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COURT OF APPEALS  
OF THE STATE OF WASHINGTON,  
DIVISION II

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FIFE PORTAL, LLC, a Washington Limited Liability  
Company; FIFE PORTAL 140 OWNERS  
ASSOCIATION, LLC, a Washington Limited Liability  
Company,

*Plaintiffs-Respondents,*

v.

ERIC L. KOTULAN and JANE DOE KOTULAN,  
husband and wife, et al.,

*Defendants-Appellants.*

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ON APPEAL FROM PIERCE COUNTY SUPERIOR COURT  
Hon. Edmund Murphy

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**BRIEF OF RESPONDENTS**

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## I. INTRODUCTION

Vicarious liability is the liability for another person's tort. It provides additional security for recovery of the injured person's losses. The doctrine of respondeat superior, which represents the most common kind of vicarious liability, holds employers and their employees jointly and severally liable for the employees' torts.

CenturyLink, Inc. hired Pacific Utility Contractors to lay conduit near Fife Portal's property. Pacific's employees on three different occasions intentionally trespassed on and caused extensive damages to Fife Portal's property. Fife Portal sued CenturyLink and Pacific. Fife Portal ultimately obtained a money judgment against Pacific. But that judgment did not reflect the total amount of Fife Portal's recoverable damages because the trial court barred Fife Portal from presenting all of its damages evidence to the jury. So Fife Portal appealed.<sup>1</sup>

Pacific then went out of business and had its assets sold at auction. Solely as a fallback to satisfy its judgment against a defunct company, Fife Portal sued several of Pacific's principals and employees (the *Employees*). The *Employees* tried to dismiss the action against them under res judicata based on Fife Portal's prior successful action against Pacific. But the trial court denied their summary-judgment motion and stayed all proceedings pending the resolution of the damages issues in *Fife Portal I*. Four months

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<sup>1</sup> Fife Portal will refer to its case against CenturyLink and Pacific as *Fife Portal I*. Fife Portal's appeal in that case (No. 52415-5) also involves a challenge to the trial court's dismissal of Fife Portal's claims against CenturyLink. That appeal has been linked with this appeal. Fife Portal will refer to its case here against Pacific's employees as *Fife Portal II*.

later, and nine months after Fife Portal sued the Employees, Pacific finally decided to satisfy the judgment.

Because the judgment has been satisfied, *res judicata* bars Fife Portal from recovering against the Employees any of the damages awarded to Fife Portal in its prior action against Pacific. That much Fife Portal and the Employees agree on. This appeal turns on whether Fife Portal may pursue the Employees for the compensatory damages that the trial court had previously barred Fife Portal from recovering against Pacific. This presents an issue of first impression in the law of judgments in Washington: May an injured person who obtains a judgment against a defunct company pursue that company's employees to recover all of the compensatory damages to which the injured party is entitled?

Century-old Washington common law and the *Restatement (Second) of Judgments* permit Fife Portal to pursue the Employees to recover all of its damages. The many courts who have applied the *Restatement* have held that a judgment in favor of the injured person against one defendant does not bar a second action against all other liable defendants. And Washington courts have routinely relied on and adopted several sections of the *Restatement (Second) of Judgments*, including Sections 49 and 51(1). This case calls for this Court to adopt Section 51(2) and hold that—to the extent Fife Portal may recover the damages that it was barred from recovering in its prior action against Pacific—*res judicata* does not bar Fife Portal from pursuing the Employees for those damages to make itself whole.

## II. ISSUE PRESENTED

Consistent with century-old Washington common law, the *Restatement (Second) of Judgments* recognizes that a judgment in favor of an injured person limits only the amount of the damages the injured person may recover in a second action against all other liable parties. Fife Portal obtained a judgment against Pacific, a now-defunct company. It then sued Pacific's employees to satisfy the judgment. Although Pacific has since satisfied the judgment, this Court may order a remand for a limited trial on the damages the trial court barred Fife Portal from recovering against Pacific. Did the trial court correctly conclude that Fife Portal's action against the employees may proceed? *Yes*.

## III. RESTATEMENT OF THE CASE

The material facts for this appeal, which are set forth below, are virtually undisputed.

### A. **CenturyLink hired Pacific Utility to lay conduit using an inherently dangerous trenchless-drilling technology. Pacific Utility and its employees thrice trespassed on and caused extensive damages to Fife Portal's property.**

Fife Portal owns a large industrial property in Fife, Washington. CP 2, 110. A landscape area adjoining the property contains the property's critical underground utilities, such as high-pressure fire-hydrant piping, storm-system piping, water piping, and high-voltage electrical equipment. CP 111.

Almost five years ago, CenturyLink hired Pacific Utility to lay conduit using a trenchless-drilling technology to service a residential subdivision. CP 110-13. Unbeknownst to Fife Portal and without its permission, Pacific and its employees began drilling and laying conduit on Fife Portal's property. CP 111. They had neither requested any utility locates on Fife Portal's property nor marked the boundary lines of the

drilling project. CP 112. Pacific and its employees first struck and damaged a storm-drain pipe. CP 113. They excavated and reburied the pipe, which disrupted Fife Portal's landscape area and its underground utilities, without promptly notifying Fife Portal or investigating the extent of the damages. CP 113.

Pacific's employees resumed drilling work on Fife Portal's property a few days later. CP 113. This time, they struck an underground water main, causing it to rupture and blow apart concrete. CP 113. This created a large, dangerous sinkhole in an access driveway used by Fife Portal's commercial tenants. CP 113.

About a week later, Fife Portal first learned that Pacific and its employees had trespassed on and caused extensive damages to Fife Portal's property.<sup>2</sup> CP 113-14. Fife Portal directed Pacific's employees to stay off the property and to stop all work. CP 114. Despite these directives, Pacific's employees continued to trespass on Fife Portal's property. CP 114. Using a tractor, they later began pulling out portions of the conduit that they had previously laid, causing more damage to Fife Portal's property. CP 114.

Fife Portal began to investigate the scope and the extent of the damages. CP 113-14. It soon discovered that Pacific's drilling operation had undermined the soil bedding supporting Fife Portal's storm-drain

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<sup>2</sup> Fife Portal embedded photographs of the damages in its opening brief in linked Case No. 52415-5 at pages 14 and 16. Fife Portal has already filed its opening brief and reply brief in that case. It asks this Court to take judicial notice of those briefs.

system. CP 114. This in turn caused the storm-drain pipes to sag and to drain improperly. CP 114.

**B. Fife Portal sued CenturyLink and Pacific Utility. The trial court established Pacific Utility's liability on summary judgment, entitling Fife Portal to treble damages and attorneys' fees.**

Fife Portal sued CenturyLink and Pacific Utility for trespass, violations of the Underground Utility Damage Prevention Act, and negligence. CP 34-37, 114-15.

On summary judgment, the trial court concluded that Pacific had negligently and intentionally trespassed on Fife Portal's property, violated multiple provisions of the Underground Utility Damage Prevention Act, and willfully and maliciously failed to notify the appropriate entities that it would be drilling on Fife Portal's property. CP 39-42. Fife Portal was thus entitled to treble damages and attorneys' fees. CP 39-42.

The only issues left for trial were CenturyLink's liability and Fife Portal's damages.

**C. The trial court barred Fife Portal from recovering all of its restoration and investigative costs spent on remediating its property.**

Fife Portal retained First Corps, as the general contractor, to lead, direct, and oversee the investigation and remediation efforts. First Corps was the property's original developer, designer, and general contractor. Fife Portal sought to recover the time First Corps spent to lead, direct, and oversee the investigation and remediation of the property as part of its restoration and investigative costs under RCW 4.24.630(1). But the trial

court barred Fife Portal from recovering these costs as a matter of law on summary judgment.

During Fife Portal's ongoing investigation and remediation efforts, it discovered that Pacific and its employees had caused additional, previously unknown damages to its property. For instance, Pacific's drilling operation caused the soil bedding beneath Fife Portal's underground utilities to settle, and the storm-drain pipe continued to subside. CP 113-14. Fife Portal sought to recover these "unknown condition" contingent damages at trial. But the trial court barred Fife Portal from presenting this evidence at trial and thus precluded the jury from awarding any damages to Fife Portal for its future remediation work.

**D. The trial court dismissed CenturyLink on a directed verdict, allowing Fife Portal to recover its damages only against Pacific Utility, which would soon become a defunct company.**

Fife Portal asserted two claims against CenturyLink under multiple theories of liability. CP 36-37. After Fife Portal finished its case-in-chief, the trial court dismissed CenturyLink from the case on a directed verdict.<sup>3</sup> CP 48-51. Fife Portal's case proceeded to verdict against Pacific on damages only.

The jury ultimately awarded Fife Portal \$195,074.79 in compensatory damages against Pacific, slightly less than half of which were undisputed. CP 53-54, 56. The trial court trebled the damages for a total damages award of \$585,224.37. CP 41-42, 56. It awarded Fife Portal

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<sup>3</sup> Fife Portal has appealed from these directed-verdict rulings in Case No. 52415-5.

\$267,748.61 in attorneys' fees and entered a final judgment against Pacific for \$852,972.98. CP 56-57.

**E. Fife Portal appealed, seeking (in part) to recover all of its restoration and investigative costs that the trial court had barred Fife Portal from recovering. Pacific Utility cross-appealed, seeking mainly to vacate the summary-judgment order establishing its liability.**

Fife Portal appealed from the final judgment, seeking the reinstatement of its claims against CenturyLink and a remand for a limited trial on all of the damages that the trial court had barred Fife Portal from recovering. CP 59-60. Instead of satisfying the judgment, Pacific chose to cross-appeal from the order that established its liability on summary judgment.<sup>4</sup> CP 62-63. Pacific posted a bond to stay execution of the judgment. CP 65-70.

**F. Because Pacific Utility refused to satisfy the judgment and went out of business, Fife Portal sued several of Pacific Utility's principals and employees who were jointly and severally liable for the damages to Fife Portal's property.**

Pacific went out of business, and its assets were put up for sale at auction. CP 116. Although Pacific had superseded the judgment on appeal, its cross-appeal, if successful, would have voided the surety's obligations under the bond. CP 69. So as a fallback to satisfy its judgment against a

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<sup>4</sup> The Employees suggest in their opening brief that Pacific, following the trial, "offered to pay the judgment in full to bring this litigation to an end." *Brief of Appellants* at 1 (citing the transcript from the motion-to-stay hearing in April 2019). But "[a]rument of counsel does not constitute evidence." *Green v. Am. Pharm. Co.*, 136 Wn.2d 87, 100, 960 P.2d 912 (1998).

now-defunct company, Fife Portal sued several of Pacific's principals and employees (the *Employees*).<sup>5</sup> CP 1-9, 116.

**G. The trial court denied the Employees' summary-judgment motion to dismiss Fife Portal's action on res-judicata grounds.**

The Employees sought summary judgment to dismiss Fife Portal's action against them on res-judicata grounds. CP 13-27. They relied principally on the *Restatement (Second) of Judgments* § 51(1) but failed to cite to the operative subsection two, to which Fife Portal did cite. *Compare* CP 21 (Employees' motion), *and* CP 118-25 (Employees' reply), *with* CP 84-85 (Fife Portal's opposition).

The trial court denied their motion. CP 132-33. It explained that the controlling case law permitted an injured party to pursue the employer and the employees either together in one action or separately in different actions. RP (3/22/19) 9-10, 25.

**H. At the Employees' request, the trial court stayed the proceedings pending the outcome of Fife Portal's damages issues in *Fife Portal I*.**

The Employees sought to stay the proceedings after the trial court denied their summary-judgment motion to dismiss the action on res-judicata grounds. CP 144-50. Over Fife Portal's objection, the trial court stayed the proceedings until this Court resolved Fife Portal's damages claims and issued its mandate in *Fife Portal I*. CP 197-98; RP (4/12/2019) 18.

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<sup>5</sup> Fife Portal was unable to locate, and thus personally serve, five of the employees sued. Its action against the Employees moved forward only against Isaac Blackwood, Eric Kotulan, and Josh Kotulan. CP 72-77.

**I. Soon after the Employees sought discretionary review of the order denying their summary-judgment motion, Pacific Utility voluntarily dismissed its cross-appeal in *Fife Portal I* and satisfied the judgment.**

The Employees sought discretionary review of the order denying their motion for summary judgment to dismiss Fife Portal's action on res-judicata grounds. (They abandoned the argument that collateral estoppel barred Fife Portal's action.)

In the meantime, Pacific satisfied the judgment.<sup>6</sup> App. 000016-000020. The trial court discharged the bond that Pacific had posted in *Fife Portal I*. App. 000019. Soon after, this Court granted Pacific's unopposed motion to withdraw review of its cross-appeal in *Fife Portal I*.

Despite having sought and obtained a stay of all trial-court proceedings to "save the parties considerable litigation costs" and to "promote judicial economy," CP 145, the Employees asked the trial court to lift the stay to be able to file yet-another summary-judgment motion to dismiss Fife Portal's action on res-judicata grounds. CP 199-205. Fife Portal opposed the motion and asked the trial court to enforce the stay that the Employees had requested (and obtained) by "await[ing] developments in the court of appeals." CP 215. The trial court refused to lift the stay and astutely observed that "there are some issues at the Court of Appeals that probably should be decided before the matter comes back to this Court." RP (9/13/19) 14.

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<sup>6</sup> The Employees filed an Appendix to their Opening Brief. See Employees' Appendix (App.) 000001-000028. The materials in their Appendix were made part of the record in the discretionary-review proceeding. In its Response Brief, Fife Portal will cite to the Employees' Appendix where appropriate.

**J. A commissioner granted the Employees’ motion for discretionary review of the order denying their summary-judgment motion.**

Commissioner Schmidt granted the Employees’ motion for discretionary review under RAP 2.3(b)(1). App. 000002, 000009. The Commissioner concluded that the trial court appeared to have committed obvious error in denying the Employees’ summary-judgment motion. The Commissioner did not address the impact of the *Restatement (Second) of Judgments* in his ruling granting review. App. 000008. The Commissioner’s ruling linked this appeal for oral argument with Fife Portal’s appeal in No. 52415-5. App. 000002, 000009. Both appeals are now linked for oral argument before the same Panel on the Merits.

**IV. STANDARD OF REVIEW**

This Court reviews a summary judgment de novo. *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 922, 296 P.3d 860 (2013). Specifically, this Court reviews de novo the issue of law whether res judicata bars an action. *Emeson v. Dep’t of Corr.*, 194 Wn. App. 617, 626, 376 P.3d 430 (2016). This Court may affirm the denial of summary judgment on any ground supported by the record. *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989).

**V. ARGUMENT**

A person may sue an employer and its employees, together or separately, to remedy an indivisible injury. If that person obtains a money judgment against one, that judgment does not bar the person from suing the other. The judgment serves only as a cap on the amount of damages

recoverable against all other liable defendants in subsequent actions. Once a judgment is satisfied, that satisfaction generally bars all subsequent actions.

Fife Portal obtained a judgment against Pacific, but the trial court barred Fife Portal from presenting all of its damages evidence to the jury. Fife Portal appealed from those damages rulings in *Fife Portal I*. Fife Portal learned that Pacific had gone out of business, so solely as a fallback, it sued Pacific's principals and employees to satisfy its judgment. Nine months later, Pacific finally satisfied the judgment.

Res judicata bars Fife Portal from recovering against the Employees any of the damages awarded to Fife Portal in its prior action against Pacific. Yet to the extent this Court reverses the damages rulings in *Fife Portal I* and remands for a limited trial on those damages, res judicata does not bar Fife Portal's action against the Employees to pursue those damages. If this Court does so, then it should affirm the trial court's order denying the Employees' motion for summary judgment.

**A. An injured person may sue an employer and its employees, together or separately, to remedy an indivisible injury.**

Vicarious liability is the liability for another person's tort. The policy behind vicarious liability is to give the plaintiff the "maximum opportunity to be fully compensated." *Vanderpool v. Grange Ins. Ass'n*, 110 Wn.2d 483, 487, 756 P.2d 111 (1988). It provides additional security for recovery of the injured person's loss. RESTATEMENT (SECOND) OF JUDGMENTS § 51 cmt. b (1982).

The doctrine of respondeat superior represents the most common kind of vicarious liability. It arises when an employer–employee relationship is created. *Ensley v. Pitcher*, 152 Wn. App. 891, 903 n.10, 222 P.3d 99 (2009). It holds employers and their employees jointly and severally liable for the employees’ torts committed within the scope of employment.<sup>7</sup> *Johns v. Hake*, 15 Wn.2d 651, 656, 131 P.2d 933 (1942).

The Employees’ suggestion that Fife Portal was required to assert claims against them in *Fife Portal I* would upend century-old Washington common law.<sup>8</sup> See *Brief of Appellants* at 8. An injured person may sue the employer and the employee in the same action or, as Fife Portal did here, sue them separately in different actions. *Johns*, 15 Wn.2d at 656; *Ensley*, 152 Wn. App. at 905 n.11. The employee is a proper but not a necessary party in a respondeat-superior action against the employer. *Orwick v. Fox*, 65 Wn. App. 71, 80-81, 828 P.2d 12 (1992). The *Restatement (Second) of Judgments* also permits a plaintiff to proceed in separate actions against an

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<sup>7</sup> Although the Tort Reform Act (chapter 4.22 RCW) generally abolished joint-and-several liability in Washington, it retained the common-law rule that joint-and-several liability would still apply to respondeat-superior liability. *Koste v. Chambers*, 78 Wn. App. 691, 694, 899 P.2d 814 (1995) (citing RCW 4.22.070(1)(a)); see also RESTATEMENT (THIRD) OF TORTS: APPOINTMENT OF LIABILITY § 13 cmt. b (2000) (explaining that a few statutes, including RCW 4.22.070(1)(a), “state explicitly that vicariously liable parties remain jointly and severally liable.”); *United States v. First Sec. Bank of Utah*, 208 F.2d 424, 428 (10th Cir. 1953) (“A master and servant are each liable for injuries caused by the negligence of the servant in the course of his employment. The servant is liable because he committed the tort and the master is liable under the doctrine of respondeat superior. While they may not be joint tortfeasors in the sense that their joint acts caused an injury, a majority of the courts hold that their liability is joint and several and each is liable to the full extent of the injuries and they may be joined in an action in the same manner as joint tortfeasors.” (citing *Marshall v. Chapman’s Estate*, 31 Wn.2d 137, 195 P.2d 656 (1948), and *Johns v. Hake*, 15 Wn.2d 651, 131 P.2d 933 (1942))).

<sup>8</sup> The Employees asserted the same argument in the trial court. See CP 26, 119; RP (3/22/19) 6.

employer and its employees. See RESTATEMENT (SECOND) OF JUDGMENTS § 49 cmt. a (observing that the injured person’s “claim against others who are liable for the same harm is regarded as separate”); RESTATEMENT (SECOND) OF JUDGMENTS § 51 cmt. b (explaining that the injured person’s claims against each obligor “are in important respects separate claims”). Although the “injured person often has strong incentive to bring the action against both defendants, . . . the injured person is ordinarily not required to join both and may bring suit in the first instance against only one of them.” RESTATEMENT (SECOND) OF JUDGMENTS § 51 cmt. a. Nor is the rule against claim-splitting violated because that rule “takes as its model a claim and action by a single plaintiff against a single defendant.” *Id.* § 24 cmt. e; accord *Landry v. Luscher*, 95 Wn. App. 779, 781-82, 976 P.2d 1274 (1999).

This Court thus should conclude that Fife Portal had a right to pursue Pacific and the Employees in different actions to remedy its damages.

**B. The preclusion rules of the *Restatement (Second) of Judgments* permit a successful plaintiff in an action against an employer to sue the employees when the plaintiff may be able to recover additional damages against both the employer and the employees.**

The doctrine of res judicata (also known as claim preclusion) generally bars the same parties from relitigating a claim that has already been adjudicated by a final judgment. *Weaver v. City of Everett*, 194 Wn.2d 464, 480, 450 P.3d 177 (2019). The threshold requirement of res judicata is the existence of a valid and final judgment on the merits in a prior suit.

*Ensley*, 152 Wn. App. at 902. The judgment entered against Pacific is a valid and final judgment on the merits.

In Washington, res judicata requires the dismissal of an action when that action is identical with a prior action in four ways: (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. *Id.* Because the Employees failed to satisfy the fourth element, the trial court correctly denied their summary-judgment motion.

**1. Washington courts apply the *Restatement (Second) of Judgments* to analyze the preclusive effects of judgments against parties and all persons in privity with those parties.**

The fourth element of res judicata seeks to determine which parties in the second action are bound by the judgment in the first action. *Ensley*, 152 Wn. App. at 905. This element is better understood as a rule about who is bound by the first judgment: all parties to the original action—plus all persons in privity with those parties—are bound. 14A KARL B. TEGLAND, WASH. PRACTICE: CIVIL PROCEDURE § 35.27 (3d ed., updated electronically Nov. 2018).

Washington courts find guidance in the *Restatement (Second) of Judgments* when deciding preclusion issues.<sup>9</sup> *See, e.g., Babcock v. State*, 116 Wn.2d 596, 621, 809 P.2d 143 (1991); *Vanderpool*, 110 Wn.2d at 489;

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<sup>9</sup> The *Restatement (Second) of Judgments* covers the scope of the preclusive effects of judgments in civil actions. RESTATEMENT (SECOND) OF JUDGMENTS 1 Scope. Those rules, or rather limitations, are commonly referred to as the rules of res judicata, which include claim preclusion, issue preclusion, and the concept of privity. *Id.*

*Glover v. Tacoma Gen. Hosp.*, 98 Wn.2d 708, 720-21, 658 P.2d 1230 (1983). The *Restatement* applies the same preclusion rules to (1) joint tortfeasors and (2) persons having a relationship in which one is vicariously responsible for the conduct of the other. See RESTATEMENT (SECOND) OF JUDGMENTS § 49; RESTATEMENT (SECOND) OF JUDGMENTS § 50; RESTATEMENT (SECOND) OF JUDGMENTS § 51.

For joint tortfeasors, a judgment against one co-obligor liable for a loss does not terminate an injured person's claim against another co-obligor because the injured person has a separate claim against each.<sup>10</sup> RESTATEMENT (SECOND) OF JUDGMENTS § 49 cmt. a; *Babcock*, 116 Wn.2d at 621 (concluding that "a judgment in favor of one tortfeasor does not terminate claims against a separate tortfeasor"); *Larson v. Hodge*, 100 Wash. 419, 424, 171 P. 251 (1918) (articulating the rule for separate judgments against joint tortfeasors and concluding that a "judgment against one is not a bar to suit against another"). This rule is "well established with regard to tort obligations." RESTATEMENT (SECOND) OF JUDGMENTS § 49 Reporter's Note (comments a and b). The only limitation is that the judgment rendered in the first action establishes the limit of the injured person's recoverable damages against other liable obligors in the second action. RESTATEMENT (SECOND) OF JUDGMENTS § 49 cmt. a (illustration 1); RESTATEMENT (SECOND) OF JUDGMENTS § 50 cmt. d.

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<sup>10</sup> The *Restatement* uses the terms "obligor" or "co-obligor" when referring to joint tortfeasors liable for the injured person's losses. See RESTATEMENT (SECOND) OF JUDGMENTS § 49 cmt. a; RESTATEMENT (SECOND) OF JUDGMENTS § 50.

The same rule applies “when the conduct of the actual wrongdoer is legally chargeable to more than one person . . . under the principle of respondeat superior.” RESTATEMENT (SECOND) OF JUDGMENTS § 49 cmt. a; *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 51. “The rule is no different where one of the parties liable is an active wrongdoer and the other is liable on the theory of respondeat superior[.]” *Marshall v. Chapman’s Estate*, 31 Wn.2d 137, 146, 195 P.2d 656 (1948).

Washington courts look specifically to the *Restatement (Second) of Judgments* § 51 to analyze “the preclusive effect of a judgment against a party where that party and another party have a relationship such that one of them is vicariously liable.” *Ensley*, 152 Wn. App. at 905-06 (relying on the *Restatement (Second) of Judgments* § 51 to analyze the fourth element of res judicata). One such relationship is “master and servant” (or employer and employee). RESTATEMENT (SECOND) OF JUDGMENTS § 51 cmt. a.

The injured person’s right to bring separate actions against an employer and employees is, however, subject to limitations. *Sheffield v. Matlock*, 587 S.W.3d 723, 736 (Mo. Ct. App. 2019). The *Restatement (Second) of Judgments* § 51 represents one such limitation by applying different preclusion rules to plaintiffs who are either successful or unsuccessful in a prior action against either an employer or employees.<sup>11</sup> It extends the effects of claim preclusion to nonparties who are either primarily or vicariously liable to the injured person:

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<sup>11</sup> The *Restatement* uses the term “primary obligor” to refer to the employees and the term “person vicariously responsible” to refer to the employer. RESTATEMENT (SECOND) OF JUDGMENTS § 49 cmts. a-b.

If two persons have a relationship such that one of them is vicariously responsible for the conduct of the other, and an action is brought by the injured person against one of them, the judgment in the action has the following preclusive effects against the injured person in a subsequent action against the other.

(1) A judgment against the injured person that bars him from reasserting his claim against the defendant in the first action extinguishes any claim he has against the other person responsible for the conduct unless:

(a) The claim asserted in the second action is based upon grounds that could not have been asserted against the defendant in the first action; or

(b) The judgment in the first action was based on a defense that was personal to the defendant in the first action.

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

(a) There were limitations on the competence of the forum in the first action preventing him from obtaining the full measure of his damages, as stated in § 26(1)(c), or he exercised the option stated in § 26(1)(e) to divide his claim; or

(b) Different rules govern the measure of damages in the two actions.

RESTATEMENT (SECOND) OF JUDGMENTS § 51 (emphasis added). This rule “becomes applicable” when the injured person, like Fife Portal here, sues the employer and the employees in different actions. *Id.* cmt. a.

The *Restatement* recognizes that an injured person is generally barred from asserting claims against an employee if that person unsuccessfully pursued the same claims against the employer in a prior action. *Id.* § 51(1); accord *Doremus v. Root*, 23 Wash. 710, 717-18, 63 P.

572 (1901). Division One correctly applied this principle in *Ensley* and held that res judicata barred a plaintiff's follow-on action against an employee because he had unsuccessfully sued the employer on the same claim in an earlier action. *Ensley*, 152 Wn. App. at 902-07 (citing the *Restatement (Second) of Judgments* § 51(1)).

By contrast, the *Restatement* recognizes that an injured person who sues an employer and obtains a favorable judgment may later pursue the same claims against the employees in a second action. RESTATEMENT (SECOND) OF JUDGMENTS § 51(2). A judgment in favor of the injured person serves only to limit the amount of the damages recoverable in a second action. *Id.* cmt. d (explaining that the judgment is “ordinarily conclusive as a ceiling on the damages that may be recovered”); *see also* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 25 cmt. b (same); JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE § 14.13, at 704 (3d ed. 1999) (“If plaintiff prevails against E [employee] or F [employer], the amount of the damages will be held binding; plaintiff cannot bring a second suit to obtain a higher award.”). The *Restatement* constructs two hypotheticals, both of which are strikingly apt:

7. P [Plaintiff] is injured as the result of the deliberate act of S [Servant], who is M's [Master's] employee. P brings an action against M, the applicable law limiting his recovery to compensatory damages. P obtains judgment for \$10,000. **In a subsequent action against S, P may obtain judgment for no more than \$10,000 in compensatory damages** but is not precluded from recovering punitive damages.

8. Same facts as in Illustration 7, except that under applicable law the measure of damages against M may include punitive damages, determined on the same basis as in an action against S. P obtains judgment for \$10,000. **In a subsequent action against S, P's recovery is limited to \$10,000.**

RESTATEMENT (SECOND) OF JUDGMENTS § 51 cmt. d (emphasis added);  
*accord id.* § 49 cmt. a (illustration 1).

Courts applying the *Restatement (Second) of Judgments* § 51(2) have held that a judgment in favor of the injured person does not preclude a second action against other liable defendants except as to the amount of damages. For instance, the Tenth Circuit applied the *Restatement (Second) of Judgments* § 51(2) to hold that a plaintiff's successful retaliation claim against the hospital in state court did not bar her claim against the hospital employees in federal court. *Gonzales v. Hernandez*, 175 F.3d 1202, 1206-08 (10th Cir. 1999) (applying the *Restatement (Second) of Judgments* § 51(2) under New Mexico law) (citing cases). Nor is the Tenth Circuit's decision an outlier. Many jurisdictions, including the Ninth Circuit, have either cited approvingly or adopted wholesale the preclusion rules under the

*Restatement (Second) of Judgments* § 51(2).<sup>12</sup> And even before the *Restatement (Second) of Judgments* was published in 1982, the majority rule in most jurisdictions, including Washington, was that the amount recovered in compensatory damages against one liable defendant only limited *the amount recoverable* against all other liable defendants. See *Marshall*, 31 Wn.2d at 145-46 (explaining that “the person derivatively liable might rely upon the judgment against the actor as being the limit of his liability”); *Larson*, 100 Wash. at 424 (discussing the “well settled” rule 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,” but “plaintiff can have but one satisfaction for her wrong”); *Ponce v. Tractor Supply Co.*, 29 Cal. App. 3d 500, 505-07, 510, 105 Cal. Rptr. 628 (1972) (holding that the plaintiff’s judgment against the employee established the upper limit of the damages available against the employer in a second action).

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<sup>12</sup> See, e.g., *M.J. ex rel. Beebe v. United States*, 721 F.3d 1079, 1083 n.4 (9th Cir. 2013) (citing approvingly *Gonzalez’s* holding); *Headley v. Bacon*, 828 F.2d 1272, 1278 (8th Cir. 1987) (applying federal preclusion law and explaining that a prior judgment in favor of the injured person is conclusive in a second action only as to the amount of damages); *Oracle Am., Inc. v. Appleby*, No. 16-cv-02090-JST, 2016 WL 5339799, at \*4-5 (N.D. Cal. 2016) (applying *Gonzalez* and holding that because the judgment was in the plaintiff’s favor in the first action, the plaintiff was not precluded from bringing a second action against nonparties who were in a vicarious-liability relationship with the first defendant); *Lee L. Saad Constr. Co., Inc. v. DPF Architects, P.C.*, 851 So.2d 507, 521 (Ala. 2002) (“[A] judgment awarding damages to an injured person in one proceeding acts as a limitation on the amount of damages that might be recovered in a subsequent proceeding against others responsible for the injury.”); *Day v. Davidson*, 951 P.2d 378, 381-83 (Wyo. 1997) (applying the *Restatement (Second) of Judgments* § 51(2) and concluding that the amount of damages obtained by the plaintiffs in a suit against the employer was the limit on the damages that may be claimed against the employee); *Helm v. Wismar*, 820 S.W.2d 495, 497-99 (Mo. 1991) (same); *Kimmel v. Iowa Realty Co., Inc.*, 339 N.W.2d 374, 378-79 (Iowa 1983) (“A judgment in favor of the injured party is preclusive as to nonparties under section 51 only as to the extent of damages.”); *Sheffield*, 587 S.W.3d at 735-37.

To be sure, unlike Pacific and its employees, the defendants in *Marshall* and *Larson* did not share an employer–employer relationship. But the Washington Supreme Court made clear that the “well settled” law-of-judgment principles adopted in those cases would apply equally in the “respondeat superior” context. *Marshall*, 31 Wn.2d at 146. And the holdings in *Marshall* and *Larson* on Washington’s common law of judgments are indeed consistent with the preclusion rules reflected in the *Restatement (Second) of Judgments* §§ 49, 50, and 51.

**2. Consistent with most jurisdictions and century-old Washington common law, this Court should apply the *Restatement (Second) of Judgments* § 51(2) to allow Fife Portal’s action to proceed against the Employees.**

Washington courts have already cited to or applied the preclusion rules of the *Restatement (Second) of Judgments* § 51(1) to bar a plaintiff who lost in a prior action against a defendant from suing any other liable defendants. *See, e.g., Vanderpool*, 110 Wn.2d at 488-89; *Glover*, 98 Wn.2d at 720; *Thompson v. King County*, 163 Wn. App. 184, 195-96, 259 P.3d 1138 (2011); *Ensley*, 152 Wn. App. at 905-07; *Brown v. Scott Paper Worldwide Co.*, 98 Wn. App. 349, 358-59, 989 P.2d 1187 (1999). But unlike many other jurisdictions, Washington courts have not had the occasion yet to consider applying the corollary of those rules to successful plaintiffs under the *Restatement (Second) of Judgments* § 51(2).

This case calls for this Court to recognize the well-established principles of the law of judgments and to apply the *Restatement (Second) of Judgments* § 51(2) here for at least three reasons. First, that preclusion rule

already comports with century-old Washington common law. *See Marshall*, 31 Wn.2d at 146; *Larson*, 100 Wash. at 424. Second, the Employees cite to no authority supporting the conclusion that res judicata bars a plaintiff who obtains a judgment against an employer from later pursuing the employees.<sup>13</sup> All of the res-judicata cases principally relied on by the Employees here share one common thread: the plaintiff lost in the first action, so res judicata correctly barred the second action. *See, e.g., Ensley*, 152 Wn. App. at 894-97; *Kuhlman v. Thomas*, 78 Wn. App. 115, 117-19, 897 P.2d 365 (1995); *Emeson*, 194 Wn. App. at 620-22, 636-37; accord RESTATEMENT (SECOND) OF JUDGMENTS § 51 cmt. b (explaining that if an injured party were “allowed to sue the second obligor after having lost an action against the first,” preclusion rules should “approximate those that govern when the same claim is successively asserted against a single defendant”). Third, most if not all jurisdictions who have confronted this issue have adopted the *Restatement’s* approach to successful plaintiffs under Section 51(2).

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<sup>13</sup> Counsel for Fife Portal has found only one jurisdiction in which a court concluded that claim preclusion barred a plaintiff who had prevailed in an earlier action from bringing new claims against the same defendant or those in privity with that defendant. *Burberry Ltd. v. Horowitz*, 534 F. App’x 41, 43 (2d. Cir. 2013) (unpublished, nonbinding authority) (citing *Cent. Hudson Gas & Elec. Corp. v. Empresa Naviera Santa S.A.*, 56 F.3d 359, 367-68 (2d Cir. 1995)). But as the federal district court in *Appleby* observed, *Burberry* did not involve respondeat-superior liability, so “section 51(2) of the *Restatement (Second) of Judgments* was not implicated in *Burberry*.” *Appleby*, 2016 WL 5339799, at \*5 n.4 (citing the *Restatement (Second) of Judgments* § 51 and concluding that the Tenth Circuit authority in *Gonzalez* controlled, “which was relied upon by the Ninth Circuit in *Beebe*”).

**3. Pacific's satisfying the judgment does not bar Fife Portal's action against the Employees as long as this Court orders a remand to allow Fife Portal to recover additional compensatory damages against the Employee's former and now-defunct company, Pacific, in *Fife Portal I*.**

Pacific's satisfaction of the judgment, the Employees contend, bars Fife Portal's action against them. *See Brief of Appellants* at 14-18. They are wrong because Fife Portal may pursue the damages that the trial court barred Fife Portal from recovering against Pacific in its follow-on action against the Employees (to the extent this Court reverses those damages determinations in *Fife Portal I*).

A party may obtain only one recovery for an indivisible injury. Although a judgment against one does not bar a suit against others jointly and severally liable for the same injury, a satisfied judgment encompassing all recoverable damages does. *Marshall*, 31 Wn.2d at 145-46; *Larson*, 100 Wash. at 424; *accord* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 25 cmt. c (2000) (illustration 3); RESTATEMENT (SECOND) OF JUDGMENTS § 50 cmt. d. This represents the one-satisfaction rule: the plaintiff may recover only one satisfaction for an injury. *See Larson*, 100 Wash. at 424.

The *Restatement (Third) of Torts* and the *Restatement (Second) of Judgments* both adopted the one-satisfaction rule. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 25(a); RESTATEMENT (SECOND) OF JUDGMENTS § 50 cmt. d. The *Restatement (Second) of Judgments* recognizes this rule in the respondeat-superior context: a judgment in favor

of the injured person is “ordinarily conclusive as a ceiling on the damages that may be recovered in the second action.” RESTATEMENT (SECOND) OF JUDGMENTS § 51 cmt. d (illustrations 7 and 8). This ensures that the injured person will have “the additional security for recovery of his loss that is represented in imposition of liability on a person other than the primary obligator.” *Id.* cmt. b. But when the “losses established in the first judgment do not include all those that may be recovered in the second, the first judgment does not preclude recovery of the additional losses from a second obligor.” RESTATEMENT (SECOND) OF JUDGMENTS § 50 Reporter’s Note (comment d).

A jury awarded Fife Portal \$195,074.79 in compensatory damages, and the trial court entered a final judgment against Pacific. CP 56-57. Pacific then went out of business and had its assets sold at auction. To ensure it would be made whole, Fife Portal sued Pacific’s principals and employees. Eight months later, Pacific finally satisfied the judgment.

Ordinarily, Pacific’s satisfaction of the judgment would bar Fife Portal’s action against the Employees. But that judgment does not reflect the “ceiling” or the full amount of Fife Portal’s “recoverable damages” against Pacific because the trial court barred Fife Portal from presenting all of its damages evidence to the jury in *Fife Portal I*. Fife Portal appealed from those damages rulings in *Fife Portal I*. And it asks this Court in *Fife Portal I* to remand for a limited trial on those damages elements. If this Court does so, Fife Portal has a right to pursue those compensatory damages against the Employees as “additional security” because Fife Portal

may not be able to collect those damages against Pacific.<sup>14</sup> RESTATEMENT (SECOND) OF JUDGMENTS § 51 cmt. b; *see also Lejeune v. Clallam County*, 64 Wn. App. 257, 266, 823 P.2d 1144 (1992) (“[R]es judicata can still be defeated by later rulings on appeal.”).

To be sure, because Pacific satisfied the judgment, res judicata bars Fife Portal from recovering any of the damages awarded to it against Pacific in *Fife Portal I* in a follow-on action against the Employees. That would constitute an impermissible double recovery. But Fife Portal is not seeking to recover a windfall; it merely seeks to be made whole for the extensive damages Pacific and its Employees caused to its property. Indeed, even after Pacific satisfied the judgment, Fife Portal’s case against the Employees was stayed pending this Court’s resolution of the damages issues in *Fife Portal I*. And Fife Portal made clear that its case against the Employees—after Pacific satisfied the judgment—now depended on whether this Court remanded for a limited trial on the damages that the trial court barred Fife Portal from recovering against Pacific in *Fife Portal I*. RP (9/13/19) 7-9. So to the extent this Court affirms the trial court’s damages rulings in *Fife Portal I*, then Fife Portal concedes that res judicata would bar its action against the Employees.

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<sup>14</sup> The extent of the judgment’s preclusive effect against the Employees in *Fife Portal II*—beyond damages—is not an issue currently before this Court. For instance, Josh Kotulan and Eric Kotulan (defendants in this action) participated in and testified at the first trial in *Fife Portal I*. Whether those defendants are bound by the judgment’s liability determinations in *Fife Portal I* remains an issue to be decided in the trial court.

**4. Applying res judicata to bar Fife Portal’s action against the Employees would conflict with Washington’s public policy that an injured person should be made whole.**

Res judicata is an equitable, common-law doctrine that should “not be applied so rigidly as to defeat the ends of justice, or to work an injustice.” *Weaver*, 194 Wn.2d at 482. “The purpose of awarding damages in cases involving injury to real property is to return the injured party as nearly as possible to the position he would have been in had the wrongful act not occurred.” *Thompson v. King Feed & Nutrition Serv., Inc.*, 153 Wn.2d 447, 459, 105 P.3d 378 (2005). The injured party “should be fully indemnified for his loss[.]” DAN B. DOBBS & CAPRICE L. ROBERTS, LAW OF REMEDIES: DAMAGES–EQUITY–RESTITUTION § 3.1, at 215 (3d ed. 2018).

Fife Portal suffered extensive damages to its property due to the misconduct of CenturyLink’s contractor, Pacific. Fife Portal sued Pacific and CenturyLink. The trial court dismissed Fife Portal’s claims against CenturyLink, but Fife Portal prevailed against Pacific and received a substantial damages award. Fife Portal appealed from the dismissal of its claims against CenturyLink and the trial court’s rulings limiting the scope of its damages case. In response, Pacific posted a supersedeas bond but also cross-appealed the summary judgment establishing its liability for the damages awarded against it. Fife Portal then learned that Pacific had gone out of business.

Only after all this did Fife Portal sue Pacific’s employees. Although Pacific had posted a bond, that bond risked being evaporated if this Court reversed the summary judgment and remanded for a trial on Pacific’s

liability. Left with the possibility of no recourse to collect on its judgment, Fife Portal sued the Employees to remedy the damages to its property. And although Pacific eventually satisfied the judgment and dismissed its cross-appeal many months after Fife Portal sued the Employees, Fife Portal is entitled to pursue the Employees if this Court in *Fife Portal I* holds that the trial court erred when it limited the scope of Fife Portal's damages case. In that event, this Court should affirm the trial court's summary-judgment order allowing Fife Portal's action to proceed to recover *those damages* against the Employees.

**C. Because the Employees admitted to liability below, Fife Portal is entitled to recover its reasonable attorneys' fees incurred from the time when Fife Portal was forced to sue the Employees until this Court ultimately dismissed review of Pacific's cross-appeal in *Fife Portal I*.**

Pacific's liability under the trespass statute (RCW 4.24.630) was established on partial summary judgment in *Fife Portal I*. The jury awarded Fife Portal compensatory damages against Pacific, and the trial court trebled those damages for a total damages award of \$585,224.37.

Fife Portal appealed from the final judgment because the trial court had precluded Fife Portal from presenting all of its damages evidence to the jury. Pacific cross-appealed from the order establishing its liability as a matter of law and posted a bond. If Pacific's cross-appeal were successful, the bond would have been voided, and Fife Portal would have had to try Pacific's liability in a limited remand trial. CP 69.

Shortly after the judgment was entered against it, Pacific went out of business and had its assets sold at auction. So Fife Portal sued the Employees for trespass (RCW 4.24.630) and negligence as a fallback to satisfy its judgment. The trespass statute allows an injured person to recover an award of reasonable attorneys' fees. RCW 4.24.630(1). The Employees' counsel on multiple occasions below admitted that the Employees' liability was undisputedly "established." RP (4/12/19) 19; *see also* RP (3/22/19) 5 ("I think, that there's no way that PUCI [Pacific] could have been found to have been willful on its own. It only could be found that way through the actions of its employees. There was no PUCI entity, thing, out there that caused any of this damage. It was all of the employees."); RP (3/22/19) 7 ("[R]es judicata is hit on all squares here because the employees are PUCI [Pacific], PUCI's actions that were found to have been willful and malicious for negligence and trespass are the actions of the employees."). This admission confirms that Fife Portal has a meritorious case against the Employees.

Thus, even if this Court vacated the summary-judgment order and remanded with directions to enter a summary-judgment in the Employees' favor here, Fife Portal should still be entitled to recover its reasonable attorneys' fees for Pacific's forcing Fife Portal to pursue the Employees for over 11 months in a case where liability was admitted as an undisputed fact. The trespass statute represents a public policy that any person liable must pay for the injured party's reasonable attorneys' fees. RCW 4.24.630(1). This Court should give effect to that policy by awarding Fife Portal its

reasonable attorneys' fees in pursuing a meritorious case against the Employees between October 5, 2018 (when Fife Portal sued the Employees) and August 14, 2019 (when this Court granted Pacific's motion to dismiss its cross-appeal in *Fife Portal I*).

In addition to the public policy represented by the trespass statute, public policy in Washington should dictate that a defendant should not benefit from initially refusing to pay a judgment, causing an injured party to incur substantial attorneys' fees in pursuing a meritorious case against other liable defendants, and then later deciding to satisfy the judgment and dismiss a cross-appeal many months after the judgment was entered. That Pacific finally decided to satisfy the judgment and to dismiss its cross-appeal many months after Fife Portal was forced to pursue Pacific's employees should not cut off Fife Portal's right to be compensated for the attorneys' fees it incurred up until August 14, 2019. This Court should not tolerate this sort of litigation gamesmanship at the expense of an injured party's right to pursue a meritorious case to remedy its damages.

#### **VI. RAP 18.1 REQUEST FOR FEES**

When a statute allows an award of attorney fees, the appellate court has inherent authority to make such an award on appeal. *Standing Rock Homeowners Ass'n v. Misich*, 106 Wn. App. 231, 247, 23 P.3d 520 (2001). Fife Portal sued the Employees for trespass under RCW 4.24.630. CP 8. That statute allows an injured party to recover an award of reasonable attorneys' fees. RCW 4.24.630(1). And the Employees' counsel admitted below that the Employees' liability was established, RP (3/22/19) 5-7; RP

(4/12/19) 19, entitling Fife Portal to reasonable attorneys' fees under RCW 4.24.630(1). Because this Court should affirm the trial court's summary-judgment order, this Court should award Fife Portal its reasonable attorneys' fees on appeal. *Standing Rock*, 106 Wn. App. at 247 (awarding fees on appeal under RCW 4.24.630 and RAP 18.1).

## VII. CONCLUSION

Consistent with the century-old Washington common law, the *Restatement (Second) of Judgments* permits an injured person to sue an employer and the employees either together or separately. Pacific's satisfaction of the judgment months after Fife Portal sued the Employees does not bar Fife Portal's action against them because Fife Portal may be entitled to additional compensatory damages against both Pacific and the Employees. If this Court remands for a limited trial on the damages that the trial court prevented Fife Portal from recovering in *Fife Portal I*, then this Court should affirm the trial court's order denying the Employees' summary-judgment motion.

Respectfully submitted: March 2, 2020.

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By: 

Bradley S. Wolf, WSBA No. 21252  
Christine L. Bauman, WSBA No. 26410

*Attorneys for Plaintiffs-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:

Via Appellate Portal to the following:

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DATED: March 2, 2020.

  
\_\_\_\_\_  
Patti Saidu, Legal Assistant

# CARNEY BADLEY SPELLMAN

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**Appellate Court Case Title:** Fife Portal LLC, et al, Respondent v. Eric L. Kotulan et al., Petitioners  
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