespass statute when it dismissed the claim for damages based on Humphrey’s “time log.”

Recoverable damages under RCW 4.24.630 include “the costs of restoration” and “reasonable costs, including but not limited to investigative costs” RCW 4.24.630(1). When interpreting a statute, the “objective is to ascertain and give effect to legislative intent.” *Cito v. Rios*, 3 Wn. App.2d 748, 758, 418 P.3d 811 (2018). The most fundamental rule of statutory construction is this: when a court construes a statute, it has a “duty to avoid absurd results.” *Estate of Bunch v. McGraw Residential Center*, 174 Wn.2d 425, 433, 275 P.3d 1119 (2012). A reading of the statute to permit Fife Portal to recover treble damages based on the “logs” it submitted to the trial court would certainly be absurd.

To begin with, to call ‘logged’ time – that was never billed and paid by anyone, a “cost” does violence to the plain meaning of the statute. The “logs” were generated for the sole purpose of presenting the time to these defendants, arbitrarily assigning an hourly rate for the time, and collecting damages. They did not reflect a “cost” that was incurred by anyone. In

fact, they reflected an effort to generate profit as a result of the damage to Fife Portal's property.

The statute says recoverable costs must be "reasonable" and necessary to investigate and restore the property damage, and they must be "costs." As with all claims for damages, the burden is on the plaintiff to produce substantial evidence to prove each of those two elements. *See, e.g., Patterson v. Horton*, 84 Wn.App. 531, 541-44, 929 P.2d 1125 (1997) (plaintiff may not merely rely on billings and payments to establish damages for medical care, but has burden of proving past and projected future expenses are reasonable and necessary).

In response to the defendants' motion for summary judgment, Fife Portal failed to produce any evidence to show the claimed "costs" were *costs* at all, much less that they were "reasonable" and necessary.

Humphrey retained Humphrey, put time in a log, and produced no evidence that the time went any further than that. He claimed the time was worth \$350 an hour – the only evidence of that being his *ipse dixit*.

The time had never been billed to anyone, even though the log reflected entries over the course of more than a year. The time had never been paid by anyone either. Fife Portal produced no accounting records showing First Corps had fees for the logged time on its books as "work in progress" or an account receivable; or that the Association or any other individual or entity booked the charges as a financial obligation to First

Corps. There was no evidence the \$350 an hour rate was remotely reasonable. Instead, the only evidence in the record shows that licensed professionals, who are legally permitted to practice the relevant disciplines – the practice of law, engineering, general contracting and construction management – had been retained by Fife Portal and were performing the “investigation” and “restoration” of the property damage and the “legal” work in this litigation. Their own “reasonable” rates for the work were a fraction of \$350 an hour. And finally, Fife Portal was already claiming the cost of all such work as damages under the statute, or as prevailing party fees recoverable under the statute. The time in the Humphrey logs was an attempt at double-dipping and then some.

The record permitted only one reasonable conclusion, and on summary judgment, the trial court reached it in a common sense application of RCW 6.24.630: to be recoverable under the statute, claimed damages must be “costs” and they must be “reasonable” and *necessary* for the investigation and restoration of property damage. There was no evidence the time shown in the “logs” and the alleged “costs” Fife Portal attempted to recover as damages under the statute based on those logs, were “costs” at all; or that they were “reasonable” and necessary within the common sense meaning of the statute. This Court should affirm the trial court’s order granting summary judgment on that issue.

C. The trial court properly declined to allow Fife Portal's claim for "future contingent damages for unknown conditions" to go to the jury.

The long-standing common law rule in Washington, and in virtually all American jurisdictions, is that "[d]amages must be supported by competent evidence in the record," and that evidence must afford a reasonable basis for estimating the loss, without subjecting the trier of fact to "mere speculation or conjecture." *Interlake Porsche & Audi, Inc. v. Bucholz*, 45 Wn. App. 502, 510, 728 P.2d 597 (1986). The trial court properly applied that fundamental rule here.

Prior to the second trial, the trial court considered motions *in limine* seeking to exclude evidence of certain elements of Fife Portal's claimed damages that were speculative projections of future costs and lacking foundation, including an unexplained line item for \$25,000 for what Fife Portal now calls "future contingent damages for unknown conditions." The trial court did not rule on the motion, and reserved judgment until it could be considered in the full context of all of Fife Portal's claimed damages during the trial and to see if the proper foundation could be laid to allow Humphrey to testify about this issue. RP 313-14.

When Mr. Humphrey offered his testimony, the court carefully reviewed the damages estimates he intended to present to the jury, line by line. It became apparent that many of the numbers were "seat of the pants" estimates, based on alleged conversations with various contractors and

engineers, or on Humphrey's "years of experience," while others were based on actual contractor bids or on work already performed and previously invoiced and/or paid. *Compare* CP 700-01; CP 692-93. The court allowed virtually all of the damages Humphrey had estimated and read from Exhibit 20, including many estimated future costs that were largely grounded in nothing more than Humphrey's claimed "experience and expertise." However, the court excluded the "unknown conditions" item, not only because it appeared to be arbitrary and speculative, but because so much of what Humphrey offered by way of damages already was comprised of rough estimates of future costs that might or might not actually be incurred – making it quite likely a separate claim for "unknown conditions" was mere double-dipping. As Judge Serko stated:

[T]here is at least one item that I'm not going to allow testimony on and that's unknown conditions. This -- *a lot of this is unknown conditions, frankly, in my book...*

(RP 719).

Judge Serko's evidentiary ruling, made in the context of all of the evidence presented during the course of the trial, including Humphrey's ever-changing, *ipse dixit* estimates of past and future costs, is reviewable only for an abuse of discretion. *Kappelman v. Lutz*, 167 Wn.2d 1, 5, 217 P.3d 286 (2009). Judge Serko did not abuse her discretion here.²⁰ Furthermore, this

²⁰ Judge Serko also issued her ruling knowing that the first trial had ended in a mistrial precisely because the underlying assumptions, methodology and damages estimates that Humphrey offered on behalf of Fife Portal always

Court will affirm the trial court's evidentiary rulings on any grounds supported by the record on review, *State v. Powell*, 126 Wn.2d 244, 259, 893 P.2d 615 (1995); and the record amply supports the trial court's exercise of judgment and discretion here.

While Fife Portal has cited a number of cases which purportedly show the trial court committed "an error of law" by excluding Humphrey's seat of the pants "unknown conditions" number from his rough-cut damages calculations, a more careful inspection of those cases merely proves the point that Judge Serko's evidentiary ruling was well-founded.

For example, unlike this case, *Flintkote Co. v. Lysford*, 246 F.2d 368, 392 (9th Cir.) was an antitrust case involving "intangible" damages, including the plaintiff's claim for future lost profits as a result of the defendants' antitrust violations. The Ninth Circuit observed the general rule, at common law, that damages must be proven with a reasonable degree of certainty. *Id.* at 391. However, the Ninth Circuit panel went on to observe that in the context of antitrust law, where damages for "intangible losses" like lost profits are at issue, federal courts had over time become more liberal in allowing proof of damages. *Id.* Yet despite the more liberal rule where intangible damages are at stake, the Ninth

seemed to be in flux, and that the only foundation offered for most of those claimed damages was Mr. Humphrey's seat of the pants analysis, based on his "vast experience." CP 672-73, 684, 685, 701. Indeed, Mr. Humphrey's damages calculations were still changing in the midst of the second trial – a matter Judge

Circuit held that the speculative testimony of the *Flintkote* plaintiffs themselves about the profits they expected to make in the future, absent the defendants' unfair competition, was too speculative to support their damages claim. The Ninth Circuit observed:

[E]ven where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork.

Flintkote, 246 F.2d at 394.

Fife Portal's damages, unlike the lost profits at issue in *Flintkote*, are the result of tangible damage to tangible property. The cost to repair that damage is not unusually difficult to determine with a reasonable degree of certainty and precision; and there was nothing in the record that showed the repair of the underground storm drain in the parking strip at the edge of the Fife Portal property was an extremely unusual affair, or that the "defendant by his own wrong prevented a more precise computation" of the cost of repair.

Fife Portal could have repaired the damage prior to trial, which took place years after the damage occurred, and then presented the invoices for the work to the jury. It could have obtained bids for the work from

Serko chose to tolerate and noted the defense could address in cross-examination. RP 717-718.

contractors, with the bids including whatever contingency for cost overruns and unknown conditions the contractors deemed necessary.²¹

However, the trial court was not required to allow Fife Portal to send the jury a laundry list of Humphrey's seat of the pants estimates of future repair costs, and then allow Humphrey to tack a speculative "fudge factor" on top of that, with no better explanation than "my years of experience." *Iipse dixit* is not an adequate foundation for an opinion from a layperson or an expert, and the "contingent future unknown conditions" line item was just that, an opinion. Judge Serko gave Fife Portal plenty of leeway here; but at this one, wholly arbitrary line item, the trial court drew the line. RP 725-727.

Like *Flintkote*, the decision in *Chandler v. Madsen*, 642 P.2d 1028 (Mont. 1982) addressed a very different situation. The plaintiffs in *Chandler* purchased a new home, only to discover it was rife with construction defects. Because of the extent of the damage, and the probability that substantial damage would be hidden behind drywall and elsewhere, a contractor's fixed price bid for the job included a substantial contingency. The defendant argued the contingency was excessive. However, the Montana court held the homeowner/plaintiff could rely on the contractor's firm bid for the work, since it reflected the actual cost the

²¹ And as Judge Serko observed, an allowance for "unknown conditions" appeared to be imbedded in the other somewhat speculative estimates Humphrey

plaintiff would pay to have the work completed – and unlike Humphrey’s “future contingent damages for unknown conditions” estimate, it wasn’t merely the plaintiffs’ *ipse dixit* opinion, it was an actual firm bid to repair the damage.

This case is not *Chandler* either. Fife Portal did not seek recovery based on a firm, fixed price bid for the job, but instead it presented an ever-changing mountain of seat of the pants estimates from Humphrey, and then asked the trial court to toss an additional seat of the pants “fudge factor” for “future contingent damages for unknown conditions” on top of the heap years after the damage occurred, after Humphrey allegedly had spent hundreds of hours “leading” the “investigation” and “restoration” of the damage, and after numerous engineers and contractors had performed investigations and repair work. There should have been few if any “unknowns” by that point.

Finally, far from supporting Fife Portal’s claim for “future contingent damages for unknown conditions,” the decision in *City of Alton v. Sharyland Water Supply Corp.*, 402 S.W.3d 867, 885 (Tex. App. 2013) merely confirms that Judge Serko properly exercised the trial court’s broad discretion in evidentiary matters.

In *Sharyland*, the Texas Court of Appeals applied the Texas rule that in matters involving restoration of damaged property or the remedy for

presented to the jury.

breach of a contract for construction of property improvements, the plaintiff has the burden of proving that its claimed restoration or construction costs are “reasonable and necessary.”²² The defendant challenged the sufficiency of the evidence to support two cost estimates, one a seat-of-the-pants estimate of past repair costs prepared by an employee of the plaintiff, Sharyland Water Supply based on ‘averages,’ rough estimates and his ‘experience’; the other the product of a detailed analysis performed by an expert, based on sound methodology and a detailed comparison of costs of comparable construction work in the same geographic area. The trial court allowed both elements of damage to go to the jury. In the *Sharyland* decision, the Texas Court of Appeals held the expert’s reasoned, detailed estimate of future costs was properly admitted, but the employee’s rough estimate was insufficient to support an award of damages.

Under the Texas rule applied in *Sharyland*, it would be unlikely that most of the damages Fife Portal was permitted to send to the jury would pass muster at all. Humphrey’s speculative opinion about “future contingent damages for unknown conditions” certainly would not.

²² Compare *First Cash Ltd. V. J-Q Parksdale, LLC*, 538 S.W.3d 189, 204 (Ct.App.Texas), (holding the “reasonable and necessary” standard applied in *Sharyland* did not apply to a claim for damages for breach of a lease contract).

The trial court properly exercised its discretion to exclude Humphrey's testimony concerning "future contingent damages for unknown conditions." This Court should affirm.

D. The trial court properly granted CenturyLink's motion for judgment as a matter of law to dismiss Fife Portal's direct negligence claims.

Granting a motion for judgment as a matter of law is appropriate when, viewing the evidence most favorable to the nonmoving party, it can be said as a matter of law that there is no competent and substantial evidence to support a verdict for the nonmoving party. *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 915, 33 P.3d 250 (2001). "Substantial evidence is said to exist if it is sufficient to persuade a fair-minded, rational person of the truth of the declared premise." *Brown v. Superior Underwriters*, 30 Wash.App. 303, 306, 632 P.2d 887 (1980). This appellate court will review a motion for judgment as a matter of law by applying the same standard as the trial court. *Guijosa*, 144 Wn.2d at 915.

In order for a plaintiff to recover on a negligence claim, it must "prove four basic elements: (1) the existence of a duty, (2) breach of that duty, (3) resulting injury, and (4) proximate cause." *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008) (internal citations omitted).

1. The trial court did not decide the question whether Fife Portal's cited statutes and ordinances imposed a duty of care on CenturyLink, and instead granted judgment as a

matter of law because there was no evidence a breach of any such duty was a proximate cause of Fife Portal's damage

Fife Portal provides an extensive review of the various alleged duties CenturyLink owed under City of Fife municipal ordinances and the trespass and Underground Utility statutes. Brief of Appellant at pp. 31-40. However, Judge Serko did not base the decision to dismiss the “direct negligence” claim against CenturyLink by finding it had no duties under the cited enactments. Instead, the court granted CenturyLink’s motion for judgment as a matter of law because it found that Fife Portal did not produce substantial evidence that a breach of any such duty was the proximate cause of its damages:

[A]ll along my concern has been the causation issue. That’s where I get hung up and I don’t believe that the plaintiff has shown causation.... Again, I feel like the negligence inferences is a closer call, but *I’ve been watching and listening for causation all along the evidence to convince me that there is a thread on causation and I have not heard it.*

RP 1012-13 (emphasis added).

Accordingly, the question whether CenturyLink owed Fife Portal a duty of care based on these ordinances and statutes was not decided or dispositive below; and this Court need not address the issue in order to affirm the dismissal of Fife Portal’s direct negligence claim. Even if the trial court had specifically found these provisions did not impose a duty on CenturyLink, the error would have been harmless in the absence of

sufficient proof of proximate cause to take the claim to the jury. *Brown v. Spokane County Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 196, 668 P.2d 571 (1983) (error does not require reversal unless it is prejudicial; and an error is not prejudicial unless it affects the outcome of the trial).

The lack of evidence of proximate cause, not the absence of a duty of care, was the basis of CenturyLink's motion for judgment as a matter of law at the close of the plaintiff's case-in-chief. The trial court granted the motion on that basis. CP 2251-2254.

"A proximate cause of an injury is defined as a cause, which, in a direct sequence, unbroken by any new, independent cause, produces the injury complained of and without which the injury would not have occurred." *Rounds v. Nellcor Puritan Bennett, Inc.*, 147 Wn. App. 155, 162, 194 P.3d 274 (2008). As the trial court correctly ruled, all three of Fife Portal's negligence theories – (1) that CenturyLink provided deficient drawings; (2) that CenturyLink did not properly supervise; and (3) that CenturyLink did not stake the property line – suffer from the same failure to present substantial, competent evidence that these acts or omissions by CenturyLink proximately caused any of the claimed damages.

As witness after witness testified, the damage at issue was caused by PUCI's failure to bore "*under the middle of the sidewalk*" as expressly

directed by the contract drawings. This was the sole “but for” proximate cause of the damage to Fife Portal’s property.

None of the eight alleged “breaches of duty” itemized in Fife Portal’s Brief at 42-43 was causally linked to the damage to Fife Portal’s storm drain.

Items one through three allege deficiencies in the engineering drawings CenturyLink gave PUCI. No set of drawings is perfect; and contractors know they are required to verify conditions in the field. RP 473-74; 510-11; Ex. 5. Moreover, these alleged deficiencies were irrelevant, because the unrefuted evidence showed that if PUCI had performed its boring under the sidewalk as directed, it would not have struck Fife Portal’s PVC plastic underground drain pipe and Fife Portal’s damages would not have occurred. RP 511.

Item four addresses CenturyLink’s alleged failure to survey the boundary lines; but again, had PUCI bored in the middle of the sidewalk, the damage at issue would not have happened and the work would have been performed in the City right of way as the contract, the drawings and the permit required.

Item five concerns CenturyLink’s plans showing that PUCI should perform borings to lay the conduit. Fife Portal did not offer substantial evidence that this was a proximate cause of their damages. The damage

was caused by the failure to bore under the middle of the sidewalk as the drawings unequivocally required.

Similarly, item six, CenturyLink's alleged failure to obtain an easement, was not a proximate cause of the damage. Fife Portal's damage was caused by the failure to bore under the middle of the sidewalk – and after the work stopped because of the damage to the drain pipe and water main, PUCI's work did not progress to the point where an easement for access to structures on Fife Portal property was required.

Item seven, CenturyLink's purported failure to visit the site during PUCI's work was not the proximate causes of the damage at issue. Again, had PUCI bored under the middle of the sidewalk, the damage *would not have occurred*.

Finally, item eight alleges that CenturyLink breached various provisions of the City of Fife municipal code, but once again, as the trial court observed, the evidence did not show that breach of any of the code provisions proximately caused the damage at issue.

Viewing all of the evidence as it came in at trial, the trial court properly concluded that reasonable minds could reach only one conclusion: this damage would not have occurred but for PUCI's decision to deviate from the drawings and the contract's unambiguous requirement that the boring and laying of conduit be performed *under the sidewalk*, a clear landmark that did not require a survey or a perfectly accurate site

drawing to completely avoid the damage that occurred during PUCI's work.

As a result, this Court should affirm the trial court's directed verdict on the direct negligence claim asserted against CenturyLink.

E. The trial court properly dismissed Fife Portal's "peculiar risk" vicarious liability claim against CenturyLink.

Washington courts have been guided by the RESTATEMENT (SECOND) OF TORTS when addressing the application of "peculiar risk" vicarious liability. *Stout v. Warren*, 176 Wn.2d 263, 272-73, 290 P.3d 972 (2012). Accordingly, a plaintiff seeking to impose this form of liability must establish that:

(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.

Id. at 273 (internal quotations and citations omitted). "Elements (3) and (4) ... are mixed questions of law and fact *because they involve circumstances that will vary from one case to the next, even given an identical activity.*" *Id.*

The *Stout* Court's observation that what is "inherently dangerous" will vary from case to case, and is fact dependent, is extremely important

here. Fife Portal attempted to argue that the boring method PUCI used is inherently improper because of the risk that the equipment may bore where the operator did not intend. But there is no evidence that is what occurred here. In fact, the evidence showed that if PUCI had bored where it was told, the damage to Fife Portal's property likely would not have occurred.

Furthermore, the harm "did not arise from the contractor's negligence with respect to the risk that is inherent in the activity," which, according to Fife Portal, is that the boring equipment will go where the operator does not intend and will strike underground objects the operator cannot know to be there. But here, to reiterate, the evidence showed that but for PUCI's failure to bore under the sidewalk, the damage to Fife Portal's underground pipe likely would not have occurred.

Furthermore, CenturyLink had no reason to anticipate that PUCI would deviate from the drawings and drill away from the sidewalk.

- 1. Use of boring equipment to lay underground conduit was not an inherently dangerous activity in this case**

While Fife Portal argues that the Missouri Court of Appeals decision in *J.J.'s Bar & Grill, Inc. v. Time Warner Cable Midwest, LLC*, 539 S.W.3d 849 (Mo. Ct. App. 2017) is "strikingly on all fours," it is anything *but* "on all fours" on its facts. Nor does that decision appear to be consistent with the Washington law set forth in *Stout*.

As an initial matter, peculiar risk liability in this state requires a showing that the work CenturyLink contracted PUCI to perform presented a “peculiar risk” of physical harm. *Stout*, 176 Wn.2d at 273. As *Stout* observed, whether the contracted work poses such a risk should be determined on a case by case basis. Here, the contract CenturyLink retained PUCI to perform directed PUCI to perform borings “under the middle of the sidewalk,” in the parking strip in a commercial zone. The work under the contract posed a *de minimis* risk of damage to persons or property if performed according to CenturyLink’s direction to bore “under the middle of the sidewalk”; and it certainly did not pose a palpable of risk of bodily injury or death, as was present in both *Stout* (a contract to apprehend violent criminals) and *J.J.’s Bar and Grill* (a contract that required boring to lay conduit in close proximity to pressurized gas lines with attendant risk of explosion).²³

²³ While Fife Portal cites *Sea Farms, Inc. v. Foster & Marshall Realty, Inc.*, 42 Wn. App. 308, 314, 711 P.2d 1049 (1985), a case involving extensive damage to a waterway as a result of dredging operations, there seems to be no other Washington case where a peculiar risk has been found that did not involve a risk of bodily harm; and the analysis in *Sea Farms* is not compelling here. *First*, the case predates the Supreme Court’s guidance in *Stout* by nearly three decades, and the reported decision contains no analysis of the elements of a peculiar risk under §427. *Second*, unlike CenturyLink and PUCI, it appears the defendant in *Sea Farms* failed to put on any evidence to show that the work it retained a contractor to perform did not pose a heightened risk if performed per the contract. In short, *Sea Farm* does not provide meaningful support for the argument that a remote risk of localized property damage in the performance of a contract to lay conduit can constitute a “peculiar risk” within the meaning of *Stout* and §427 under the facts presented here.

Unlike PUCI's contract here, the contract at issue in *J.J.'s Bar and Grill* required the contractor to perform borings and lay conduit in a "highly congested urban area." *Id.* 539 S.W.3d at 855. Unlike the contract here, the contract in *J.J.'s Bar and Grill* required the contractor to bore and lay conduit in close proximity to a pressurized gas line that was connected to nearby business premises open to the public, including the *J.J.'s* restaurant and bar. *Id.* As a result, the work posed a significant risk of explosion, injury and death, and in fact, the work in that case caused a massive gas explosion and fireball, which resulted in extensive property damage, bodily injury and death some distance away from the contractor's work site. *Id.* at 855. Here, there was no risk of such catastrophic damage, injury or death – our case involves localized damage to a PVC plastic stormwater drain pipe that never would have occurred if PUCI had just bored under the sidewalk per the plans.

J.J.'s Bar and Grill further holds that there must be substantial evidence that an activity entails a 'peculiar risk' before the issue will be for the jury. *Id.* at 858. Here, Fife Portal failed to meet its burden to produce 'substantial evidence' evidence to prove that the type of work, performed where it was being performed in this case, posed a peculiar risk of harm to property or persons if performed as the contract specified. And, as the Supreme Court held in *Stout*, the determination whether the performance of a particular contract entails a peculiar risk under

Restatement §427 is driven by the facts in each case, not an abstract analysis. The facts in *J.J.'s Bar and Grill* are light years away from the facts in the record here.

Unlike Washington, California has a well-developed body of law addressing the peculiar risk doctrine; and a representative sampling of the California decisions where the doctrine has been applied is in stark contrast to our case. Recognized “peculiar risks” have included the risk of injury from being struck by an automobile while working on lane markings on a busy street (*Van Arsdale v. Hollinger* (1968) 68 Cal. 2d 245, 66 Cal. Rptr. 20, 437 P. 2d 508), the risk of being run over by dump trucks backing up during road construction work (*Anderson v. L. C. Smith Construction Co.* (1969) 276 Cal. App. 2d 436, 81 Cal. Rptr. 73), the risk of explosion while painting the inside of a tank with volatile paint (*Woolen v. Aerojet General Corp.* (1962) 57 Cal. 2d 407, 20 Cal. Rptr. 12, 369 P. 2d 708), the risk of falling while working on a 10-foot high wall (*Morehouse v. Taubman* (1970) 5 Cal. App. 3d 548, 85 Cal. Rptr. 308) or on a 20-foot high bridge (*Fonseca v. County of Orange* (1972) 28 Cal. App. 3d 361, 104 Cal. Rptr. 566), the risk of electrocution while operating a crane near high voltage wires during bridge construction (*Walker v. Capistrano Saddle Club* (1970) 12 Cal. App. 3d 894, 90 Cal. Rptr. 912), and the risk of a cave-in while working at the bottom of a 14-foot deep

trench (*Widman v. Rossmoor Sanitation, Inc.* (1971) 19 Cal. App. 3d 734, 97 Cal. Rptr. 52).

The straightforward boring work the contract required PUCI to perform, under a sidewalk where there was virtually no risk of striking an underground utility, did not pose a ‘peculiar risk’ to property, much less to human life. Nor did it entail a ‘peculiar risk’ like the one in *J.J.’s Bar and Grill*, that is the risk of working in close proximity to a pressurized gas line in a densely populated area, which created a risk of explosion and grievous harm to persons as well as property over a wide area.²⁴ Nor is it the risk that was at issue in the cases cited as examples of peculiar risk in *J.J.’s Bar & Grill*, like the risk of bodily injury or death associated with the construction and maintenance of a bungee jumping facility, *Hatch v. V.P. Fair Foundation, Inc.*, 990 S.W.2d 126, 134 (Mo. App. E.D. 1999); and the risk of electrocution during construction of a high voltage

²⁴ See *Privette v. Superior Court*, 5 Cal. 4th 689, 695, 854 P.2d 721 (1993), as modified on denial of reh’g (Sept. 16, 1993). The *Privette* court noted that “[a] critical inquiry in determining the applicability of the doctrine of peculiar risk is whether the work for which the contractor was hired involves a risk that is ‘peculiar to the work to be done,’ **arising either from the nature or the location of the work.**” (Emphasis added). *Privette* involved a worker who was tasked to carry heavy buckets of hot tar up and down a ladder to work on a high roof, and was horribly burned when he slipped and was inundated with tar as a result. “The nature of the work” and “the location of the work” both created an inherent, “peculiar risk” of injury.

electrical system, *Ballinger v. Gascosage Elec. Co-op.*, 788 S.W.2d 506, 511 (Mo.1990).²⁵

Under the four-part test to establish a “peculiar risk” set forth in *Stout* and Restatement §427 – and on the record in this case – the work CenturyLink contracted with PUCI to perform did not constitute a peculiar risk.

2. CenturyLink did not know or have reason to know that PUCI would deviate from the drawings.

CenturyLink also is not vicariously liable under the peculiar risk doctrine because it did not know or have reason to know that PUCI would deviate from the drawings. A company who hires an independent contractor is entitled to reasonably assume that the independent contractor will carry out operative details of the work with proper care. RESTATEMENT (SECOND) OF TORTS § 427, cmt. d. PUCI’s decision to forgo boring “UNDER MIDDLE OF SIDEWALK,” and to bore south of the sidewalk instead, was an “operative detail” that CenturyLink was entitled to assume PUCI would perform with proper care simply by following the contract specification.

3. The harm did not arise from an inherent risk in performing boring operations, but from a collateral risk -- PUCI’s failure to do what CenturyLink retained it to do: bore and lay

²⁵ Overruled on unrelated grounds by *Zueck v. Oppenheimer Gateway Properties, Inc.*, 809 S.W.2d 384 (Mo.1991)).

conduit directly below the sidewalk, which posed little or no risk to persons or property.

CenturyLink also cannot be vicariously liable under the peculiar risk doctrine because the harm did not arise from any inherent risk of boring, but arose instead from PUCI's deviation from the contract specifications. "[T]he rule here stated [vicarious liability under the peculiar risk doctrine] **only** applies where 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." RESTATEMENT (SECOND) OF TORTS § 427, cmt. d.

It has no application where the negligence of the contractor **creates a new risk**, not inherent in the work itself or in the ordinary or prescribed way of doing it, and not reasonably contemplated by the employer.

Id. (emphasis added).

Here, Fife Portal failed to establish that the harm arose from the contractor's negligence with respect to the risk that it claims to be inherent in the activity. Fife Portal provided no evidence that this damage would have occurred had PUCI bored "UNDER MIDDLE OF THE SIDEWALK" as the contract required. The utility locates were called and facilities were properly marked with the understanding that PUCI would be boring under the sidewalk. The damage occurred because PUCI did not bore under the sidewalk. End of story.

The only “negligence of the contractor” was its decision to deviate from boring under the sidewalk and instead bore through the grass south of the sidewalk. That was not a “risk inherent in the activity or in the ordinary or prescribed way of doing it,” but instead it was a risk created precisely because PUCI did not follow “the prescribed way of doing it” in the contract. This created a “new risk” that had nothing to do with the allegedly “inherent risk” of the boring method – that the boring equipment could not be controlled when used around an underground pipe or other object. That risk did not exist if the boring had been performed where PUCI contracted to perform it, *under the middle of the sidewalk*.

4. The negligence for which PUCI was found liable prior to trial was collateral to the risk of doing the work.

Washington’s application of the RESTATEMENT is also crucial because it establishes that PUCI’s actions constitute *collateral negligence* for which CenturyLink is not vicariously liable. “Collateral negligence” is defined as “negligence collateral to the contemplated risk.” RESTATEMENT (SECOND) OF TORTS § 426 (1965). A company who hires an independent contractor to perform work is not liable for the collateral negligence of its independent contractor. *Id.* In other words, an employer of an independent contractor is “not required to contemplate or anticipate abnormal or unusual kinds of negligence on the part of the contractor, or negligence in the performance of operative details of the

work which ordinarily may be expected to be carried out with proper care.” *Id.* This concept and its applicability to the instant case is illustrated by a strikingly similar example from the RESTATEMENT. It provides:

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

RESTATEMENT (SECOND) OF TORTS § 427 (1965). Other jurisdictions are in accord. “Even when work performed by an independent contractor poses a special or peculiar risk of harm, however, the person who hired the contractor will not be liable for injury to others if the injury results from the contractor's “collateral” or “casual” negligence.” *Privette v. Superior Court*, 5 Cal. 4th 689, 696, 854 P.2d 721 (1993), citing *Aceves v. Regal Pale Brewing Co.*, *supra*, 24 Cal.3d at p. 510; Prosser, *supra*, § 71, at pp. 515-516; Rest. 2d Torts, § 426. “An independent contractor's negligence is collateral, we have said, when the negligence involves an “operative detail of the work, as distinguished from the general plan or method to be followed.” *Id.*

Here, CenturyLink hired PUCI, an independent contractor, to install conduit under a public sidewalk, much like (A) hired (B), an independent contractor, in the Restatement’s illustration, to excavate a sewer in a public street. As the trial court found, PUCI negligently bored on private

property by deciding to follow a different path than boring under the sidewalk, just as B negligently followed the wrong line in excavating and damaged the water main of C in the illustration.

PUCI's decision to deviate from the drawings that clearly state to bore under the middle of the sidewalk is the type of "unusual negligence" addressed by the RESTATEMENT; and CenturyLink was not required to anticipate that PUCI would violate the contract requirements. The law does not impose a duty on CenturyLink to *anticipate* such collateral negligence. *Id.* at § 426, cmt. b.

Just as A is not vicariously liable to C in the Restatement's illustrative paradigm, CenturyLink is not vicariously liable to plaintiffs for the collateral negligence of PUCI. This court should affirm the trial court's directed verdict in favor of CenturyLink.

F. The trial court properly dismissed Fife Portal's trespass vicarious liability claim against CenturyLink.

1. PUCI was required to verify the drawings in the field.

The drawings provided by CenturyLink have a number of "construction notes." Ex. 5. Among these notes are:

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.

13. The following footages are estimates, footages to be verified prior to construction.

Id. No set of drawings is perfect and contractors know they are required to verify conditions in the field RP 473-74; 510-11; Ex. 5. Thus, CenturyLink did not direct or have reason to know that PUCI was going to trespass because PUCI was undisputedly required to verify the footages and estimates in the field.

Moreover, the work that the contract scope of work allegedly required PUCI to perform on Fife Portal's property has precisely nothing to do with the damages at issue in this case and there is no evidence the work was ever performed. As discussed at length above, the sole proximate cause of Fife Portal's damages in this case was not the location of the bore pit or a connection to an electrical pedestal that did not even occur, it was the failure to bore under the middle of the sidewalk. Accordingly, the alleged directions of CenturyLink were required to be verified in the field, but were not, and these "directions" had nothing to do with the cause of the damage. Thus, CenturyLink had no reason to anticipate that PUCI would trespass; and it did not direct PUCI to do so on its behalf.

2. **Fife Portal's "trespass vicarious liability" claim failed because it was based on speculation about what could have occurred if the work had progressed – and it failed, like the other negligence claims, for want of substantial evidence of proximate cause.**

As Fife Portal now describes its “trespass vicarious liability” claim under *Restatement (Second) of Torts* § 427B in its Brief at 53-54, the claim was predicated on speculation piled on speculation, in a futile effort to bypass the same incontrovertible fact that doomed each variation on the negligence theme Fife Portal attempted to play: *PUCI would not have struck and damaged the underground storm drain if it had bored under the sidewalk as the contract drawings directed it to do.*

The claim also ignored the fact that PUCI’s work did not progress to the point at which PUCI allegedly would have trespassed in order to connect conduit to a pedestal or utility box on Fife Portal property because it struck the drain pipe and a water main, because it did not follow the contract drawings and drill under the sidewalk, and thus PUCI did not proceed to complete the scope of work that allegedly would have required PUCI to trespass on Fife Portal property somewhere along the way.²⁶ *See generally*, CP 2251-58, RP 1000-13.

Liability is not based on a trespass that might have occurred – it is based on a trespass, and resulting damage, that actually occurred. And what actually occurred was not proximately caused by the theoretical possibility that PUCI might have trespassed performing tasks under the contract it never performed.

G. The trial court properly dismissed Fife Portal's principal-agent vicarious liability claim against CenturyLink.

“Generally a principal is not vicariously liable for the acts of an independent contractor.” *Phillips v. Kaiser Aluminum & Chemical Corp.*, 74 Wn. App. 741, 749, 875 P.2d 1228 (1994). This general rule applies, so long as the principal does not retain control over the right to direct the work of the agent. *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 121, 52 P.3d 472 (2002). “An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other’s right to control with respect to his physical conduct in the performance of the undertaking.” *Afoa v. Port of Seattle*, 176 Wn.2d 460, 476, 296 P.3d 800 (2013) (internal quotations omitted). “The right to control is determined by factors such as the conduct of the parties, the contract between them, and the right of the principal to interfere in the independent contractor’s work.” *FutureSelect Portfolio Management, Inc. v. Tremont Group Holdings*, 175 Wn. App. 840, 879, 309 P.3d 555 (2013). Here, the Agreement and the conduct of the parties clearly demonstrate that no principal-agent relationship existed between CenturyLink and PUCI.

1. The Master Services Agreement between CenturyLink and PUCI established that the

²⁶ In oral argument on CenturyLink’s motions for judgment as a matter of law, Fife Portal’s counsel devoted no more than a few sentences to this tenuous liability theory. RP 1000-01.

companies were not engaged in a principal-agent relationship.

The Master Services Agreement between CenturyLink and PUCI expressly states that PUCI and its employees are independent contractors.

(a) Except as provided in subsection (b) below, **Supplier and Supplier Personnel are independent contractors for all purposes and at all times.** Supplier's core business includes servicing other customers and Supplier Personnel may be assigned to other customer as Supplier's business dictates. **Supplier has the responsibility for, and control over, the methods and details of performing Services. Supplier will provide all tools, materials, training, hiring, supervision, safety and work policies and procedures** (including training Supplier Personnel about CenturyLink's methods and procedures) and be responsible for the compensation, discipline and termination of Supplier Personnel. Supplier is responsible for the payment of all Supplier Personnel compensation. Neither Supplier nor Supplier Personnel have any authority to act on behalf of, or to bind CenturyLink to any obligation.

(b) Supplier Personnel will be at all times Supplier Employees and/or Supplier subcontractors. "Supplier Employees" means Suppliers W-2 employees, who perform services, act on Supplier's behalf or are paid by Supplier in connection with the Agreement. In any event, Supplier Personnel are not employees or joint employees of CenturyLink. Supplier Personnel are being furnished for discrete projects of limited duration or, if and as applicable, to supplement CenturyLink's regular work force on a temporary basis. Supplier Personnel are prohibited from representing themselves as CenturyLink employees.

Ex. 9. The Agreement does provide CenturyLink the right to inspect PUCI's work before it is complete, but this does not constitute a retention of the right to control PUCI's work. *Morris v. Vaagen Bros. Lumber,*

Inc., 130 Wn. App. 243, 251, 125 P.3d 141 (2005). As the contract expressly states:

CenturyLink may inspect Supplier's work before it is complete. Additionally, CenturyLink may maintain inspectors on the job site. CenturyLink's inspectors or other employees or agents of CenturyLink will have no authority to direct or advise Supplier or Supplier Personnel concerning the method or manner by which the work is to be performed Supplier has sole authority, responsibility, and control over the method and manner by which the work is to be performed and will remain in all respects an independent contractor.

Ex. 9. Accordingly, the Agreement clearly shows that CenturyLink does not retain a right to interfere with PUCI's work and that PUCI has the sole authority over the method and manner in which the work is performed. As such and as a matter of law, no principal-agent relationship between CenturyLink and PUCI existed.

2. The evidence of the parties' conduct established that PUCI acted as an independent contractor, not as CenturyLink's agent.

"The difference between an independent contractor and an employee is whether the employer can tell the worker how to do his or her job." *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 119, 52 P.3d 472 (2002). The testimony of CenturyLink's construction project administrator, Stephen Entrekin, further emphasizes that CenturyLink and PUCI were not engaged in a principal-agent relationship.

According to Mr. Entrekin, the closest involvement CenturyLink has with PUCI (or other contractors) during the contract work is to send an inspector to the job site. RP 814. The inspector will “drive by see that [the contractor is] there, and plus look at the setup to make sure they are doing it safely.” *Id.* By safely, Mr. Entrekin clarified that the inspector will look to see if traffic signs and cones are up. RP 823. Mr. Entrekin’s expectation was that his inspectors would not even get out of the car during these “very quick” “drive-by inspections.” *Id.* Sending an inspector to the job site does not constitute control over the work sufficient to render an independent contractor and “agent” of the contracting party. *Morris*, 130 Wn. App. at 251 (“Retention of the right to inspect and supervise to ensure proper completion of contractual duties does not create a retained control exception to the general rule.”). Mr. Entrekin’s testimony regarding the conduct of the parties clearly demonstrates CenturyLink did not retain any right to control the work performed by PUCI. PUCI co-owner Eric Kotulan confirmed Mr. Entrekin’s testimony. RP 540. He understood PUCI was an independent contractor, he understood PUCI was responsible for all safety measures, and he understood PUCI was responsible for the means and methods of completing their work at the Fife Portal site. *Id.* Accordingly, no principal-agent relationship existed as a matter of law.

The evidence at trial concerning the conduct of the parties and the contract between the parties established that PUCI is an independent contractor and that PUCI did not act as CenturyLink's agent. CenturyLink retained no right of control and or interfere with or direct the day to day work of PUCI. This court should affirm the trial court's judgment as a matter of law in favor of CenturyLink.

H. This court should not award attorney fees, but if it does, the amount should be determined by the trial court pending the outcome on remand.

If fees are awarded on appeal, the court should allow the trial court to determine the amount pending the outcome in the event of a remand. In support of its fee argument, Fife Portal relies on *Standing Rock Homeowners Ass'n v. Misich*, 106 Wn. App. 231, 23 P.3d 520 (2001). *Standing Rock*, however relied upon the case of *Ur-Rahman v. Changchun Dev., Ltd.*, 84 Wn. App. 569, 928 P.2d 1149 (1997). In *Ur-Rahman*, the court awarded fees, but cited RAP 18.1(i) and remanded the case to the trial court to determine the proper amount of the fee award. *Id.* at 576-77. This is the procedure this court should follow if fees are awarded in this case. Because the underlying PUCI judgment has been paid, Fife Portal would need to obtain an award on any claim that is remanded in order to trigger the prevailing party fee provisions of RCW 4.24.630 and Ch. 19.122 RCW. Further, the amount of reasonable fees for successful claims on the appeal, if awarded, would need to be determined by the trial

court because this amount would necessarily depend on what the jury awarded after trial on remand, and under which theory of recovery. Accordingly, if the Court awards fees in this appeal, the amount should be determined later by the trial court – only, of course, if the matter is remanded for a third trial to address Fife Portal’s additional claimed elements of damage.

V. CONCLUSION

PUCI damaged Fife Portal’s underground PVC plastic storm drain. A jury awarded damages. Fife Portal received a judgment for treble damages and fees. The judgment has been satisfied and Fife Portal been paid more than four times the reasonable restoration cost, with interest. CenturyLink has tendered back the *de minimis* award of attorney fees it obtained following the trial court’s dismissal of the claims against it; and waives recovery of that award – which can no longer serve as the pretext for an appeal of CenturyLink’s dismissal.

Fife Portal has been paid in full, no further damages are properly recoverable for its claim, and as a result, whether CenturyLink is concurrently liable for Fife Portal’s damage is a moot question this Court need not and should not consider. Any such error in that regard would be harmless error.

Furthermore, PUCI was an independent contractor. CenturyLink is not vicariously liable for the property damage that resulted from PUCI’s

trespass, all of which occurred because PUCI did not do the work in compliance with the direction to “bore under the sidewalk.” No alleged negligence was the proximate cause of that trespass and damage. Finally, the work CenturyLink retained PUCI to as not “inherently dangerous” and did not entail a “peculiar risk” that would render CenturyLink liable for the conduct of PUCI.

PUCI and CenturyLink therefore ask this Court to affirm the trial court’s judgment on the jury verdict; and to dismiss Fife Portal’s appeal.

Respectfully submitted this 26th day of July, 2019.

LEE SMART, P.S., INC.

By: 

Dirk J. Muse, WSBA No. 28911
Kyle J. Rekofke, WSBA No. 49327
Of Attorneys for CenturyLink and PUCI

WILSON SMITH COCHRAN DICKERSON

By: /s/ David M. Jacobi

David M. Jacobi, WSBA No. 13524
Of Attorneys for CenturyLink and PUCI

APPENDIX A

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Hon. Susan K. Serko

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

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

Plaintiffs,

vs.

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

Defendants.

No. 15-2-14644-6

DEFENDANT PACIFIC UTILITY CONTRACTORS, INC. NOTICE OF CROSS APPEAL TO THE COURT OF APPEALS, DIVISION II

Defendant Pacific Utility Contractors, Inc., by and through their counsel of record, seek review by the designated appellate court, Court of Appeals, Division II, of the (1) June 24, 2016 Order Granting Plaintiffs' Motion for Partial Summary Judgment Against Pacific Utility Contractors, Inc. (Appendix 1); (2) the July 26, 2016 Order Denying Defendant's Motion for Reconsideration of the Court's June 24, 2016 Order Granting Plaintiffs' Motion for Partial Summary Judgment Against Pacific Utility Contractors, Inc. (Appendix 2); (3) the March 30, 2018 Order Denying Defendants' Motion to Certify + Denying Motion to Clarify (Appendix 3); (4) the July 27, 2018 Order Granting Plaintiffs' Motion to Treble the Damages Awarded in the June 1, 2018 Jury Verdict (Appendix 4); (5) the Final Judgment against Pacific

1 Utility Contractors (entered on July 27, 2018 and corrected on August 6, 2018) (Appendix 5);
2 (6) the July 30, 2018 Order Granting in Part Plaintiffs' Motion for Fees and Costs
3 (Appendix 6), along with any prior ruling (written or oral) that prejudicially affects review of
4 any of the aforementioned orders and/or judgment.

5 DATED this 15th day of August, 2018.

6 LEE SMART, P.S., INC.

7
8
9 By: 

10 Dirk J. Muse, WSBA No. 28911
11 Kyle J. Rekofke, WSBA No. 49327
12 Of Attorneys for Defendant Pacific Utility
13 Contractors, Inc.

APPENDIX B

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Hon. Susan K. Serko

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

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

Plaintiffs,

vs.

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

Defendants.

No. 15-2-14644-6

NOTICE OF SUPERSEDEAS

Defendant Pacific Utility Contractors, Inc. hereby gives notice that the judgment entered against it on July 30, 2018 is superseded by bond. A copy of the superseadeas bond is attached as Appendix 1 to this notice and enforcement of the judgment shall be stayed pursuant to RAP 8.1(b)(1).

DATED this 16th day of August, 2018.

LEE SMART, P.S., INC.

By: 
Steven G. Wraith, WSBA No. 17364
Kyle J. Rekofke, WSBA No. 49327
Of Attorneys for Defendant Pacific Utility Contractors, Inc.

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Hon. Susan K. Serko

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

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,

No. 15-2-14644-6

SUPERSEDEAS BOND NO. 0154571

Plaintiffs,

vs.

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

Defendants.

KNOW ALL MEN BY THESE PRESENTS, that Pacific Utility Contractors, Inc., and Berkley Insurance Company, a corporation authorized to transact surety business in the state of Washington, as Surety, are held and firmly bound unto plaintiffs, Fife Portal, LLC; Fife Portal 140 Owners Association, LLC; and Z.V. Company, Inc. as obligees, in the just and maximum penal sum of One Million Fifty Five Thousand and 00/100 dollars (\$1,055,000.00), for which sum, well and truly to be paid, we bind ourselves, our and each of heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents; and

THE CONDITION OF THIS OBLIGATION, is such that WHEREAS, the

1 above-named plaintiffs in the above-entitled action and Court, recovered the judgment against
2 the above-named defendant Pacific Utility Contractors, Inc. for the sum of \$852,972.98; and

3 WHEREAS, defendant Pacific Utility Contractors, Inc. having filed a Notice of Appeal
4 to the Court of Appeals of the State of Washington, Division II, from a judgment entered in the
5 above-entitled action in the above-referenced Court in favor of plaintiffs Fife Portal, LLC; Fife
6 Portal 140 Owners Association, LLC; and Z.V. Company, Inc. on July 30, 2018; and

7 WHEREAS, defendant Pacific Utility Contractors, Inc. desires to stay enforcement of
8 the money judgment in favor of the plaintiffs by filing a supersedeas bond as provided by
9 Rule 8.1 of the Washington Rules of Appellate Procedure;

10 NOW, THEREFORE, in consideration of the premises and of such appeal the
11 undersigned Berkley Insurance Company, a corporation organized and existing under and by
12 virtue of the laws of the State of Delaware, and authorized to transact surety business in the
13 state of Washington, does hereby undertake and obligate itself, its successors and assigns to
14 plaintiff in the sum of One Million Fifty Five Thousand and 00/100 dollars (\$1,055,000.00),
15 this sum being the amount of the judgment in favor of plaintiffs, plus interest likely to accrue
16 during the pendency of the appeal and attorney fees, costs, and expenses likely to be awarded
17 on appeal, as required by Rule 8.1(c)(1) of the Washington Rules of Appellate Procedure.

18 The condition of this obligation is that Berkley Insurance Company, as surety for
19 defendant Pacific Utility Contractors, Inc., shall satisfy the judgment in full, together with costs
20 and interest, if the appeal is finally dismissed or if the judgment is affirmed or shall satisfy in
21 full such judgment as modified together with such costs, interest, and attorney fees as the Court
22 of Appeals may award. The obligation remains in full force and effect during any further
23 appeal taken from the Court of Appeals by either party to the Supreme Court. Such obligation
24 becomes due following issuance of mandate by the Court of Appeals, or if applicable, by
25

1 issuance of mandate by the Supreme Court, and the entry of any additional orders by the
2 Superior Court as may be required to effectuate the terms of the mandate.

3 The Supersedeas Bond, No. 0154571, is to remain in full force and effect and supersede
4 the judgment during all phases of appeal. If the court ruling is reversed and the judgment is
5 vacated after all phases of appeal, then this bond shall be null and void, but otherwise
6 shall remain in full force and effect.

7 IN WITNESS WHEREOF, the corporate seal and name of the surety is hereto affixed
8 and attested by Christopher Bowen, who declares under penalty of perjury under the laws of the
9 State of Washington that he/she is its duly authorized attorney-in-fact acting under an
10 unrevoked power of attorney.

11 DATED this 15th day of August, 2018.

12
13 PACIFIC UTILITY CONTRACTORS, INC.
(PRINCIPAL)

14
15 By: Steven G. Wraith
16 Steven G. Wraith, WSBA No. 17364
Attorney for Pacific Utility Contractors, Inc.

17 BERKLEY INSURANCE COMPANY
18 (SURETY)

19 By: Christopher Bowen
20 Christopher Bowen, Attorney-in-Fact

POWER OF ATTORNEY
BERKLEY INSURANCE COMPANY
WILMINGTON, DELAWARE

NOTICE: The warning found elsewhere in this Power of Attorney affects the validity thereof. Please review carefully.

KNOW ALL MEN BY THESE PRESENTS, that BERKLEY INSURANCE COMPANY (the "Company"), a corporation duly organized and existing under the laws of the State of Delaware, having its principal office in Greenwich, CT, has made, constituted and appointed, and does by these presents make, constitute and appoint: *Richard D. Jones; Pamela Berkland; Christopher Bowen; Lisa Simpson; Andrew Bergman; or Carol Miller of Berkley Surety Group of Urbandale, IA* its true and lawful Attorney-in-Fact, to sign its name as surety only as delineated below and to execute, seal, acknowledge and deliver any and all bonds and undertakings, with the exception of Financial Guaranty Insurance, providing that no single obligation shall exceed Fifty Million and 00/100 U.S. Dollars (U.S.\$50,000,000.00), to the same extent as if such bonds had been duly executed and acknowledged by the regularly elected officers of the Company at its principal office in their own proper persons.

This Power of Attorney shall be construed and enforced in accordance with, and governed by, the laws of the State of Delaware, without giving effect to the principles of conflicts of laws thereof. This Power of Attorney is granted pursuant to the following resolutions which were duly and validly adopted at a meeting of the Board of Directors of the Company held on January 25, 2010:

RESOLVED, that, with respect to the Surety business written by Berkley Surety Group, the Chairman of the Board, Chief Executive Officer, President or any Vice President of the Company, in conjunction with the Secretary or any Assistant Secretary are hereby authorized to execute powers of attorney authorizing and qualifying the attorney-in-fact named therein to execute bonds, undertakings, recognizances, or other suretyship obligations on behalf of the Company, and to affix the corporate seal of the Company to powers of attorney executed pursuant hereto; and said officers may remove any such attorney-in-fact and revoke any power of attorney previously granted; and further

RESOLVED, that such power of attorney limits the acts of those named therein to the bonds, undertakings, recognizances, or other suretyship obligations specifically named therein, and they have no authority to bind the Company except in the manner and to the extent therein stated; and further

RESOLVED, that such power of attorney revokes all previous powers issued on behalf of the attorney-in-fact named; and further

RESOLVED, that the signature of any authorized officer and the seal of the Company may be affixed by facsimile to any power of attorney or certification thereof authorizing the execution and delivery of any bond, undertaking, recognizance, or other suretyship obligation of the Company; and such signature and seal when so used shall have the same force and effect as though manually affixed. The Company may continue to use for the purposes herein stated the facsimile signature of any person or persons who shall have been such officer or officers of the Company, notwithstanding the fact that they may have ceased to be such at the time when such instruments shall be issued.

IN WITNESS WHEREOF, the Company has caused these presents to be signed and attested by its appropriate officers and its corporate seal hereunto affixed this 4th day of May, 2015.

Attest:

Berkley Insurance Company

(Seal)

By

Ira S. Lederman
Senior Vice President & Secretary

By

Jeffrey M. Hafter
Senior Vice President

WARNING: THIS POWER INVALID IF NOT PRINTED ON BLUE "BERKLEY" SECURITY PAPER.

STATE OF CONNECTICUT)

) ss:

COUNTY OF FAIRFIELD)

Sworn to before me, a Notary Public in the State of Connecticut, this 4th day of May, 2015, by Ira S. Lederman and Jeffrey M. Hafter who are sworn to me to be the Senior Vice President and Secretary, and the Senior Vice President, respectively, of Berkley Insurance Company.

MARIA C. RUNDBAKEN
NOTARY PUBLIC
MY COMMISSION EXPIRES
APRIL 30, 2019

Maria C. Rundbaken
Notary Public, State of Connecticut

CERTIFICATE

I, the undersigned, Assistant Secretary of BERKLEY INSURANCE COMPANY, DO HEREBY CERTIFY that the foregoing is a true, correct and complete copy of the original Power of Attorney; that said Power of Attorney has not been revoked or rescinded and that the authority of the Attorney-in-Fact set forth therein, who executed the bond or undertaking to which this Power of Attorney is attached, is in full force and effect as of this date.

Given under my hand and seal of the Company, this 15th day of August, 2018.

(Seal)

Andrew M. Tuma

WARNING - Any unauthorized reproduction or alteration of this document is prohibited. This power of attorney is void unless seals are readable and the certification seal at the bottom is embossed. The background imprint, warning and verification instructions (on reverse) must be in blue ink.

APPENDIX C

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Hon. Gretchen Leanderson

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

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

Plaintiffs,

vs.

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

Defendants.

No. 15-2-14644-6

DECLARATION OF RECORDS CUSTODIAN

UTILITY NOTIFICATION CENTER

I, Greg Snyder, state under penalty of perjury under the laws of the state of

Oregon that the following is true and correct to the best of my knowledge:

1. What is your name and business address?

ANSWER: Greg Snyder
305 NE 102nd Ave.
Suite 300
Portland, OR 97220

1
2 2. Please produce all records evidencing subscriptions or registrations with the State
3 of Washington's One-Call Utility Notification Service, currently or on September 21, 2015, as to
4 any of the following people or entities.

5 a. Fife Portal, LLC

6 ANSWER:

7 b. Fife Portal 140 Owners Association, LLC

8 ANSWER:

9 c. Z.V. Company, Inc.

10 ANSWER:

11 d. George Humphrey

12 ANSWER: I could not find any records indicating any
13 of the people or entities listed above were registered with
14 the State of Washington's One Call Utility Notification Service.

15 3. Are the attached records, if any, ALL of your records requested in the

16 SUBPOENA dated March 31, 2016?

17 ANSWER: No attached records as no records found.

18 4. Were these records which you have produced and which are attached here made,
19 kept and maintained in the usual and normal course of business?

20 ANSWER: No records found to attach.

21
22
23 5. If photocopies have been made of the original records, were such copies made
24 under your direction and control, and are they true and correct copies of such records?

25 ~~No photocopies made.~~

DECLARATION OF RECORDS CUSTODIAN - 2
5887986.doc

LBB • SMART

P.S., Inc. • Pacific Northwest Law Offices

1800 One Convention Place • 701 Pike Street • Seattle • WA • 98101-3929
Tel. 206.624.7990 • Toll Free 877.624.7990 • Fax 206.624.5944

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ANSWER: No photocopies made

6. Have any changes or alterations been made in these records since the date of origination?

ANSWER: No

DATED this 6th day of March, 2016, at _____ (location).

Greg Snyder
Signature

General Manager
Title

Greg Snyder
Print name

APPENDIX D

Honorable Susan K. Serko
July 26, 2019 at 9 a.m.
With Oral Argument



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

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

Plaintiffs,

vs.

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

Defendants.

NO. 15-2-14644-6

ORDER REGARDING REQUEST FOR SATISFACTION OF JUDGMENT AND EXONERATION OF BOND;

~~ORDER STRIKING PORTIONS OF BRIEF & DECLARATION~~

ORDER OF DISBURSAL

(Clerk's Action Required)

I. CLERK'S ACTION

From funds deposited in the registry of the court for this case, disburse as follows:

Payee: Bauman & Wolf, PLLC IOLTA Account
Amount: \$906,301.26 less any applicable disbursement fees
Address: Bradley S. Wolf
Bauman & Wolf, PLLC
811 First Avenue, Suite 350
Seattle, WA 98104

PLAINTIFFS' MEMORANDUM OPPOSING THE MOTIONS TO ENTER SATISFACTION OF JUDGMENT AND TO EXONERATE BOND - 1

Bauman & Wolf, PLLC
811 First Avenue, Suite 350
Seattle, Washington 98104
Phone: (206) 264-4577

1 The clerk is further directed to enter the following satisfaction of judgment with respect
2 to the judgment dated ~~8/6/18~~ **7/27/2018 as amended 8/6/2018** (None Pro
3 to
4 7/27/2018)

3 [] Make no entry

4 [] Recognize a partial satisfaction of judgment in the amount of \$906,301.26 as of
5 7/26/19

6 Recognize a full satisfaction of judgment

7 **ORDERS**

8 This matter came on before the above entitled court on the motion of the Defendants for
9 an order satisfying the judgment rendered against them, and for an order exonerating their
10 supersedeas bond. It also came on the cross motion of the Plaintiffs, to shorten time in order
11 that the court could consider their Motion for Disbursal of Funds, for an Order to Disburse
12 Funds, for an Order striking portions of the Defendants' Declarations and Briefs, and for an
13 Order requiring the parties to mutually attempt to coordinate all future hearing dates and times
14 before unilaterally scheduling them.

15 The court considered the evidence adduced by the Defendants, including the
16 Declarations of Kyle Rekofke, and the evidence adduced by the Plaintiffs, including the
17 Declaration of Bradley S. Wolf.

18 **II. ORDER ON MOTION TO SHORTEN TIME**

19 Plaintiffs' Motion to Shorten Time is granted, without opposition.

20 **III. ORDER OF DISBURSAL**

21 The Plaintiffs' Motion to Disburse Funds is granted, ~~with opposition~~. The clerk is
22 ordered to disburse funds from the registry of the court, as set forth above in the Clerk's Action
23 Section of this Order.
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PLAINTIFFS' MEMORANDUM OPPOSING THE
MOTIONS TO ENTER SATISFACTION OF JUDGMENT
AND TO EXONERATE BOND - 2

Bauman & Wolf, PLLC
811 First Avenue, Suite 350
Seattle, Washington 98104
Phone: (206) 264-4577

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IV. ORDER ON MOTION TO STRIKE

Finding that the various communications between counsel prior to the deposit of funds is not relevant, and is protected settlement communications under ER 408, the following page and lines of the Defendants' Declarations and Briefs are stricken, and will not be considered by the court:

Declaration of Kyle J. Rekofke in Support of Motion to Discharge Supersedeas Bond

¶4, ¶5, ¶6

Defendants' Motion to Discharge Supersedeas Bond

Pg. 2, Lines 1-5

Pg. 2, Lines 22 – Page 3, Line 5

Declaration of Kyle J. Rekofke in Support of Motion to Satisfy Judgment

¶2 – 7

Exhibits 1-4

Motion to Satisfy Judgment

Page 2, Lines 1-13

Page 2, Line 24 starting "On June 7" – Page 3 Line ending "judgment lien"

Page 4, Line 13 starting "Defendants are aware" – Page 14, Line 17.

Defendant's Reply in Support of their Motion for Entry of Satisfaction of Judgment

Page 1, Lines 20 – Page 2, Line 3.

Page 3, Line 1 -7

Declaration of Kyle J. Rekofke, Dated July 24, 2019

Stricken in its entirety.

[Handwritten signature]
[Handwritten initials: BW, DM]

1 **V. ORDER CONCERNING SCHEDULING OF HEARINGS**

2 It is hereby Ordered that the attorneys in this case shall, in good faith, consult each-other
3 in advance of setting hearings, in order to avoid scheduling conflicts.
4

JWS
BW
DM

5 **VI. ORDER CONCERNING REQUEST FOR SATISFACTION OF JUDGMENT**

6 It is hereby ordered that:

7 (Alternatively)

8
9 The application of the above disbursal to the judgment, dated 8/6/18, or to such
10 costs and fees as may be awarded on appeal, is deferred until after a mandate has been
11 issued by the Court; or

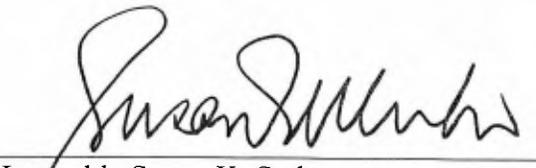
12 The court recognizes and hereby directs that a partial satisfaction of judgment
13 dated 8/6/18, in the amount of \$906,301.26, shall be entered as of 7/26/19, by the clerk;

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16 The court recognizes and hereby directs that a full satisfaction of the judgment
17 dated ~~8/6/18~~ *7/27/19*, be entered by the clerk. This is based on Defendant

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1 DATED: 7/26/2019

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5 Honorable Susan K. Serko
6 Superior Court Judge

7 PRESENTED BY:

8 BAUMAN & WOLF, PLLC

9
10 By: /s/ Bradley S. Wolf

11 Bradley S. Wolf, WSBA #21252
12 Christine L. Becia, WSBA #26410
13 Attorneys for Plaintiffs,
14 Fife Portal, LLC, and Fife Portal 140
15 Owners Association, LLC
16 Bauman & Wolf, PLLC
17 811 First Avenue, Suite 350
18 Seattle, WA 98104
19 Telephone: (206) 264-4577
20 Email: bwolf@wolflaw.us;
21 cbecia@wolflaw.us

18 
19 Attorney for Defendant



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PLAINTIFFS' MEMORANDUM OPPOSING THE
MOTIONS TO ENTER SATISFACTION OF JUDGMENT
AND TO EXONERATE BOND - 5

Bauman & Wolf, PLLC
811 First Avenue, Suite 350
Seattle, Washington 98104
Phone: (206) 264-4577

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July 26, 2019 - 4:36 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

The following documents have been uploaded:

- 524155_Briefs_20190726163530D2961237_9309.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Fife Portal -- Respondents brief.PDF

A copy of the uploaded files will be sent to:

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- dstrasser@lawandresolution.com
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- jay@wscd.com
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