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COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

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FIFE PORTAL LLC, *et al.*,
Plaintiffs/Respondents

v.

ERIC L. KOTULAN, *et al.*,
Defendants/Petitioners

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***BRIEF OF APPELLANTS ERIC L. KOTULAN, ET AL.***

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Pierce County Superior Court Cause No. 18-2-11920-6
The Honorable Edmund Murphy

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## *I. INTRODUCTION*

The Appellants, Eric Kotulan, *et al.,* ("the Employees") are owners and/or employees of Pacific Utility Contractors, Inc. ("PUCI"). In October 2015, PUCI was an independent contractor performing work for CenturyLink, Inc. ("CenturyLink"). PUCI was boring a trench to lay telecommunications conduit, working in a parking strip at the perimeter of a business park that belongs to Fife Portal, LLC ("Fife Portal" or "FP"). PUCI's workers struck and damaged FP's underground plastic stormwater drain pipe and a City of Fife water main.

FP sued PUCI and CenturyLink for the damage. (CP 34-37). A Pierce County jury awarded FP $195.074.79 in damages, comprised of itemized costs to restore the damaged property. (CP 53-54). The trial court awarded treble damages and attorney fees under the Washington trespass statute (RCW 4.24.630) and the "Underground Utilities Damages Prevention Act" (ch. 19.122 RCW); and entered a final money judgment against PUCI for $852,972.98. (CP 39-42, 56-57).

Following the trial, PUCI offered to pay the judgment in full to bring this litigation to an end. (RP 4/12/2019 at 15-16). FP instead commenced an appeal, asking this Court to affirm the money judgment against PUCI *and* to remand for another trial, in which it would seek additional money damages from PUCI and CenturyLink for the same property damage ("Fife Portal I").

(CP 59-60).[1] PUCI cross-appealed and posted a bond for over $1 million to secure the judgment. (CP 62-63, 67-70).

FP then sued the Employees, seeking a judgment against them for the same work they performed for PUCI, that resulted in the same damage, for which FP already had obtained a final judgment of over $850,000 against PUCI – at that time fully secured by a bond for over $1 million. (CP 1-12).[2]

On summary judgment, the Employees asked the trial court to dismiss FP's lawsuit against them on *res judicata* grounds. (CP 13-27). The trial court declined to do so. (CP 132-34). This Court granted discretionary review, finding the trial court committed obvious error that renders further proceedings useless within the meaning of RAP 2.3(b)(1) ("Fife Portal II").[3]

Consistent with the Commissioner's ruling, this Court should reverse the trial court; and free the Employees from further repetitive, piecemeal, vexatious litigation arising out of the manual labor they performed during their employment with PUCI in the autumn of 2015.

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[1] In Fife Portal I, FP asked the Court to reverse the trial court order granting judgment as a matter of law dismissing CenturyLink; and to remand so FP may seek additional, treble damages from CenturyLink and PUCI for time FP principal George Humphrey logged in connection with the claim, and for "future contingent unknown conditions." (No. 52415-5-II, Brief of Appellant at 1-6).

[2] PUCI subsequently paid the judgment in full, including all accrued interest; and withdrew its cross-appeal before submitting its opening brief. (App. 4, ftn. 2; App. 16-20). After PUCI paid the judgment against it, FP argued for the first time, in its reply brief in Fife Portal I, that it now should be entitled to seek a duplicate award of "punitive damages" against CenturyLink for the same property damage encompassed in the treble damages judgment that PUCI has already paid in full. (No. 52415-5-II, Appellants' Reply Brief at 1-14).

[3] CP 135-40; App. 1-9.

## *II. ASSIGNMENTS OF ERROR*

The Employees assign error to the trial court's order denying their motion for summary judgment on grounds of claim preclusion (*res judicata*) and related doctrines. (CP 132-34).

## *III. ISSUES RELATED TO ASSIGNMENTS OF ERROR*

Whether the trial court committed an error of law by failing to grant the Employees' motion for summary judgment, which asked the trial court to find that this second lawsuit constitutes claim-splitting prohibited under Washington law and should be barred, as a matter of law, by the doctrine of *res judicata.*

## *IV. STATEMENT OF THE CASE*

### *A. In the prior litigation, and on summary judgment, PUCI was found in violation of the Washington trespass statute and the "Underground Utilities Damage Prevention Act."*

In the original action that FP commenced in December 2015, the trial court found prior to trial, on FP's motion for partial summary judgment, that the actions of PUCI and its employees who worked on the project, to install telecommunications conduit under contract with CenturyLink, constituted willful violations of ch. 19.122 RCW, the "Underground Utilities Damages Prevention Act"; as well as intentional trespass under RCW 4.24.630. (CP 39-42).

As a result of the court's pretrial summary judgment order, the "intent" of PUCI and its crew working in the field was decided before trial and before FP presented its case in chief to the jury. As to PUCI, FP's entitlement to treble damages and other remedies available under RCW 4.24.630 and ch. 19.122

RCW also was established prior to trial.[4] The trial addressed FP's claimed damages; as well as FP's claims that CenturyLink was either vicariously liable for the damages that resulted from the conduct of PUCI and its workers in the field, or that CenturyLink's alleged independent negligence was a proximate cause of FP's damages.[5]

The trial court dismissed CenturyLink as a matter of law before the case went to the jury. (CP 48-51). The damages case against PUCI did go to the jury, which found FP's actual damages to be $195,074.79. Pursuant to the court's pretrial summary judgment order, the court trebled the jury's award of damages; and FP also obtained an award of attorney fees as the prevailing party. In all, FP obtained a judgment for $852,972.98, including over $267,000 in attorney fees, with interest running at 7% per annum from the date of entry of judgment. (CP 53-54, CP 56-57).

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[4] FP has argued that a second lawsuit against the Employees was justified because it was unable to present its "intent" case to the jury – the issue already having been decided on its own pretrial motion for summary judgment. (*See, e.g.*, CP 85-87, CP 93-94). However, in its appeal in the first lawsuit, FP did not assign error to the trial court's order *in limine* to bar "relitigation of issues [of intent] already decided" on FP's motion for partial summary judgment. (No. 52415-5-II, Appellants' Opening Brief at 2-3; CP 108-109).

[5] FP's claims against PUCI and CenturyLink first went to trial in May 2017 – after FP had well over a year to perform discovery and to formulate its damages claims. The first trial ended in a mistrial as a result of FP's misconduct. (CP 44-46). The second trial commenced in May 2018. (No. 52415-5-II, RP 262. et seq.)

### *B. The second lawsuit against the PUCI employees seeks the same damages, arising out of the same work, performed by the same PUCI employees, under the same contract with CenturyLink.*

After obtaining a judgment for over $850,000, including treble damages and fees; after being offered full payment for the judgment and declining the offer; and after filing an appeal seeking additional damages from PUCI and CenturyLink – FP filed a new lawsuit, yet again alleging that in performing its work, PUCI and its employees intentionally trespassed on its property, damaged its underground stormwater drain system and caused other property damage. (CP 1-9 (2018 Complaint); *compare* CP 34-37 (2015 Complaint)).

FP admitted that it may not obtain double recovery for the same dam age and conceded that it may not be awarded more in damages in the second lawsuit than the amount of the judgment in the first lawsuit. (CP 84-85). Yet FP has argued that this second lawsuit is permissible and necessary, in large part because it must perform additional discovery to determine the "state of mind" of each of the Employees when they were performing their work; and that its claims hinge on "the mental state of each individual Defendant," each of whom allegedly committed "*ipso facto* **different** torts." (CP 90) (emphasis in original). FP further argued that it must be permitted to pursue the Employees because PUCI has ceased doing business; and FP thus may be left without a way to collect the prior judgment from PUCI. (CP 78-81).[6]

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[6] This argument was disingenuous, to say the least. Over the course of two months, PUCI repeatedly tendered payment of the judgment in full; and FP repeatedly rejected the payment. *See, e.g.,* Petitioners' Motion to Continue, 6/25/2019

None of these motives can circumvent the *res judicata* bar against a second round of litigation of the very same property damage claims that already have been reduced to final judgment; and both putative motives are contrary to the factual record in any event. FP need not prove the "state of mind" of each PUCI employee to obtain a treble damages award: "intent" triggering treble damages was established in the prior action, before the case went to trial, and FP already has a money judgment including trebled damages and attorney fees predicated on "intent." (CP 39-42, CP 56-57).[7] The judgment, including treble damages, interest and anticipated attorney fees, was fully secured when FP sued the Employees (CP 65-70); and has since been paid and satisfied in full. (App. 16-20).

As for FP's assertion that it must sue the individual Employees because PUCI's insurer has denied coverage – that, bluntly stated, was a flagrant misrepresentation, and has since been proven so.

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(documenting FP's repeated refusal to accept tender of payment, objection to entry of satisfaction of judgment and release of bond, and demands for delay for convenience of counsel Wolf and FP principal Humphrey). In any event, at this point, this justification for suit against the Employees should be moot – despite FP's repeated rejection of PUCI's payment of the judgment, the judgment has been satisfied; the bond has been released; and FP's objections to the trial court order granting full satisfaction of the judgment and release of the bond have been rejected by this Court and/or waived. (App. 13-28).

[7] In its own appeal, FP submitted an opening brief of 85 pages, which includes an extraordinarily lengthy Statement of the Case, asserting that the evidence in the prior action proved that both PUCI and CenturyLink intentionally damaged FP's property. (See Opening Brief of Appellant in No. 52415-5-II at 7 - 30). The assertion that suit against the Employees was necessary to establish their "intent" and "state of mind" was and remains meritless and directly contrary to the record.

This case involves a straightforward property damage claim. PUCI was laying underground conduit as an independent contractor for CenturyLink. The corporate entity PUCI does not dig trenches – perforce its employees (and owners) do the work. The PUCI employees struck and damaged FP's underground stormwater drain pipe and a City of Fife water main while performing the work CenturyLink retained PUCI to do. Not complex.

FP sued PUCI and obtained a large money judgment as a result of that property damage, including a treble damages award – already far in excess of the amount required to compensate FP for the actual damage to its property. (CP 53-54, CP 56-57). The treble damages and fee awards were predicated on a finding that PUCI's workers acted with intent within the meaning of the trespass statute and the Underground Utilities Damage Prevention statute. (CP 39-42).

FP could have been paid in full shortly after trial. Instead, FP has taken that judgment on appeal in No. 52415-5-II – seeking still more money and hoping to drag CenturyLink back into the never-ending litigation as well. (CP 59-60).

A second lawsuit seeking damages for the very same property damage, against employees acting at all times in privity with PUCI, to establish each employee's "state of mind," and to collect the fully secured judgment (and now fully satisfied) judgment against PUCI is not required to protect FP's rights under the common law, under the trespass and Underground Utilities statutes, or any other legal theory FP may formulate as grounds for an award of damages

for the injury to its real property and improvements that occurred as a result of the trenching work PUCI performed in October 2015.

## *V. ARGUMENT AND AUTHORITIES*

### *A. The trial court committed an error of law by failing to apply Washington's clear and controlling law of res judicata to bar this suit against the Employees, which sought to recover the same monetary damages already awarded to FP in a fully secured, final and appealable judgment in the prior lawsuit against PUCI – a judgment that has now been satisfied in full.*

Whether *res judicata* bars FP's lawsuit against the Employees is a question of law this Court reviews *de novo.*[8] *Res judicata* is a doctrine of claim preclusion that bars relitigation of a claim that has been determined by a final judgment. Filing two separate lawsuits based on the same event is precluded under Washington law.[9] "*Res judicata* applies to matters that were actually litigated and those that 'could have been raised, and in the exercise of reasonable diligence should have been raised, in the prior proceeding.'"[10]

Our courts invoke the doctrine of *res judicata* to prevent piecemeal litigation and to ensure the finality of judgments.[11] The doctrine of *res*

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[8] *Ensley v. Pitcher*, 152 Wn. App. 891, 899, 222 P.3d 99 (2009), *rev. denied*, 168 Wn.2d 1028 (2010).

[9] *Ensley,* 152 Wn. App. at 898-99.

[10] *DeYoung v. Cenex Ltd.,* 100 Wn. App. 885, 891-92, 1 P.3d 587 (2000) (quoting *Kelly-Hansen v. Kelly-Hansen*, 87 Wn. App. 320, 328-29, 941 P.2d 1108 (1997)), *rev. denied,* 146 Wn.2d 1016 (2002); *see also, Leigh v. Dep't of Labor & Indus.*, 2020 Wash. App. LEXIS 143, *8 ("Generally, *res judicata* bars the relitigation of claims that were litigated, *might* have been litigated, or *should* have been litigated in a prior action").

[11] *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 99, 117 P.3d 1117 (2005).

*judicata* further promotes judicial economy, efficiency, and fairness to litigants.

The threshold requirement of *res judicata* is a valid and final judgment on the merits in a prior suit.[12] The final and appealable money judgment against PUCI, entered on the jury's verdict after trial, is just such a final judgment on the merits. The filing of Fife Portal's appeal did not suspend or negate the finality and preclusive effect of the final judgment entered against PUCI after a trial.[13]

Under Washington law, the *res judicata* doctrine bars successive lawsuits where the first and second actions are similar or identical in four respects: (1) persons and parties; (2) causes of action; (3) subject matter; and (4) the quality of the persons for or against whom the claim is made.[14] All four criteria for barring successive lawsuits under the *res judicata* doctrine squarely apply here.

*Persons or parties:* Different defendants in separate lawsuits are the same party for *res judicata* purposes so long as they are parties in privity.[15]

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[12] *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 865, 93 P.3d 108 (2004).

[13] *Gausvik v. Abbey*, 126 Wn.App. 868, 884, 107 P.3d 98, 107 (2005); citing *Nielson by and through Nielson v. Spanaway Gen. Med. Clinic, Inc.,* 135 Wn.2d 255, 956 P.2d 312 (1998).

[14] *Ensley*, 152 Wn.App. at 902.

[15] *Kuhlman v. Thomas*, 78 Wn.App. 115, 121, 897 P.2d 365 (1995).

As employees of PUCI, the Employees are in privity with PUCI as a matter of law.[16]

*Causes of action:* This element of *res judicata* scarcely requires detailed analysis in this case. In the 2015 lawsuit, FP sued PUCI and CenturyLink for negligence and intentional trespass. (CP 34-37). FP obtained a summary judgment ruling that PUCI committed intentional trespass within the meaning of RCW 4.24.630 and violated ch 19.122 RCW. (CP 39-42). At trial, FP put on evidence of the damages resulting from that conduct. Under the statutes, the trial court trebled the jury's award of damages for the cost to restore FP's property and awarded attorney fees. (CP 52-57). In this copycat lawsuit, FP similarly alleges causes of action for negligence and trespass under RCW 4.24.630 against the Employees (CP 1-9); and in opposition to the Employees' motion for summary judgment, assured the trial court that it is merely seeking to collect from the Employees the damages that were already awarded against PUCI in the prior litigation. (CP 82-85). The applicability of the *res judicata* bar here should not be controversial.

Nevertheless, FP has insisted on pursuing the Employees and has thus far been permitted to do so with the aid of the trial court's erroneous denial of their motion for summary judgment; and its subsequent refusal to consider dismissal of the suit following satisfaction of the prior judgment against their employer PUCI.

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[16] *Emeson v. Dep't of Corrections*, 194 Wn.App. 617, 626, 376 P.3d 430 (2016). citing *Kuhlman*, 78 Wn.App. at 121.

Under the circumstances, we resort to four factors that Washington courts have propounded for determining whether the "causes of action" in two lawsuits are identical or sufficiently similar to support application of *res judicata* to bar successive litigation.[17] FP told the trial court those factors point to different "causes of action" between the 2015 and 2018 lawsuits; but FP was wrong on the facts and the law.

*First,* FP argued below that the causes of action in the two lawsuits are different; because it pursued additional theories of recovery against PUCI and CenturyLink in the first action, seeking to establish liability under the Underground Utilities Damage Prevent statute, ch. 19.122 RCW, and under various municipal ordinances not addressed in the second suit. (CP 87-89). However, Washington law is clear that pursuing the same damages, arising out of the same events, but under different legal theories, does not create separate "causes of action" for the purposes of *res judicata.*[18] FP's argument to the contrary has no merit.

*Second,* FP similarly argued that for purposes of *res judicata,* the case against the Employees does not involve "infringement of the same right" as

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[17] The four factors, not all of which must be shown to bar a second suit on res judicata grounds, are (1) whether the rights established in the prior judgment would be destroyed or impaired in the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of "the same transactional nucleus of facts." *Kuhlman,* 78 Wn. App. at 122, citing *Rains v. State*, 100 Wn.2d 660, 664, 674 P.2d 165 (1983). See also, *Ensley*, 152 Wn.App. at 903 (all four factors need not be present to bar the second lawsuit).

[18] *Kelly–Hansen*, 87 Wn.App. at 331 (compiling Washington Supreme Court cases).

the first lawsuit did, because unlike the suit against the Employees, the prior lawsuit also addressed the duty to locate and avoid damage to underground utilities under ch. 19.122 RCW and the Fife Municipal Code. (CP 87-89).[19] Yet again, this is a distinction without a difference. No matter what the legal theory, the two suits seek the same money damages for the same physical damage to FP's property, based on infringement of FP's rights as a private property owner. No matter what the theory, the rights and remedies addressed in the two lawsuits are identical.

*Third,* FP argued that the two suits do not involve "the same nucleus of facts" because, purportedly unlike the first lawsuit against PUCI, the second lawsuit has placed the "individual mental state" of each of the Employees at issue. (CP 89-90). Yet again, this ignores the fact that the trial court in the suit against PUCI found, on summary judgment, that in the course of their work to install underground conduit, the PUCI employees working on site committed "intentional trespass in violation of the State's trespass statute RCW 4.24.630." Once again, the two lawsuits also involve the same events – the work PUCI, acting through the owner/employees named as defendants in this second action, performed under contract with CenturyLink to dig and install underground conduit – and the same resulting property damage.

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[19] Having relied on this argument to avoid summary judgment, FP later told the trial court it would amend its complaint to add a claim against the Employees under ch. 19.122 RCW, as well as additional damages predicated on alleged inflation of repair costs after the entry of final judgment in its first lawsuit. *See generally,* Supplemental Appendix to Petitioners' Reply in Support of Motion for Discretionary Review.

*Subject matter:* The subject matter of the two suits is identical – the trespass and resulting property damage caused by the work that PUCI's employees performed when installing underground conduit as the independent contractor for CenturyLink. While FP argued that its new lawsuit involves "a multitude of trespasses" (CP 86-87), and that its second case will not involve "the same evidence," all of those alleged trespasses, and the resulting damage, occurred years before the trial. The relevant evidence was, or could and should have been, presented in the prior litigation.

*Quality of persons for or against whom the claim is made:* The plaintiffs in the two lawsuits are the same or related entities; and in both suits they assert their rights as owners of the real property and improvements at issue. Thus, the "quality of persons" on the plaintiffs' side of the versus unquestionably is the same. Similarly, the "quality" of the defendants is the same, because the Employees and their employer PUCI are in privity as a matter of law and are treated as a single person for purposes of *res judicata* analysis.[20]

In summary, all of the requisites for application of *res judicata* to bar successive lawsuits are met here. The trial court should have granted the

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[20] *Emeson*, 194 Wn.App. at 635-636 (citing 14A Karl B. Tegland, WASHINGTON PRACTICE: CIVIL PROCEDURE § 35.27, at 464 (1st ed. 2007); *see also, KH v. Olympia School Dist.*, 2016 WL 5871708 at *5 (W.D.Wash. October 7, 2016); *aff'd* 726 Fed.Appx. 599 (9th Cir. 2018).

Employees' motion for summary judgment; and the trial court committed an error of law by declining to do so.

The lawsuit against the Employees is precisely what *res judicata* and the related collateral estoppel and claim splitting doctrines are intended to prevent: the abuse, harassment and waste of resources that result from endless relitigation of the same claims, arising out of the same nucleus of facts as a prior lawsuit that has been brought to final judgment – a judgment fully secured or *paid in full.*

Whether on appeal or not, and whether paid in full or not, the judgment against PUCI is *final* for the purposes of these preclusion doctrines. That judgment should bar FP from pursuing the Employees in a second lawsuit, arising out of the same nucleus of facts. FP had years to investigate, perform discovery, formulate its claim for past and projected future damages and take its claims to the jury. It obtained and has been paid a final judgment. That process cannot begin all over again against the Employees

### *B. Neither Marshall v. Chapman's Estate nor the Restatement (Second) of Judgments § 51 provides authority for FP's pursuit of this action against the Employees.*

The cornerstone of FP's opposition to the application of *res judicata* all along has been the 1948 decision in *Marshall v. Chapman's Estate.*[21] In *Marshall,* the plaintiffs successfully opposed an earlier creditor's action to attach their property; but did not obtain an award for damage to the property that occurred when it was in the custody of the sheriff as payment for the

[21] 31 Wn.2d 137, 195 P.2d 565 (1948).

alleged debt. The debtors brought their own subsequent action against the sheriff for damages he allegedly caused when he seized and held the property -- dairy cows that allegedly had fallen ill while in the sheriff's custody.

The *Marshall* court held that the second action was not barred because the plaintiffs had not sought or obtained a prior money judgment for the injury to their cows; and because the sheriff had not been a party to the first action, relying on the proposition that "identity of parties" in the first and second actions was required before *res judicata* would apply.

*Marshall* is not our case; and it does not authorize the suit against the Employees, for at least three reasons.

*First,* unlike the debtors in *Marshall,* who did not obtain a judgment for the damage to their property in the prior action, FP *did* obtain a money judgment against PUCI for compensatory damages, treble damages and attorney fees as a result of the damage that resulted from the Employees' work for PUCI.

*Second,* unlike the status of the creditors and the sheriff as separate parties in *Marshall,* here we *do* have the "identity of parties" required for application of the *res judicata* bar. In the 75 years since *Marshall,* Washington courts repeatedly and consistently have held that an employer and its employees are parties in privity and must be treated as a single party for *res judicata* purposes.[22]

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[22] *Emeson v. Dep't of Corrections*, 194 Wn.App. 617, 635-36, 376 P.3d 430 (2016); citing *Kuhlman v. Thomas*, 78 Wn.App. 115, 121, 897 P.2d 365 (1995).

*Third,* even though the $852,000 judgment against PUCI already was fully secured and stayed pursuant to RAP 8.1 by a bond for over $1 million, FP argued that under *Marshall* it should be free to avoid that stay of execution and pursue the Employee's to secure and collect the judgment against their employer:

> ... a successful Plaintiff who obtains a judgment against an employer is not barred from bringing a second action against an employee. The only effect of the prior judgment is to limit the amount of damages that may be awarded in the second action.

(CP 82; *see generally* FP's argument at CP 81-85). FP went on to quote – selectively so – from the *Marshall* Court's discussion of a still more ancient authority, *Larson v. Hodge,*[23] on "the rule as to separate judgments against joint tortfeasors." *Larson,* as quoted in *Marshall,* held that a plaintiff may sue and execute on a judgment against either or both joint tortfeasors who are responsible for her damages. However, in the portion of the decision FP chose not to include in its selective quotation, *Larson* and *Marshall* went on to hold that *satisfaction of the judgment is a bar to further litigation of the same damages claim*:

> It is too well settled to need citation of authority that joint tort-feasors may be sued either jointly or severally, and that a judgment against one is not a bar to suit against another. *While plaintiff can have but one satisfaction for her wrong... neither can set up anything less than a satisfaction of a judgment against the other as a bar to an action.*[24]

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[23] 100 Wash. 419, 171 Pac. 251 (1918).

[24] *Marshall,* 31 Wn.2d at 146, quoting *Larson,* 171 Pac. at 252. [Ellipsis and italics ours].

Even if *Marshall* is still good law; and even if it applies when a judgment has been fully secured and stayed under RAP 8.1; *Marshall* would require dismissal of the suit against the Employees following PUCI's satisfaction of the judgment entered in the prior lawsuit.[25]

FP also told the trial court that the *Restatement (Second) of Judgments* §51(2) authorized its suit against the Employees, so long as the judgment against PUCI remained unpaid. (CP 82-85). However, as FP itself has noted, that *Restatement* provision reflects "the notion that the injured person should have additional security for recovery of his loss that is represented in imposition of liability on a person other than the primary obligor." *Restatement (Second) of Judgments* §51(2), cmt. b; That "additional security" rationale does not apply here. The $850,000 judgment against PUCI was fully secured by a bond for over $1 million before FP filed this lawsuit against the Employees; and the suit against the Employees was first posited as an attempt to collect that judgment and to avoid the stay of execution on the judgment imposed under RAP 8.1. Furthermore, as FP repeatedly has conceded, both in the trial court (*see. e.g.,* CP 84 – "the first suit merely serves to cap [the plaintiff's] damages") and in opposition to the Employees' motion for discretionary review (Answer at 12-13), the *Restatement* also provides:

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[25] Indeed, FP told the trial court its pursuit of the Employees would stop if PUCI (or its insurer) paid the judgment; and that if PUCI's cross-appeal (still pending at the time) were successful, PUCI should pursue recovery of its money under RAP 12.8. (RP 4/12/2019 at 11-12). Later, after PUCI tendered payment in full satisfaction of the judgment, FP reversed course and plowed ahead against the Employees.

> (2) A judgment ***in favor*** of the injured person is conclusive upon him ***as to the amount of his damages.***

(CP 84, emphasis in FP's as-filed original).

Here, the damages awarded in the prior judgment against PUCI were fully secured at the time FP filed this lawsuit; and execution on that judgment was stayed in compliance with the Rules. Furthermore, that judgment has been fully satisfied. PUCI also withdrew its cross-appeal in Fife Portal I – before submitting an opening brief in that cross-appeal.

FP's suit was barred by *res judicata* when it was filed; and it is surely barred by *res judicata* now that the prior judgment against PUCI has been satisfied in full.

## *VI. CONCLUSION*

Fife Portal's pursuit of the Employees in this second lawsuit is a textbook example of the repetitive, wasteful and abusive relitigation of claims the doctrine of *res judicata* is intended to prevent. The trial court undermined the doctrine's intent by refusing to apply it and dismiss the claims against the Employees as a matter of law on summary judgment.

The proper application of the *res judicata* doctrine presents a threshold question of law this Court reviews *de novo*. Properly applied, the doctrine mandates dismissal of this suit against the Employees, commenced after entry of a substantial, final money judgment against PUCI after a jury trial; and doggedly pursued despite the fact that judgment at all times relevant has been either fully secured and stayed by a *supersedeas* bond under RAP 8.1; or

fully paid, satisfied and discharged by trial court order that is no longer subject to modification or appeal.

Consistent with the Commissioner's order granting discretionary review under RAP 2.3(b)(1), the Court should hold that the trial court committed an obvious error of law here; reverse the order denying summary judgment on *res judicata* grounds; and direct the trial court to enter an order dismissing Fife Portal's complaint against the Employees.

RESPECTFULLY SUBMITTED this 28th day of January, 2020.

By */s/ David M. Jacobi*
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*Appellate Counsel for Eric L. Kotulan, et al.*

## *CERTIFICATE OF SERVICE*

The undersigned certifies, under penalty of perjury under the laws of the State of Washington, that on the below date I caused to be filed with Division II of the Court of Appeals of the State of Washington, and arranged for service of true and correct copies of the foregoing ***BRIEF OF APPELLANTS ERIC L. KOTULAN, ET AL.*** and the ***APPENDIX*** to that Brief, upon the following:

***Attorneys for Plaintiffs/Respondents***
***Fife Portal LLC, et al:***

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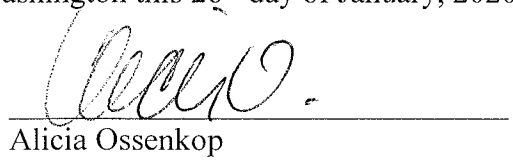

Alicia Ossenkop

## WILSON SMITH COCHRAN DICKERSON

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| **Filed with Court:** | Court of Appeals Division II |
| **Appellate Court Case Number:** | 53444-4 |
| **Appellate Court Case Title:** | Fife Portal LLC, et al, Respondent v. Eric L. Kotulan et al., Petitioners |
| **Superior Court Case Number:** | 18-2-11920-6 |

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COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

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FIFE PORTAL LLC, *et al.,*
Plaintiffs/Respondents

v.

ERIC L. KOTULAN, *et al.,*
Defendants/Petitioners

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***APPENDIX TO BRIEF OF APPELLANTS***

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Pierce County Superior Court Cause No. 18-2-11920-6
The Honorable Edmund Murphy

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# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

| | |
|---|---|
| FIFE PORTAL, LLC, a Washington Limited Liability Company; FIFE PORTAL 140 OWNERS ASSOCIATION, LLC, a Washington Limited Liability Company;<br><br>Respondents,<br><br>v.<br><br>ERIC L. KOTULAN and JANE DOE KOTULAN, husband and wife, and the marital community comprised thereof; JOSH KOTULAN and JANE ROE KOTULAN, husband and wife, and the marital community comprised thereof; RICH HALL and JANE DOE HALL, husband and wife, and the marital community comprised thereof; SEAN GAY and JANE DOE GAY, husband and wife, and the marital community comprised thereof; ROGELIO GOMEZ and JANE DOE GOMEZ, husband and wife, and the marital community comprised thereof; BRADLEY WILLIAMS and JANE DOE WILLIAMS, husband and wife, and the marital community comprised thereof; ISAAC BLACKWOOD and JANE DOE BLACKWOOD, husband and wife, and the marital community comprised thereof; GARY TURNER and JANE DOE TURNER, husband and wife, and the marital community comprised thereof; and JOHN ROE 1-10 and JANE ROE 1-10,husbands and wives, and the marital communities comprised thereof, | No. 53444-4-II<br><br>RULING GRANTING REVIEW, DENYING CONSOLIDATION AND LINKING APPEALS |

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DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

Petitioners.

Eric L. Kotulan, Josh Kotulan, Rich Hall, Sean Gay, Rogelio Gomez, Bradley Williams, Isaac Blackwood and Gary Turner (the Pacific Employees) seek discretionary review of the trial court's March 22, 2019 Order Denying Defendants' Motion for Summary Judgment. They also seek consolidation of this matter with an earlier appeal, *Fife Portal, LLC, et al. v. CenturyLink, Inc. and Pacific Utility Contractors, Inc.*, No. 52415-5-II. Concluding that the Pacific Employees have demonstrated that discretionary review is appropriate under RAP 2.3(b)(1), this court grants review. Because briefing is already complete in the earlier appeal, this court denies consolidation but links the appeals for oral argument.

## FACTS

### The First Lawsuit – 52415-5-II

In October 2015, while conducting underground utilities work under its contract with CenturyLink, Inc. to lay conduit for a new housing development, Pacific Utility Contractors, Inc. (Pacific) entered onto property owned by Fife Portal, LLC and Fife Portal 140 Owners Association, LLC (Fife Portal) and destroyed the property's storm drainage system. In December 2015, Fife Portal sued Pacific and CenturyLink seeking treble damages under RCW 4.24.630 and attorney's fees for Pacific's trespass, negligence and violation of the Underground Utility Damage Prevention Act (the Utility Damage Act).[1]

[1] Chapter 19.122 RCW.

The trial court granted Fife Portal's partial summary judgment motion, concluding that Pacific negligently and intentionally trespassed onto Fife Portal's property, violated multiple provisions of the Utility Damage Act, and willfully and maliciously failed to notify the appropriate entities that it would be excavating on Fife Portal's property. But the trial court precluded Fife Portal from recovering investigation and restoration fees, and from presenting testimony on any future unknown conditions. At the conclusion of Fife Portal's case-in-chief, the trial court dismissed CenturyLink from the case on a directed verdict. In July 2018, the court entered an $852,972.98 judgment against Pacific, consisting of a $195,074.79 jury award for damages, $585,224.37 in trebled damages, and $267,748.61 in attorney fees.

In August 2018, Fife Portal appealed, arguing that the trial court erred by granting CenturyLink a directed verdict. Fife Portal also appealed the trial court's refusal to allow it to recover its restoration and investigative costs and its decision precluding Fife Portal from presenting evidence on "future, contingent damages based on 'unknown conditions.'" 52415-5-II Br. of Appellant at 2 (Assignment of Error 6). Fife Portal requested remand for a new and limited trial on these issues, but sought affirmation of the $852,972.98 damages and attorney fee awards. That appeal is currently pending in this court under cause number 52415-5-II.

The Second Lawsuit – 53444-4-II

In October 2018, Fife Portal sued the Pacific Employees to hold them jointly and severally liable with Pacific for the damages caused in 2015. Fife Portal explains the reason for this second suit is because Pacific has gone out of business and its assets have been sold at auction. Therefore, Fife Portal asserts, it needed to bring a second

claim to recover its damages.[2] The Pacific Employees moved for summary judgment, arguing that the claims against them are barred by res judicata and collateral estoppel. The trial court denied their motion and they now seek discretionary review of that decision under RAP 2.3(b)(1) and (b)(2), but only assert preclusion of Fife Portal's claims under the doctrine of res judicata.

ANALYSIS

Washington strongly disfavors interlocutory review, and it is available only "in those rare instances where the alleged error is reasonably certain and its impact on the trial manifest." *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 462, 232 P.3d 591 (2010), *review denied*, 169 Wn.2d 1029 (2010); *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 380, 46 P.3d 789 (2002), *cert. denied sub nom., Gain v. Washington*, 540 U.S. 1149 (2004). This court may grant discretionary review only when:

> (1) The superior court has committed an obvious error which would render further proceedings useless;
> (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;
> (3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court; or
> (4) The superior court has certified, or all the parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

[2] Fife Portal's answer does not acknowledge, however, that on June 3, 2019, Pacific committed to pay the judgment in full.

RAP 2.3(b).

Summary judgment is only appropriate if "'there is no genuine issue as to any material fact' and 'the moving party is entitled to a judgment as a matter of law.'" *Walston v. Boeing Co.*, 181 Wn.2d 391, 395, 334 P.3d 519 (2014) (quoting CR 56(c)). "The appellate court engages in the same inquiry as the trial court, with questions of law reviewed de novo and the facts and all reasonable inferences from the facts viewed in the light most favorable to the nonmoving party." *Christensen v. Grant Cty. Hosp. Dist. No. 1*, 152 Wn.2d 299, 305, 96 P.3d 957 (2004). "The moving party bears the burden of showing that there is no genuine issue of material fact. If this burden is satisfied, the nonmoving party must present evidence demonstrating material fact. Summary judgment is appropriate if the nonmoving party fails to do so." *Walston*, 181 Wn.2d at 395-96 (citations omitted). "A genuine issue is one upon which reasonable people may disagree; a material fact is one controlling the litigation's outcome." *Youker v. Douglas Cty.*, 178 Wn. App. 793, 796, 327 P.3d 1234, *review denied*, 180 Wn.2d 1011 (2014).

Whether a claim is barred by the doctrine of res judicata is a question of law reviewed de novo. *Emeson v. Department of Corr.*, 194 Wn. App. 617, 626, 376 P.3d 430 (2016). "The threshold requirement of res judicata is a valid and final judgment on the merits in a prior suit." *Emeson*, 194 Wn. App. at 626. This doctrine not only bars relitigation of claims that were actually litigated and determined, but also precludes those that could or should have been raised in the prior proceeding. *DeYoung v. Cenex Ltd.*, 100 Wn. App. 885, 891-92, 1 P.3d 587 (2000) (*quoting Kelly-Hansen v. Kelly-Hansen*, 87 Wn. App. 320, 328-29, 941 P.2d 1108 (1997)), *review denied*, 146 Wn.2d 1016 (2002); *Storti v. University of Washington*, 181 Wn.2d 28, 40, 330 P.3d 159 (2014).

"For res judicata to preclude a party from litigating a claim, a prior final judgment must have a concurrence of identity with that claim in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) quality of the persons for or against whom the claim is made." *Richert v. Tacoma Power Util.*, 179 Wn. App. 694, 704, 319 P.3d 882, *review denied sub nom. Richert v. City of Tacoma*, 181 Wn.2d 1021 (2014). The doctrine of res judicata "promotes judicial economy, efficiency, and fairness to litigants" by preventing "piecemeal litigation and [ensuring] the finality of judgments." *Emeson*, 194 Wn. App. at 626.

In Washington, "an appeal does not suspend or negate the res judicata or collateral estoppel aspects of a judgment entered after trial in the superior courts." *Nielson by and through Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wn.2d 255, 264, 956 P.2d 312 (1998). This is because a judgment "becomes final for res judicata purposes at the beginning, not the end, of the appellate process, although res judicata can still be defeated by later rulings on appeal." *Lejune v. Clallam Cty.*, 64 Wn. App. 257, 266, 823 P.2d 1144, *review denied*, 119 Wn.2d 1005 (1992).

Under the doctrine of res judicata, parties to the litigation and persons in privity with those parties are bound by a prior final judgment. *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 764, 887 P.2d 898 (1995) (en banc). Privity is established "where a person is in actual control of the litigation, or substantially participates in it even though not in actual control." *Loveridge*, 125 Wn.2d at 764. Accordingly, different defendants that are in privity can be considered the same party for res judicata purposes. *Kuhlman v. Thomas*, 78 Wn. App. 115, 121, 897 P.2d 365 (1995). In Washington, the employer-

employee relationship is generally sufficient to establish privity. *Kuhlman*, 78 Wn. App. at 121; *Emeson*, 194 Wn. App. at 636.

The Pacific Employees argue that the trial court erred by denying summary judgment in their favor because the doctrine of res judicata bars Fife Portal's second lawsuit. They contend that res judicata applies because the subject matter, cause of action, persons and parties, and quality of the persons against whom the claim is made are the same. According to the Pacific Employees, the second lawsuit seeks damages for the "very same property damage, against employees acting at all times in privity with [Pacific]." Mot. for Disc. Rev. at 9.

This court concludes that the trial court committed obvious error in denying the Pacific Employees' motion for summary judgment. Res judicata appears to bar Fife Portal's claims against the Pacific Employees because the subject matter, cause of action, persons and parties, and quality of persons against whom the claim is made are all the same. The subject matter and cause of action in the two actions are identical. The persons and parties, and the identity in quality of persons, are the same in both lawsuits because the Pacific Employees are in privity with Pacific.

Fife Portal's reliance on *Crown Controls, Inc. v. Smiley*, 110 Wn.2d 695, 706, 756 P.2d 717 (1988), as an exception to res judicata is misplaced. *Crown Controls* involved an agent and its previously undisclosed principal, which the court held were jointly and severally liable. The Supreme Court held that a creditor may recover judgments against both parties, and "to the extent that the judgment remains unsatisfied, may subsequently pursue collection from the other party." *Crown Controls*, 110 Wn.2d at 706. Here, there are no previously undisclosed parties and the judgment against Pacific has been satisfied.

Similarly, *Vanderpool v. Grange Ins. Ass'n,* 110 Wn.2d 483, 756 P.2d 111 (1988), does not apply here. The *Vanderpool* court addressed whether a settlement agreement with a principal releases the primarily liable agent. The court held that such an agreement releases an agent when the plaintiff intentionally surrendered the claim. *Vanderpool*, 110 Wn.2d at 488-89. Because this case involves a final judgment on the merits as opposed to a settlement agreement, *Vanderpool* is distinguishable.

The trial court appears to have committed obvious error in denying the Pacific Employees' motion for summary judgment because the action against them is barred by res judicata. Under RAP 2.3(b)(1), the trial court's error, if left uncorrected, must render further proceedings useless. "The text of subsection (b)(1) provides that discretionary review is proper when the error committed is so blatant and severe that there is no point to continuing the particular litigation, either because further proceedings would require reversal and repetition on remand, or because the litigation should be dismissed altogether." Judge Stephen J. Dwyer, Leonard J. Feldman, Hunter Ferguson, *The Confusing Standards for Discretionary Review in Washington and A Proposed Framework for Clarity*, 38 SEATTLE U. L. REV. 91, 102 (2014). Here, discretionary review will avoid further useless litigation of the claims against the Pacific Employees because the claims appear to be barred by res judicata.

## CONCLUSION

The Pacific Employees demonstrate that discretionary review is appropriate under RAP 2.3(b)(1). Because the trial court committed obvious error, it also committed probable error. However, the Pacific Employees fail to show that the effect prong of RAP

2.3(b)(2) has been met. Therefore, this court only grants discretionary review under RAP 2.3(b)(1). Accordingly, it is hereby

ORDERED that the Pacific Employees' motion for discretionary review is granted. The Clerk will issue a perfection schedule. It is further

ORDERED that the Pacific Employees' motion to consolidate this appeal with *Fife Portal, LLC, et al. v. CenturyLink, Inc. and Pacific Utility Contractors, Inc.*, No. 52415-5-II, is denied because the briefing in the earlier appeal is complete but the appeals will be linked for oral argument.

DATED this 13 day of November, 2019.

Eric B Schmidt

Eric B. Schmidt
Court Commissioner

cc: Steven G. Wraith
Dirk J. Muse
Kyle L. Refkoke
David M. Jacobi
Bradley S. Wolf
Michael B. King
Rory D. Cosgrove
Hon. Edmund Murphy

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COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

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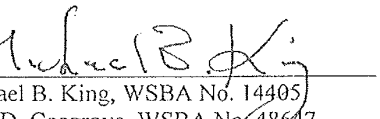
| FIFE PORTAL, LLC, a Washington Limited Liability Company; FIFE PORTAL 140 OWNERS ASSOCIATION, LLC, a Washington Limited Liability Company,<br>Plaintiffs-Respondents,<br>v.<br>ERIC L. KOTULAN and JANE DOE KOTULAN, husband and wife, et al.,<br>Appellants-Petitioners. | NO. 53444-4-II<br><br>RESPONDENTS' ANSWER TO PETITIONERS' MOTION TO CONTINUE HEARING AND TO EXTEND TIME FOR REPLY BRIEF |

Whether the Employee Petitioners will in fact fully and unconditionally satisfy the judgment in *Fife Portal I* is an open question. And whether such a satisfaction indeed operates to moot Respondents' case against the Employee Petitioners is an issue that should be addressed to the trial court, which still has plenary jurisdiction over the case, pending this Court's decision on whether to grant discretionary review. With these caveats, Respondents do not object to the requested continuance.

Respectfully submitted: June 4, 2019.

CARNEY BADLEY SPELLMAN, P.S.

By 
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*Appellate Counsel for Respondents*

## CERTIFICATE OF SERVICE

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

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DATED: June 4, 2019.

Patti Saiden, Legal Assistant

## CARNEY BADLEY SPELLMAN

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| **Superior Court Case Number:** | 18-2-11920-6 |

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Honorable Susan K. Serko

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

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| FIFE PORTAL, LLC, a Washington Limited Liability Company; FIFE PORTAL 140 OWWNERS ASSOCIATION, LLC a Washington Limited Liability Company; Z.V. COMPANY, INC., a Washington Corporation,<br><br>Plaintiffs,<br><br>v.<br><br>CENTURYLINK, INC. a Louisiana corporation licensed to do business in Washington; PACIFIC UTILITY CONTRACTORS, INC., a Washington Corporation; JOHN DOE 1; JOHN DOE 2,<br><br>Defendants. | NO. 15-2-14644-6<br><br>PLAINTIFFS SECOND NOTICE OF APPEAL TO THE COURT OF APPEALS, DIVISION TWO<br><br>(Cause No. 52415-5-II) |

Plaintiffs Fife Portal, LLC, Fife Portal 140 Owners Associations, LLC and Z.V. Company, Inc. ("Plaintiffs"), by and through their counsel, seek review by the designated appellate court of the Order to Disburse Funds, Satisfaction of Judgment, Exoneration of Bond ("Satisfaction and Release of Bond Order"), entered on July 26, 2019. A copy of the Satisfaction and Release Order is attached. This appeal arises out of the same matter as the pending appeal (Cause No. 53415-5-II) and specifically relates to the Final Judgment against Pacific Utility Contractors, Inc., entered on July 27, 2018, which is presently on review and under the jurisdiction of the designated appellate court. Plaintiffs have already paid the filing fee in this matter. Plaintiffs file this notice without waiving their rights to direct relief from the designated appellate court under RAP 8.3 and any other applicable authority.



CARNEY BADLEY SPELLMAN, P.S.
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DATED this 26th day of July, 2019.

CARNEY BADLEY SPELLMAN, P.S.

By: M. Lee B. King

Michael B. King, WSBA No. 14405
Attorneys for Plaintiffs



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## CERTIFICATE OF SERVICE

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

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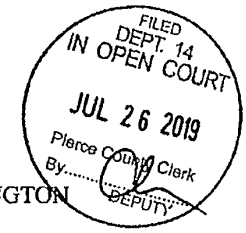
DATED this 26th day of July, 2019.

Patti Saiden

Patti Saiden, Legal Assistant

**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,<br><br>Plaintiffs,<br><br>vs.<br><br>CENTURYLINK, INC., a Louisiana corporation licensed to do business in Washington; PACIFIC UTILITY CONTRACTORS, INC., a Washington Corporation; JOHN DOE 1; JOHN DOE 2,<br><br>Defendants. | NO. 15-2-14644-6<br><br>ORDER REGARDING REQUEST FOR SATISFACTION OF JUDGMENT AND EXONERATION OF BOND;<br><br>~~ORDER STRIKING PORTIONS OF BRIEF & DECLARATION~~<br><br>ORDER OF DISBURSAL<br><br>(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 disbursal fees |
| Address: | Bradley S. Wolf<br>Bauman & Wolf, PLLC<br>811 First Avenue, Suite 350<br>Seattle, WA 98104 |



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

The clerk is further directed to enter the following satisfaction of judgment with respect to the judgment dated ~~8/6/18~~ 7/27/2018 as amended 8/6/2018 (Nunc Pro Tunc to 7/27/2018)

[ ] Make no entry

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

[X] Recognize a full satisfaction of judgment

**ORDERS**

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

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

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

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

**III. ORDER OF DISBURSAL**

The Plaintiffs' Motion to Disburse Funds is granted, ~~without opposition~~. The clerk is ordered to disburse funds from the registry of the court, as set forth above in the Clerk's Action Section of this Order.



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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.



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## V. ORDER CONCERNING SCHEDULING OF HEARINGS

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

## VI. ORDER CONCERNING REQUEST FOR SATISFACTION OF JUDGMENT

It is hereby ordered that:

(Alternatively)

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

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

or

The Court Finds: Payment was made 6/21/19, and Notice was proper, and the payment was not conditional

[X] The court recognizes and hereby directs that a full satisfaction of the judgment dated ~~8/6/18~~ 7/27/18, be entered by the clerk. This is based on Defendant Counsel's representation that an additional payment of $490.81 is being made to Plaintiff Counsel's Trust Account.

## VII. ORDER CONCERNING SUPERSEDEAS BOND

On the Defendant's motion to exonerate the supersedeas bond dated August 13th, 2018, by Berkley Insurance Company, it is hereby ordered:

[X] The motion is ~~denied;~~ granted, Supersedeas Bond No. 015471 Posted by Berkley Insurance is hereby discharged.

[ ] The motion is denied, but it is ORDERED that the penal sum of such bond be reduced to $320,000.



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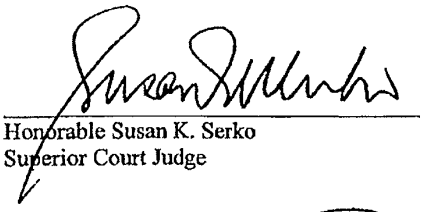
DATED: 7/26/2019



Honorable Susan K. Serko
Superior Court Judge

**PRESENTED BY:**

**BAUMAN & WOLF, PLLC**

By: /s/: *Bradley S. Wolf*

Bradley S. Wolf, WSBA #21252
Christine L. Becia, WSBA #26410
Attorneys for Plaintiffs,
Fife Portal, LLC, and Fife Portal 140
Owners Association, LLC
Bauman & Wolf, PLLC
811 First Avenue, Suite 350
Seattle, WA. 98104
Telephone: (206) 264-4577
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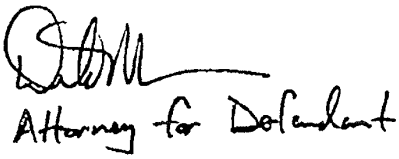
cbecia@wolflaw.us



Attorney for Defendant

## CARNEY BADLEY SPELLMAN

## July 26, 2019 - 11:46 AM

## 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_Other_20190726114625D2080554_1509.pdf
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FILED
Court of Appeals
Division II
State of Washington
8/26/2019 11:49 AM
NO. 52415-5-II

DIVISION TWO, COURT OF APPEALS
OF THE STATE OF WASHINGTON

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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,

*Defendant-Respondent*,

and

PACIFIC UTILITY CONTRACTORS, INC., a Washington Corporation

*Defendant-Respondent*.

---

ON APPEAL FROM PIERCE COUNTY SUPERIOR COURT
Hon. Susan K. Serko

---

**APPELLANTS' MOTION TO DISMISS APPEAL FROM TRIAL COURT RELEASE ORDER**

---

Michael B. King, WSBA No. 14405
Jason W. Anderson, WSBA No. 30512
Rory D. Cosgrove, WSBA No. 48647
CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
Telephone: (206) 622-8020
*Attorneys for Plaintiffs-Appellants*

FIF006-0001 5880324.docx

## I. IDENTITY OF MOVING PARTIES

Appellants Fife Portal LLC, Fife Portal 140 Owners Association LLC, and Z.V. Company, Inc. (collectively, *Fife Portal*) seek the relief stated in Section II below.

## II. RELIEF REQUESTED

Fife Portal requests that this Court dismiss the appeal Fife Portal filed from the trial court's order of July 26, 2019, which (in relevant part) released the supersedeas bond posted by Respondent Pacific Utility Contractors, Inc.

## III. MATERIAL FACTS

The material facts are set forth in the "Grounds for Relief Requested" portion of this motion.

## IV. GROUNDS FOR RELIEF REQUESTED

The trial court ordered the release of the supersedeas bond posted by Pacific. App. A (copy of order). Fife Portal filed a notice of appeal from that order. Fife Portal then moved for an order from this Court setting aside the release. This Court has now denied that motion.

In response to a query from this Court, Fife Portal stated that it intended to dismiss the appeal from the release order, having concluded that the proper course for addressing Fife Portal's concerns with the release order would be by a motion seeking relief under this Court's supervisory authority over supersedeas matters. Fife Portal also reiterated this intent in its motion to set aside the release order.

Consistent with these statements, Fife Portal now moves to dismiss the appeal from the release order.

## V. CONCLUSION

This Court should dismiss Fife Portal's appeal from the release order.

Respectfully submitted: August 26th, 2019.

CARNEY BADLEY SPELLMAN, P.S.

By _____

Michael B. King, WSBA No. 14405
Jason W. Anderson, WSBA No. 30512
Rory D. Cosgrove, WSBA No. 48647
*Attorneys for Plaintiffs-Appellants*

## CERTIFICATE OF SERVICE

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

☒ Email to the following:

| | |
|---|---|
| Dennis M. Strasser<br>Strasser Law and Resolution LLC<br>19125 N Creek Pkwy Ste 120<br>Bothell WA 98011-8000<br>dstrasser@lawandresolution.com | Steven G. Wraith<br>Kyle J. Rekofke<br>Dirk J. Muse<br>Lee Smart PS, Inc.<br>701 Pike St Ste 1800<br>Seattle WA 98101-3929<br>sgw@leesmart.com<br>kjr@leesmart.com<br>djm@leesmart.com |
| Bradley S. Wolf<br>Christine L. Becia<br>Law Office of Bradley S. Wolf<br>811 First Avenue, Suite 350<br>Seattle, WA 98104<br>Telephone: (206) 264-4577<br>bwolf@wolflaw.us<br>cbecia@wolflaw.us | David M. Jacobi<br>John M. Silk<br>Wilson Smith Cochran Dickerson<br>901 Fifth Avenue, Suite 1700<br>Seattle, WA 98164-2050<br>jacobi@wscd.com<br>silk@wscd.com |

DATED this 26th day of August, 2019.

Patti Saiden

Patti Saiden, Legal Assistant

## CARNEY BADLEY SPELLMAN

## August 26, 2019 - 11:49 AM

## Transmittal Information

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

**The following documents have been uploaded:**

- 524155_Motion_20190826114929D2890011_1879.pdf
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  *The Original File Name was Appellants Mtn to Dismiss Appeal from trial Court Release Order.pdf.pdf*

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# Washington State Court of Appeals
## Division Two

950 Broadway, Suite 300, Tacoma, Washington 98402-4454
Derek Byrne, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)
General Orders, Calendar Dates, and General Information at http://www.courts.wa.gov/courts **OFFICE HOURS**: 9-12, 1-4.

September 19, 2019

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cosgrove@carneylaw.com

**CASE #: 52415-5-II: Fife Portal, LLC v. Centurylink, Inc.**
**Case Manager: Jodie**

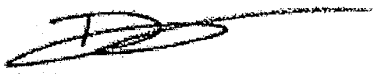
Counsel:

On the above date, this Court entered the following notation ruling:

**A RULING BY COMMISSIONER SCHMIDT:**

On motion of the Appellants, the Appeal from the trial court's July 26, 2019 order to disburse funds is dismissed.

Very truly yours,



Derek M. Byrne
Court Clerk

:jlt

## WILSON SMITH COCHRAN DICKERSON

## January 28, 2020 - 2:53 PM

## Transmittal Information

| | |
|---|---|
| **Filed with Court:** | Court of Appeals Division II |
| **Appellate Court Case Number:** | 53444-4 |
| **Appellate Court Case Title:** | Fife Portal LLC, et al, Respondent v. Eric L. Kotulan et al., Petitioners |
| **Superior Court Case Number:** | 18-2-11920-6 |

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