IN THE COURT OF APPEALS OF THE STATE OF OREGON

JEANYNE JAMES, *et al.*, individually and on behalf of all others similarly situated,

Plaintiffs-Respondents, Cross-Appellants,

and

MARY KATHLEEN BECHERER, et al.,

Plaintiffs,

and

OREGON DEPARTMENT OF JUSTICE,

Creditor-Respondent,

v.

PACIFICORP, an Oregon corporation, and PACIFIC POWER, an Oregon registered electric utility and assumed business name of PacifiCorp,

Defendants-Appellants, Cross-Respondents

CA No. A183140

Multnomah County Circuit Court Case No. 20CV33885

APPELLANTS PACIFICORP AND PACIFIC POWER'S OPENING BRIEF

Appeal from the Limited Judgments of the Multnomah County Circuit Court
The Hon. Steffan Alexander

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April 2025

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I. INTRODUCTION

This is an unprecedented class action against PacifiCorp, a public utility, for damage to Plaintiffs' real and personal property arising out of four separate wildfires that began during a once-in-a-lifetime windstorm on Labor Day 2020. The trial court committed multiple legal errors, including (1) allowing the case to proceed as a class action despite Plaintiffs' inability to present common proof that PacifiCorp in fact caused all of the fires at issue (particularly in the Santiam Canyon area where there was undisputed evidence that a lightning-caused fire, the Beachie Creek Fire, burned properties within the class area); (2) instructing the jury that it could find PacifiCorp liable despite a lack of proof that PacifiCorp caused harm to all class members; and (3) allowing the jury to award Plaintiffs noneconomic damages for the loss of real and personal property, notwithstanding a controlling statute and common law precedent to the contrary. Those errors resulted in jury verdicts awarding over $100 million in damages against PacifiCorp to date, and untold future damages, as the trial court has scheduled multiple additional damages-only trials based on the same erroneous rulings that will continue through 2025.

The specific errors committed by the trial court include:

Class Certification and Causation. The trial court certified (and failed to decertify) a single broad "issues class" comprised of property owners within the boundaries of the four separate wildfires at issue, all in different parts of the

state. By pursuing this case as a class action, Plaintiffs assumed a fundamental threshold burden: to present common proof establishing that PacifiCorp's negligent conduct caused all the property damage to every parcel within the four fire boundaries, without the need for any individualized inquiries. Plaintiffs failed to meet that burden, particularly in the Santiam Canyon area, where it is undisputed that a pre-existing lightning-caused wildfire damaged property within the class boundary and where Plaintiffs did not even attempt to present any proof of class-wide or individual causation. Indeed, a recent Oregon Department of Forestry (ODF) investigation report completely exonerated PacifiCorp, concluding that the lightning-caused Beachie Creek Fire alone caused the harm throughout the Santiam Canyon.[1]

Instructional and Trial Errors. The trial court compounded its errors on class certification and causation by converting the "issues" class to a full liability class at the eleventh hour and agreeing to Plaintiffs' proposed jury instructions, under which the jury was told that it could "assume" that evidence applicable to the named class members—who had real property in selected areas within the class boundaries—applied to *all* of the class members. That instruction—

[1] The ODF Report was filed with the trial court on March 20, 2025, in connection with a motion to stay. (TCF-03/20/25.) Under ORAP 3.05(1), "the trial court record on appeal shall consist of the trial court file," and the ODF Report may properly be considered on appeal. In any event, the fact of the ODF Report's existence and its contents may be judicially noticed. *See* OEC 201(b)-(c), (e).

prominently highlighted by Plaintiffs' counsel during closing argument—allowed Plaintiffs to replace their obligation to introduce class-wide proof with an assumption unsupported by any evidence or legal principle. The results have cascaded through the damages phase of this case, where the trial court wrongly precluded PacifiCorp from even mentioning the lightning-caused Beachie Creek Fire as an alternative cause for a host of individualized injuries that had not been established during the liability phase.

Noneconomic Damages. This case involves only real and personal property damage caused by a wildfire. Under both ORS 477.089(4) and established caselaw, noneconomic damages are not available in cases involving only property damage. Nonetheless, the trial court has permitted every Plaintiff to seek unlimited noneconomic damages, resulting in an average award of over $4 million per plaintiff—all based on testimony describing distress at the loss of property, such as a car, tools, jewelry, and other personal property, which is manifestly insufficient to justify the award of noneconomic damages.

For those reasons and all the reasons outlined below, this case has gone completely off track procedurally and substantively. The judgments must be reversed.

II. STATEMENT OF THE CASE

A. Nature of the Action and Relief Sought

This is a class action against PacifiCorp for damage to Plaintiffs' real and personal property arising out of four wildfires on Labor Day 2020. Plaintiffs asserted claims for negligence, private nuisance, public nuisance, trespass, gross negligence, and inverse condemnation on behalf of individual Plaintiffs, as well as a putative class consisting of owners and residents of properties that experienced fire activity within attorney-drawn geographic class boundaries. Plaintiffs demanded over $1.6 billion in compensatory damages as well as punitive damages. Plaintiffs also sought double economic damages under ORS 477.089(2)(b), prejudgment interest, attorney fees, and injunctive relief. (ER-96-174.)

The trial court certified an "issues" class action under ORCP 32 G and ordered a bifurcated trial structure in which an initial "Phase I" trial would address 14 allegedly common issues for the entire class, along with liability and damages for the 17 class representatives. The "Phase I" trial then would be followed by "Phase II" individual proceedings to determine individualized issues, including damages, for the remaining absent class members. (ER-51-52; ER-53-77.) PacifiCorp sought interlocutory review of the trial court's class certification decision pursuant to ORS 19.225. This court declined to grant interlocutory review. *James v. PacifiCorp*, 323 Or App 764, 524 P3d 506

(2023). This appeal arises from the "Phase I" trial on class issues and damages for the individual class representatives, as well as limited judgments entered after the first two "Phase II" damages trials.

B. Nature of the Judgments

After the Phase I trial, the trial court entered a limited judgment for the 17 individual class representatives. (ER-351-456.) The trial court entered a supplemental judgment, and a corrected limited judgment as to Phase I. (ER-529-50; ER-625-92.) The trial court subsequently entered two additional limited judgments, and two supplemental judgments, involving 19 additional class members. (ER-541-624; ER-695-706; ER-707-818; ER-819-32.)

C. Basis of Appellate Jurisdiction

Appellate jurisdiction is based on ORS 19.205(1).

D. Effective Dates for Appellate Purposes

The limited judgments were entered on January 4, 2024, April 26, 2024, and June 28, 2024. The supplemental judgments were entered on April 3, 2024, June 11, 2024, and October 21, 2024. Notices of appeal from those judgments were filed on January 5, 2024, April 30, 2024, May 23, 2024, July 1, 2024, and November 20, 2024.

III. QUESTIONS PRESENTED

1. Did the trial court err in certifying a single class of property owners living in geographically diverse areas hundreds of miles apart, affected

by different fires with different causes, and failing to decertify that class at trial when the undisputed evidence demonstrated that liability and causation of harm could not be established on a class-wide basis?

2. Did the trial court err in sustaining the jury's verdict that PacifiCorp harmed each and every class member, when there was no evidence that PacifiCorp equipment caused a fire that damaged class member properties in the east and west ends of class boundaries in the Santiam Canyon?

3. Did the trial court err and violate PacifiCorp's due process rights in instructing the jury that it could "assume" that any evidence at trial "applies to all class members," even though evidence introduced at trial about the cause of a fire affecting one class member had no bearing on the cause of fires that burned another class member's property hundreds of miles away?

4. Did the trial court err and violate the due process rights of the absent class members and PacifiCorp by shifting the class from an issues class to a liability class without undertaking any class certification analysis, providing notice to the absent class, or providing fair notice to PacifiCorp?

5. Did the trial court err in allowing Plaintiffs to obtain noneconomic damages, admitting evidence of unrecoverable emotional distress, and refusing to instruct the jury as to the legal limitations on noneconomic damages, when the case involved solely unintentional damage to property?

6. Did the trial court err in allowing Plaintiffs to obtain noneconomic damages, notwithstanding the unambiguous text of ORS 477.089?

7. Did the trial court err and violate PacifiCorp's due process rights in instructing the Phase II juries that PacifiCorp was the sole cause of all injuries suffered by the class, and in preventing PacifiCorp from arguing and introducing evidence that the lightning-caused Beachie Creek Fire harmed the class members, when there was no evidence that PacifiCorp was the exclusive cause of class member injuries?

IV. SUMMARY OF ARGUMENT

The trial court allowed Plaintiffs to secure hundreds of millions of dollars in damages from PacifiCorp—including unlawful noneconomic damages—on behalf of an absent class without proof of PacifiCorp's liability to the class. The verdicts are plagued by evidentiary and instructional errors that exacerbated the deeper, underlying legal flaws in the adjudication of this case as a class action.

A. Class Certification

The trial court's class certification decision—and refusal to revisit that decision—should be reversed. The class consisted of thousands of property owners who lived hundreds of miles away from one another and whose properties were affected in different ways by different fires that ignited under different circumstances. Individualized inquiries regarding the central questions of whether each fire was negligently started by PacifiCorp and whether each fire

spread and caused damage to every one of the thousands of class members completely overwhelmed any possible common questions.

Class actions must have common questions that can be answered with common evidence applicable to class members. Here, liability, causation of fires, and causation of harm defied commonality. The liability question depended on whether PacifiCorp's equipment maintenance or fire management practices as to each particular ignition were reasonable, which depended on unique local conditions. Whether PacifiCorp acted reasonably in keeping the power on (or, in some cases, turning it off) in the drier southern part of the state (such as Klamath County where the 242 Fire ignited) is a different question from whether it acted reasonably in a wetter low-fire-risk coastal area (such as Lincoln County where the Echo Mountain Fire ignited).

Similarly, the causation questions necessarily depended on location-specific evidence. Whether PacifiCorp caused a particular fire could not possibly turn on class-wide proof when the class was comprised of property owners in four entirely different parts of the state—with the sole commonality being that the fires all occurred during the same weather event. And whether PacifiCorp caused *harm* similarly required a parcel-by-parcel analysis. Common proof did not resolve those questions, which could be answered only through location-specific evidence and testimony unique to each fire.

Those problems were most acute in the Santiam Canyon, where more than 1,000 class members had property spread over 70 square miles. Within the Santiam Canyon class boundary alone, negligence was not resolved using common proof on any uniform basis because power shutoff decisions in different parts of the canyon were based on different considerations. In some locations, first responders were actively battling the lightning-caused Beachie Creek Fire—a 190,000-acre, wind-driven megafire that exploded from the Opal Creek Wilderness and raced down the canyon on the night of September 7—and affirmatively asked for the power to be kept ***on***, while in other locations, first responders asked for the power to be turned ***off***.

Even more critically, the causation case in the Santiam Canyon fundamentally differed from the other locations, as Plaintiffs were forced to recognize by proposing a different causation standard—"substantial factor" causation, rather than the "but-for" causation standard that applied to the three other fire areas. Unlike the three other fires, Plaintiffs never identified a single utility-caused ignition point that spread to a defined area. At most, Plaintiffs identified several disparate ignition points in the middle of the canyon, and their expert expressly declined to speculate whether, where, or how far those ignitions spread. Further, the presence of the Beachie Creek Fire meant that individualized inquiries were necessary to determine which fire was responsible for what damage.

As a result, Plaintiffs were unable to present any common proof (or any proof at all) that any of the PacifiCorp-caused spot fire ignitions in the Santiam Canyon spread to even one property in the class boundary—much less any common proof that those ignitions spread to every property within the entire class boundary.

That failure cuts to the core of Plaintiffs' case. It was erroneous for the trial court to stand by its class certification decision when trial confirmed that the central questions were incapable of resolution through common proof applicable to all proposed class members.

B. Class Causation

The jury's verdict on liability in the class's favor must be reversed and judgment entered for PacifiCorp because there was no evidence that a fire caused by PacifiCorp equipment harmed every member of the class. It was undisputed that at least some class member properties in the Santiam Canyon were burned by the Beachie Creek Fire before PacifiCorp equipment allegedly ignited any fire whatsoever. Plaintiffs offered nothing to show that PacifiCorp-caused fires somehow spread and burned every class member property in the canyon before the Beachie Creek Fire swept through it. Indeed, some class members' properties were miles away from PacifiCorp's equipment and directly in the path of the Beachie Creek Fire. The ODF Report confirms that there was no evidence that powerline ignitions—or PacifiCorp—caused harm to the class members in

the Santiam Canyon. (ER-848-850 ("no evidence of powerline ignitions contributing to the spread of the fire in the Santiam Canyon"; "no evidence" that "powerline ignitions significantly contributed to the spread of the fire in the Santiam Canyon"; "most probable explanation for these ignitions is spot fires from the main Beachie Creek Fire").)

Plaintiffs skipped a step. They presented evidence of a handful of utility ignitions with no corresponding evidence that any of those fires spread, and then they presented evidence of burned properties after the fact. But evidence of burned properties alone was not enough to establish which fires damaged those properties—especially when it is uncontested that the massive lightning-caused Beachie Creek Fire swept through the canyon the same evening. The class-wide causation finding rested on pure speculation untethered to any evidence or reasonable inference from the evidence. It must be reversed.[2]

C. Instructional Errors

At Plaintiffs' request, the trial court then made a critical instructional error that excused the lack of evidence on class-wide causation and violated PacifiCorp's due process rights. The trial court erroneously instructed the jury that it could "assume" that evidence regarding the class representatives applied to every member of the class. By instructing the jury that it could "assume" that

[2] Because the Phase II damages trials depend on the class-wide causation finding, the judgment in those trials should be vacated as well.

evidence applied across the entire class, the court effectively told the jury that if it believed even one class representative had proved their claims, it could find that PacifiCorp was liable to ***every one*** of the thousands of class members—even if there was no evidence about the particular fires that harmed those class members and irrespective of any individualized defenses PacifiCorp presented. The instruction thus permitted the jury to find liability despite Plaintiffs' failure to prove that every class member was injured by PacifiCorp's conduct, violated the fundamental principle requiring Plaintiffs to prove the claims of every class member to establish liability, and prevented PacifiCorp from defending itself against the claims of each of the class members, thus violating due process. This alone was a sufficient legal error to require reversal of the jury's verdict in the class's favor.[3]

D. Issues to Liability Class

At Plaintiff's request, the trial court certified an "issues" class to resolve a defined list of issues set out in the class-certification order. The class notice sent to absent class members expressly stated that the trial would be on discrete issues, not liability. But at the end of trial, the court—at Plaintiffs' request—adopted a verdict form that abandoned the certified issues and changed the class

[3] Because the Phase II damages trials depend on the class-wide liability finding—which was based on the erroneous instruction—the judgments following those trials should be vacated as well.

entirely. That shift was made without any analysis as to whether a liability class could be sustained based on the evidence in the case, without any notice to the class, and without fair notice to PacifiCorp. Such a shift violated both ORCP 32 and PacifiCorp's and the absent class members' due process rights, requiring vacatur of the verdicts against PacifiCorp.

E. Noneconomic Damages

The trial court repeatedly ruled that Plaintiffs could recover noneconomic damages because their property was damaged by the fires. That first-of-its-kind decision contravenes decades of Oregon precedent. Damage to real or personal property alone cannot be the basis for noneconomic damages.

The trial court's ruling also contravened ORS 477.089, which provides that the "***exclusive remedies***" that a plaintiff can recover for property damage caused by wildfire are "economic and property damages." ORS 477.089(4) (emphasis added). That statute independently prohibits Plaintiffs from recovering noneconomic damages for property damage in wildfire cases that do not involve bodily injury.

F. Application of Class-Wide Causation Verdict in Phase II Trials

Contrary to the express terms of the Phase I verdict form, which purported to establish that PacifiCorp was "a cause" of harm to the class, the trial court told the Phase II juries that PacifiCorp was "the" sole cause. The trial court also precluded PacifiCorp from introducing any evidence of the Beachie Creek

Fire—the clear cause of harm in the Santiam Canyon. As a result, class members were allowed to recover damages that were not proven—and that PacifiCorp did not have a chance to contest—during the Phase I trial. Each new claim of injury—whether for smoke damage, emotional distress, or evacuation-related harms—serves as a concrete illustration of the absence of evidence supporting the Phase I finding that PacifiCorp caused that specific harm to that specific class member.

V. STATEMENT OF FACTS

A. PacifiCorp's History of Wildfire Mitigation Policies and Practices

In March 2018, PacifiCorp became the first utility company in Oregon to conduct a fire risk study for purposes of developing a wildfire mitigation program. (Tr-5518:16-18; Tr-7025:2-6[4].) PacifiCorp retained subject matter experts to identify the areas of highest wildfire risk based on historical fire activity and countless other datapoints. (ER-193-255; Tr-7053-54.) It featured a protocol for conducting public safety power shutoffs ("PSPS") in 14 of the highest fire-risk areas. (ER-243-51.) It also provided for the deployment of technologically advanced weather stations on its electrical system (when other utilities in the state had no such weather stations at all as of Labor Day 2020). (*Id.*; Tr-7354:20-7355:7; DTX-8585.)

[4] Unless otherwise noted, references to "Tr-" are to the Phase I transcript, and "PTX-" "DTX-" are to Phase I trial exhibits.

PacifiCorp's wildfire mitigation program supplemented the company's baseline safety practices, including its vegetation management and equipment maintenance programs as well as its emergency de-energization practices. (Tr-5299:20-22, 5263:5-10, 4999:15-22, 5035:18-5036:1.) Those programs were designed to respond to specific local conditions, which varied greatly across PacifiCorp's sprawling service territory. (Tr-4983:25-4984:7; 7348:6-21.) Because power shutoffs have the potential to impact hospitals, vulnerable customers, and emergency communications, PacifiCorp's power shutoff procedures and practices were "granular," based on a variety of local factors, including discussions with first responders and community leaders regarding their need to maintain electricity. (Tr-5400:7-5401:5, 7259:1-22, 7390:13-7392:6.)

B. Events Leading to the Labor Day 2020 Fires

1. The Santiam Canyon

On August 16, 2020, lightning struck in the Opal Creek Wilderness, triggering the Beachie Creek Fire. (Tr-644:20-646:11, 3874:4-16, 5077:16-21, 5156:20-25.) Because the fire struck federal land, "the U.S. Forest Service was supposed to be fighting that fire," but they did not actively combat it, so it grew. (Tr-5078:2-9, 5158:12-5159:21.) Both firefighters and residents of the Santiam Canyon were aware of the Beachie Creek Fire and concerned about its spread. (Tr-4693:16-4694:8, 4866:19-4867:13, 5077:11-15.)

By Sunday, September 6, 2020, it became clear that the wind on Labor Day could be severe. (Tr-6787:14-6788:4.) Over Labor Day weekend, PacifiCorp monitored the weather and wind. (DTX-5681, 6650; PTX-47, 827; Tr-6806:16-6807:4, 7099:3-12, 7107:1-12.) By Monday afternoon, PacifiCorp had activated an emergency operations center. (Tr-6799:13-6800:1.)

A few hours later, the Beachie Creek Fire entered the northeast end of the Santiam Canyon, a 20-mile-long canyon served by multiple utility companies. (DTX-8537; Tr-2429:10-12, 4055:7-9, 4498:3-13, 7482:24–7483:23.) Throughout the evening and night, embers from the Beachie Creek Fire fell throughout the Santiam Canyon, triggering "spot fires." (DTX-8526-28; Tr-4813-15.) Some witnesses also testified to seeing spot fires caused by power lines downed by the windstorm. (Tr-619:11-14.) Stoked by strong east-to-west winds, by 11:30 p.m., the Beachie Creek Fire had reached Gates and Mill City—two towns in the center of the canyon. (ER-188-91, Tr-5182:17-23, 5229-30, 4769-72, DTX-6842, DTX-8537.) By 4 a.m. on September 8, according to Plaintiffs, the Beachie Creek Fire had engulfed the entire canyon. (ER-191; 3909:8-3910:9, Tr-5104:8–14, 5190:11-5191:10; 6578:22-6579:5, 7505:14-17, 7517:4-8.) Over 1,250 private parcels were burned in the canyon, in addition to extensive areas of public lands on which some class members had personal property. (ER-177.)

State and local emergency responders worked to combat the fire, with PacifiCorp energizing and de-energizing lines in particular areas as requested by first responders. (Tr-1572:20-22, 1641:20-22, 6245:9-15, 6502:7-12.) At 10:31 p.m. on Labor Day, PacifiCorp de-energized most of the power lines in Gates, in the center of the canyon; by 12:09 a.m., the entire town had been de-energized. (Tr-6085:7-14; 6047:21-24; DTX-8553.) In parallel, PacifiCorp also worked to restore power in areas where firefighters requested it. (Tr-6573:6-9, 7538:2-5.)

ODF closely studied the fire damage in the Santiam Canyon. After reviewing thousands of documents and conducting over a hundred witness interviews, ODF concluded that there was "no evidence of powerline ignitions contributing to the spread of the fire in the Santiam Canyon." (ER-848.)

2. The Echo Mountain, South Obenchain and 242 Fires

In other areas in Oregon—each of which was hundreds of miles apart—fires also began during the Labor Day windstorm. Three of those fires became known as the Echo Mountain, South Obenchain, and 242 Fires, respectively. Plaintiffs and their experts alleged that PacifiCorp equipment caused those fires, while PacifiCorp and its experts argued that the powerlines Plaintiffs identified could not have started the fires, or that PacifiCorp had not acted negligently in maintaining and managing its utility infrastructure.

After each fire was contained, PacifiCorp worked to re-establish service to the affected areas. PacifiCorp worked in coordination with the ODF and the

U.S. Forest Service to enter the regions that had been burned safely and make needed repairs. (Tr-1626:2-19, 5850:25-5851:11, 5007:2-16.)

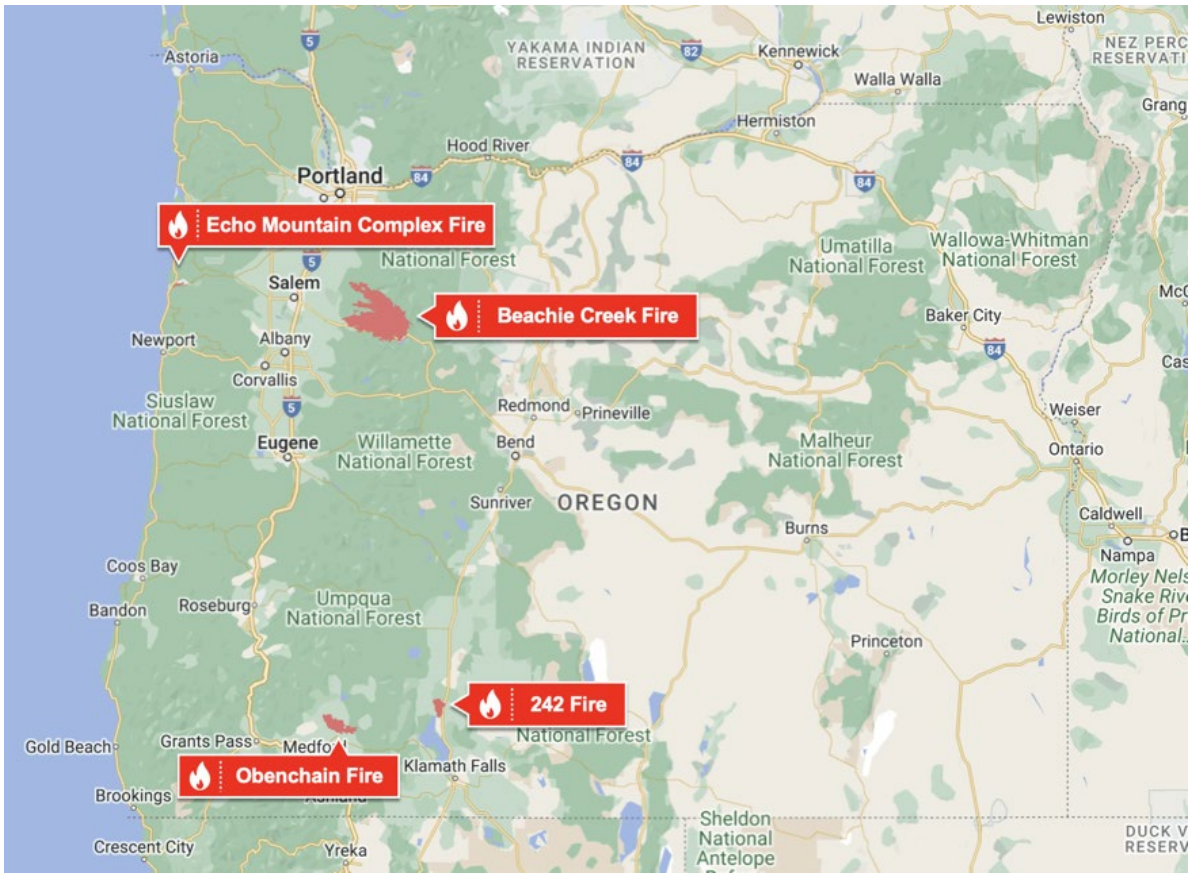
C. Procedural History

1. Complaints

On September 30, 2020, Plaintiffs filed their initial class action complaint, alleging causes of action for negligence, private and public nuisance, and trespass. (ER-1-30.) Plaintiffs subsequently amended the complaint several times, adding claims of gross negligence and inverse condemnation and ultimately seeking over $1.6 billion on behalf of the entire class. (ER-96-174.)

2. Plaintiffs' Class Certification Theory

On October 27, 2021, Plaintiffs filed a "Motion for Issues Class Certification," seeking to certify a class defined as all "owners or residents" of private property or owners of personal property on public lands located within the "boundary of the maximum extent of burn" for the "Echo Mountain," "South Obenchain," "242," or "Santiam Canyon" fires that "experienced fire activity during those fires." (TCF-10/27/21 (Plaintiffs' Motion for Certification of Issues Class).) The Santiam Canyon portion of the class boundary was by far the largest in the area at 20 miles long and taking up roughly 70 square miles. Each of the four fire areas was located over a hundred miles away from any other fire area:



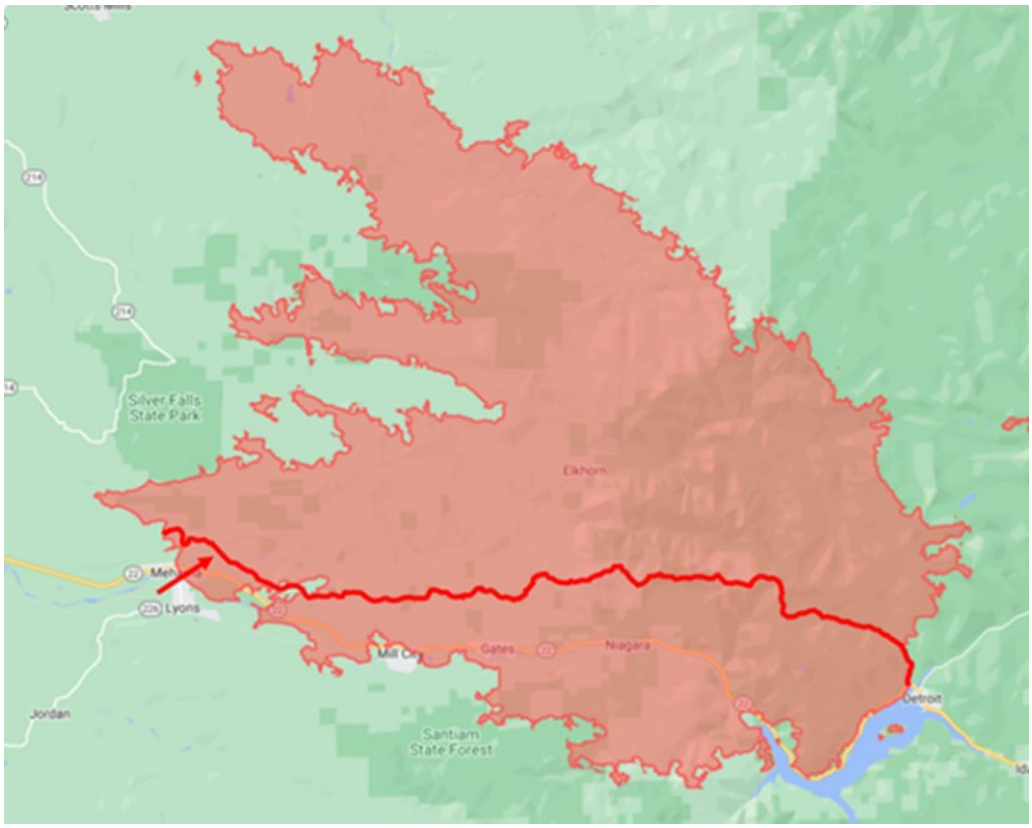
(TCF-03/17/2023 (Defendants' Motion to Decertify).)

The class certification briefing—in which Plaintiffs explained their evidentiary and legal theories and represented what they intended to prove at trial—was the foundation for the fundamental structural flaws that would become evident at the Phase I trial. For the Echo Mountain, South Obenchain, and 242 fires, Plaintiffs advanced a simple theory—that a single event (a tree or branch falling on a power line) started a fire at a specific origin point that then spread over a defined geographic area. (TCF-10/27/21 (Motion for Issues Class Certification); TCF-02/16/22 (Plaintiffs' Supplemental Brief).)

The circumstances in the Santiam Canyon were different and presented Plaintiffs with unique problems. Unlike the other fires, no single alleged power-equipment ignition (or even a defined combination of ignitions) existed that then spread to cause all damage in the canyon. In addition, there was an obvious alternative explanation for that fire damage: the lightning-caused Beachie Creek Fire had indisputably burned the whole canyon.

In their zeal to maximize the size of the class and blame PacifiCorp for damaging the largest area, Plaintiffs advanced a theory that depended on three key (and disputed) factual allegations and a flawed legal theory.

First, Plaintiffs drew a red line across the existing Beachie Creek Fire boundary and defined the (more populous) area south of that line (but still within the Beachie Creek Fire boundary) as the "Santiam Canyon Fire":



(ER-50.)

Second, Plaintiffs claimed they would introduce the testimony of an expert—Nicole Brewer—who could testify that PacifiCorp was responsible for all property damage ***below*** their red dividing line. (TCF-02/16/22 (Plaintiffs' Supplemental Brief).) Brewer's report discussed various alleged power-line-caused fires in the Santiam Canyon, beginning at approximately 8:30 p.m. on the night of Labor Day. (ER-35-50.) Unlike the other three fires, Plaintiffs pointed to no single ignition point (or even combination of ignition points) that progressed within a defined area. Instead, they vaguely promised that Brewer would somehow tie those ignitions together in a way that made them "one

conflagration" and justified their class-wide causation theory. (TCF-02/16/22 (Plaintiffs' Supplemental Brief).)

Third, Plaintiffs relied on two related propositions: (1) that class-wide evidence would show that the scattered power-line ignitions—some of which may have been extinguished or burned less than 50 square ***feet***—somehow caused ***all*** the damage within the purported 70-square-***mile*** class boundary ***before*** the Beachie Creek Fire arrived; and (2) that individualized, location-specific inquiries would not be required to make that determination. Plaintiffs told the trial court that they would "use common evidence"—namely, Brewer's testimony—to show a single "conflagration" that was all caused by PacifiCorp and spread to all "the properties included in the class." (TCF-02/16/22 (Plaintiffs' Supplemental Brief).) As to the Santiam Canyon specifically, Plaintiffs claimed that the "substantial factor" causation standard would apply to demonstrate that those ignitions were a "material element or substantial factor" in causing harm to every class member, citing *Haas v. Estate of Carter*, 316 Or App 75, 83, 502 P3d 1144, 1149 (2021), *aff'd*, 370 Or 742 (2023). Plaintiffs dismissed the presence of the Beachie Creek Fire by arguing that "even that potential other cause—a single, lightning ignited wildfire—is common to all class members." (TCF 02/16/22 (Plaintiffs' Supplemental Brief).)

3. The Trial Court's Class Certification Order

Based on Plaintiffs' representations, the trial court entered its "Opinion and Order Granting Plaintiffs' Motion for Issues Class Certification." (ER-53-77.) The Order certified an issues class of all property owners and residents in the four fire areas (totaling roughly 2,500 property owners). (*Id.*) The class-certification order was predicated on Plaintiffs' promises (ultimately unrealized) to establish class-wide harm with class-wide common proof. The trial court's issues-class certification repeatedly referenced Brewer's proposed testimony, and her assertion that she could show PacifiCorp burned the entire Santiam Canyon class area. (ER-64-65.)

The class-certification order was also limited to establishing an "issues class." The order identified 14 "Certified Issues" that would be decided by the jury, such as, "If defendants' conduct was a cause of harm to the class, was that harm reasonably foreseeable?"; and "Did defendants' action or inaction cause or contribute to the cause of the wildfire or cause or contribute to the spreading of the wildfire?" (ER-55.) The approved class notice specifically listed each of the 14 certified issues and explained that this case "is a class action as to the Certified Issues only," that the Court "has scheduled an Issues Trial to decide the fourteen Certified Issues for all members of the Class," and that Plaintiffs' counsel "will have to prove at trial that some or all of the Certified Issues should be answered in Plaintiffs' favor." (ER-87, 91.) Critically, the notice expressly stated that after

the issues trial, "PacifiCorp is * * * entitled to present its defenses to liability and to individual Class Members' claims." (ER-91.)

The trial court then bifurcated the case, settling on a trial plan where, in "Phase I," the jury would resolve the individual claims of the 17 class representatives and, using a special verdict form, resolve the 14 certified class issues. After Phase I, the trial court contemplated a "Phase II" in which absent class members would present evidence of their damages in some format. (ER-51-52.) The trial court made clear that issues class certification would "***not preclude*** * * * inquiry into individual damages in phase two to determine ***whether each plaintiff's damages are a result of PacifiCorp's fault*** and the amount of legally cognizable damages, if any." (ER-71 (emphasis added).)

4. Interlocutory Appeal

PacifiCorp sought interlocutory appeal of the trial court's class certification ruling. *James*, 323 Or App at 762. This court decided, as a matter of discretion, to decline interlocutory review. *Id*. In so doing, the court noted that class certification in this case represents an "important and novel" question with respect to predominance, but that "resolution of that issue would require extensive analysis of the record below," making it more appropriate for review after trial. *Id.* at 775, 777. The court further remarked that the trial court's certification order contemplated that the first phase of the trial could litigate issues of causation without "a 'property-by-property' analysis" (*id.* at 776) but

also noted that the trial court could "rescind or amend its certification order * * * if the litigation does not pan out the way the court expects." *Id.* at 777-78.

5. Phase I Trial

The Phase I trial began on April 24, 2023. Each fire area had its own distinct causation and potential liability theory, its own distinct set of fact and expert witnesses, and its own distinct set of relevant documentary and physical evidence.

With respect to the Santiam Canyon, Plaintiffs offered a strikingly different set of facts and theory of liability than they outlined at the class certification stage. The expert that Plaintiffs prominently highlighted—Brewer—did *not* testify about *any* of the fires at issue in the Santiam Canyon, nor did Plaintiffs offer any other expert to support the assertions that they made in their class certification motion. Plaintiffs offered no evidence that there was "one conflagration" caused by PacifiCorp in the Santiam Canyon, and Plaintiffs did not offer any expert (or other evidence) to support their theory that PacifiCorp-caused fires spread and burned the entire canyon.

Instead of Brewer, Plaintiffs offered the testimony of two experts: Larry Pelton and Dr. John Bailey.

Relying on 911 calls or other evidence of utility lines that had been affected by the windstorm, Pelton testified that, in his opinion, a handful of different fires in a narrow sliver in the middle of the 20-mile-long canyon were started by PacifiCorp equipment. (Tr-5085:2-7; Tr-4799:24-4800:9, 7636:6-11, DTX-8526, 8588.) Plaintiffs presented a demonstrative graphic showing all events identified by Pelton (only some of which were attributed to PacifiCorp):

(ER-192.)

Unlike Brewer, Pelton was not a fire progression expert, and he had not analyzed whether or to what degree any fire spread (or if they spread at all). (Tr-4452:22-24.) Rather than multiple ignitions constituting (or contributing to) a

single conflagration, Pelton simply identified every possible report of some activity (including utility line activity with no fire reported and small grass fires), all of which occurred in the middle of the class area. (Tr-4400:13-19.) Pelton did not identify *any* alleged utility fire in the *entire eastern ten miles* or *western seven miles* of the canyon. (ER-192; Tr-7483:6-9.) And Pelton did not attempt to explain what happened *after* any fires were started, much less where or how far they burned, whether they were extinguished, or whether they affected any class member's property.

Bailey "modeled" the progression of the preexisting, lightning-caused Beachie Creek Fire as it moved from the wilderness north and east of the Santiam Canyon into the canyon itself. Plaintiffs apparently called Bailey to support their theory that some PacifiCorp-equipment fires started before the Beachie Creek Fire tore through the canyon. But Bailey's actual testimony contradicted that theory. According to Bailey's model, the Beachie Creek Fire had already entered the canyon and consumed class member property by 8:00 p.m. on Labor Day. *See infra* 49-51. Pelton, however, had already testified that the earliest fire attributable to PacifiCorp started at 8:37 p.m. (and was quickly extinguished). (Tr-4400:13-19.) So, according to the testimony of Plaintiffs' two experts, the Beachie Creek Fire had already damaged at least some class member properties ***before*** any the earliest alleged PacifiCorp fires even ignited.

Plaintiffs also offered the expert testimony of Mark Buckley. But the entirety of Buckley's analysis consisted of determining which tax parcels within the four class areas included "at least some property" that experienced at least "low" "soil burn severity" according to a U.S. Forest Service map—in other words, whether any portion of a parcel was burned, even if it was just a small portion and even if the extent of the damage was minimal. (*See, e.g.*, ER-177-78; Tr-3333:18-23, 3338:17-3339:2.) He was not asked to, and did not, opine on the cause of any "soil burn." (Tr-3366:20-25.)

After presenting their case, Plaintiffs recognized that they had failed to offer any evidence showing that PacifiCorp was responsible for a fire that destroyed all the class members' properties in the Santiam Canyon. Plaintiffs filed a motion asking the court to change the class boundary to eliminate the entire eastern half of the canyon from the class definition. (Tr-8145:16-25.) Plaintiffs presented a map that simply "Xed out" which portion of the canyon should be removed from the class:

(ER-256, 259.)

By presenting their "Xed" out map, Plaintiffs essentially admitted two things: (1) that they had no evidence supporting their "one conflagration" theory, and (2) that the presence of the Beachie Creek Fire (and when and where it entered the canyon) made it impossible to determine on a class-wide basis which fire was responsible for damaging any single property in the canyon.

In response, PacifiCorp argued that Plaintiffs were simply trying to excuse their failure to prove that a PacifiCorp fire affected the eastern part of the canyon, and that they could not escape the consequences of their failure of proof by simply removing that area from the class. (ER-260-62.) The trial court agreed and denied Plaintiffs' motion, keeping that portion of the canyon in the class. (ER-263.)

In that same hearing, Plaintiffs also requested jury instructions that helped them overcome their failure of proof. Over PacifiCorp's objection, Plaintiffs obtained an instruction that the jury "may assume that the evidence at the trial applies to all class members." (ER-258.) Plaintiffs also persuaded the court to issue a unique jury instruction on causation for the Santiam Canyon fire *only*, allowing the jury to find liability on a "substantial factor" theory of causation rather than the "but for" causation instruction applied for the other three fires. (Tr- Tr-7979:17-7983:10, 8081:12-8082:2.) And they secured a verdict form that asked the jury to resolve liability, both as to the individual Plaintiffs and on a class-wide basis, rather than asking the jury to address the 14 discrete issues that were identified in the class certification order. (ER-290-312.)

6. Phase I Verdict and Limited Judgment

On June 12, 2023, the jury returned a verdict in favor of Plaintiffs. A non-unanimous jury found in favor of the individual Plaintiffs and the class as a whole on all claims except the inverse condemnation claim. (ER-290-305)

The jury awarded the class representatives a total of $4.38 million in economic damages, and a total of $67.5 million in noneconomic damages. (ER-306-09.) Based on testimony describing their sentimental attachment to their property, each Plaintiff received $4.5 million in noneconomic damages, except for three plaintiffs that received $3 million each, two of whom were not at home on the day of the fires and one of whom only lost timber, not his home. (*Id.*)

The jury also awarded a class-wide punitive damages multiplier, which increased by 25-percent the damages of both the class representatives before the court in Phase I and any future Plaintiffs. (ER-313-18.) The economic damages were then doubled to $8.75 million under ORS 477.089(2)(b).

Although PacifiCorp challenged Plaintiffs' proof and the verdict in directed verdict and post-trial motions, the trial court overruled PacifiCorp's challenges in a brief order (ER-319-20.) and then awarded judgment to the individual Plaintiffs in the amount of $92.29 million. (ER-351-456.)

7. Phase II Trials

Following the Phase I verdict, the trial court scheduled the first Phase II damages trial. The first Phase II jury rendered a verdict on January 23, 2024. The second Phase II damages trial was held just a few weeks later, and a verdict was rendered on March 5, 2024. Contrary to the trial court's original contemplated trial plan, the juries in both Phase II trials were instructed that liability and causation had already been decided against PacifiCorp, that PacifiCorp was "the" cause of Plaintiffs' injuries, and that the only issue for resolution was the amount of damages owed to individual class members. (ER-463-79; ER-499-516.)

In support of their claims of up to $25 million in noneconomic damages, and like the Phase I Plaintiffs, the Phase II Plaintiffs presented evidence concerning the mental and emotional distress that they experienced because the

fire had damaged their real and personal property. Plaintiffs testified, for example, about the sentimental meaning associated with personal property such as cars, tools, collectibles, family photographs, and animals, and their loss of enjoyment in the aesthetic value of the land and surrounding vegetation. The juries in the damages trials have awarded every class member an average of more than $4 million in noneconomic damages. (ER-480-89; ER-517-26.)

FIRST ASSIGNMENT OF ERROR

The trial court erred when it granted Plaintiffs' motion for class certification.

A. Preservation

The parties extensively briefed Plaintiffs' motion for class certification. (TCF-10/27/2021 (Plaintiffs' Motion); TCF-12/23/2021 (Defendants' Opposition); TCF-01/27/22 (Plaintiffs' Reply); TCF-02/16/22 Plaintiffs' Supplemental Brief); TCF-02/21/22 (Defendants' Supplemental Opposition); TCF-02/23/22 (Plaintiffs' Supplemental Reply).) The trial court granted Plaintiffs' motion in a written opinion. (ER-53-77.) PacifiCorp sought interlocutory review of the trial court's opinion, but this court declined review.

B. Standard of Review

This court "review[s] class certification for abuse of discretion, but * * * review[s] legal issues underlying the decision * * * for legal error." *Bellshaw v. Farmers Ins. Co. of Oregon*, 326 Or App 605, 620, 533 P3d 40 (2023); *see also*

Bernard v. First Nat. Bank of Oregon, 275 Or 145, 153-54, 550 P2d 1203 (1976) (predominance inquiry and other legal issues reviewed for legal error).

SECOND ASSIGNMENT OF ERROR

The trial court erred when it rejected PacifiCorp's motions to decertify the class before, during, and after trial.

A. Preservation

PacifiCorp repeatedly moved—before trial, at the close of Plaintiffs' case, and after trial—to decertify the class in light of the evidence that had developed and was presented. (TCF-03/17/2023 (Defendants' Motion); TCF-05/31/2023 (Renewed Motion); TCF- 06/19/2023 (Renewed Motion).) The trial court denied each motion. (ER-319-20; ER-527-28; ER-693-94.)

B. Standard of Review

The same standard of review that applies to a certification decision (*see* First Assignment of Error) applies to a trial court's subsequent decision not to decertify. *See Delgado v. Del Monte Fresh Produce, N.A., Inc.*, 260 Or App 480, 489, 317 P3d 419 (2014). This court reviews the record before the trial court at the time of the decertification motion when analyzing whether the trial court's refusal to decertify was correct. *Id.* at 488.

COMBINED ARGUMENT ON FIRST AND SECOND ASSIGNMENTS OF ERROR

The trial court's decision to certify a class consisting of thousands of people living hundreds of miles apart, affected by different fires, and subject to

location-specific defenses, contravened established class-action rules and due-process requirements. The trial court certified the class based on Plaintiffs' promise that they could answer the 14 certified issues on a class-wide basis, using common proof, without any need for a "property-by-property analysis." *James*, 323 Or App at 776. But the actual evidence at trial showed that Plaintiffs' promise was false.

Determining whether any particular class member was harmed by PacifiCorp's conduct required a host of individualized inquiries: What fires were burning near the class member's home or property? How did each of those fires start? If any were started by PacifiCorp power equipment, were they started by negligent conduct, or were they unavoidable even with due care? And most importantly, even if any of those fires were negligently started by PacifiCorp equipment, did those fires actually spread to and damage the property of each class member? In the Santiam Canyon especially, where the nearby Beachie Creek Fire indisputably spread into the same area and where many of the alleged PacifiCorp fires were extinguished, did the PacifiCorp fires actually spread to and harm each class member before the Beachie Creek Fire?

Common proof could not and did not resolve those questions for the whole class. It was erroneous for the trial court to certify the class in the first place, and it was even more erroneous for the trial court to stand by that decision when the evidence (and absence of evidence) at trial clarified that the questions related

to liability and causation, particularly within the Santiam Canyon portion of the class, were incapable of resolution through common proof. Class certification should be reversed.

A. ORCP 32 Requires a Showing That the Central Questions Can Be Resolved by Common Proof.

A class action cannot be certified unless "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." ORCP 32 B. A "plaintiff seeking class certification has the affirmative burden to demonstrate that the requirements of ORCP 32 are satisfied," and "[t]he plaintiff must prevail on the superiority question before the action may be maintained as a class action." *Pearson v. Philip Morris, Inc.*, 358 Or 88, 111, 361 P3d 3 (2015). A driving factor of that determination in many cases is whether "questions of law or fact common to the members of the class predominate over any questions affecting only individual members." ORCP 32 B(3). The predominance inquiry asks whether "proof as to one class member will be proof as to all, or whether dissimilarities among the class members will require individualized inquiries." *Pearson*, 358 Or at 111.

Even if ***some*** common questions can be resolved on a class-wide basis, individual issues still predominate if resolving those common questions will not be determinative of each class member's claim. The common questions need to be "central." *Id*. at 110. "What matters to class certification * * * is not the

raising of common 'questions'—even in droves—but, rather, the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." *Id.* (quoting Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 NYU L Rev 97, 100, 132 (2009)).

Thus, the class certification analysis must account both for what the plaintiffs say they can prove and the defendant's right to contest liability as to each individual. *Pearson*, 358 Or at 115 (class certification "inquiry looks not only to how a plaintiff can prove its *prima facie* case; it considers, as well, the nature of the plaintiff's claim more generally, the defenses to the claim, the legal and factual issues framed by the parties' positions, and the record made on the disputed issues of fact"). Employing the procedural shortcut of class certification means that the class "will prevail ***or fail*** in unison." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 US 455, 460, 133 S Ct 1184, 185 L Ed 2d 308 (2013) (emphasis added). Predominance and ORCP 32 require demonstrating that a reasonable jury would necessarily reach the same answer for all class members whether the jury agreed with the plaintiffs or the defendant—*i.e.*, finding that either all the class members were damaged by PacifiCorp's negligent conduct or none of the class members were so damaged. "If the record suggests legitimate and legally material factual differences among

the class members that a defendant is entitled to expose through individualized inquiries—what Professor Nagareda terms 'fatal dissimilarities' among the class—the predominance inquiry must take those individualized inquiries into account." *Pearson*, 358 Or at 114.

Unlike most cases, whether the ORCP 32 requirements were met in this case is not based on a prediction (and certainly not based on what the Plaintiffs represented at the class certification stage or to this court on interlocutory appeal). Here, there is an actual trial record against which the Court can assess whether "proof for one individual class member [was] proof for all," or whether PacifiCorp should have been given the right to expose "fatal dissimilarities" among the class through individualized inquiries. *Pearson*, 358 Or at 114.

B. The Trial Court's Certification Decisions Were Erroneous Because Common Questions Did Not Predominate, and Common Proof to Resolve Those Questions Was Lacking.

To demonstrate that class certification was appropriate at the outset and could be maintained throughout the Phase I trial, Plaintiffs had to show that common proof would resolve the questions of whether (1) PacifiCorp equipment started a particular fire, (2) the fire started because PacifiCorp acted negligently, and (3) the negligently caused fire spread and caused damage to each class member's property. Plaintiffs never produced evidence that answered any of these questions on a class-wide basis. No precedent supports certifying a class indisputably affected by different wildfires in four different geographic areas.

1. Culpability Was Not Susceptible to Common Proof.

To prove liability to every class member for each of the claims at issue, Plaintiffs had to show that PacifiCorp acted in a negligent (or more culpable) manner. *Fazzolari v. Portland Sch. Dist. No. 1J*, 303 Or 1, 17, 734 P2d 1326 (1987) (negligence); *Raymond v. S. Pac. Co*., 259 Or 629, 634-65, 488 P2d 460 (1971) (nuisance); *Koos v. Roth*, 293 Or 670, 673, 652 P2d 1255 (1982) (trespass). But there was no common evidence that PacifiCorp's culpable conduct caused every fire. Plaintiffs' diverse theories of negligence—inadequate vegetation management, failure to shut off power sooner, failure to adequately monitor the windstorm, just to name a few—required different analysis depending on the fire (or even specific ignition in the case of multiple-ignition fires).

The trial court thought that class-wide liability could be established through common proof because Plaintiffs alleged "that PacifiCorp failed to de-energize its powerlines anywhere within the geographic areas at issue." (ER-70.) But whether PacifiCorp ***should*** have kept the power on or off was not susceptible to some sweeping, class-wide analysis. It depended on numerous specific questions, like needs of first responders in a particular area (particularly given that first responders asked for power to be kept on or restored in certain areas) and whether the power was needed to support evacuation. (Tr-7259:15-25 (noting "granular[ity]" of different power shutoff decisions); Tr-7391:18-

7392:7 (describing various factors relevant to power shutoff decisions), Tr-7259:4-14 (describing risks of shutoffs and need for discussions with first responders).) For example, some homes needed power to bring up well water and one radio station needed to transmit evacuation orders but did not have a back-up generator. (Tr-7527:11-7528:22, 7595:7-20.) Whether PacifiCorp acted reasonably in keeping the power on (or, in some cases, turning it off) in the southern part of the state, for example, is a different question from whether it acted reasonably in a coastal area, and those questions are different still from whether PacifiCorp acted reasonably in the Santiam Canyon, where, unlike in any of the other fire areas, first responders needed power to battle the approaching lightning-caused Beachie Creek Fire, and residents both inside and outside the class boundary needed power to evacuate. (Tr-6573:3-9, 7527:24-7529:25, 7537:13-7538:5, 7595:7-20.)

Plaintiffs also argued that PacifiCorp's vegetation management practices were lacking. But again, the reasonableness of PacifiCorp's vegetation management practices was not something that could be resolved in one adjudication based on common proof and common witnesses. Whether PacifiCorp negligently trimmed one tree did not prove that it negligently trimmed another, and answering those questions required Plaintiffs to present testimony from distinct witnesses responsible for vegetation management in different geographic regions. (*See, e.g.*, Tr-4983:25-4984:7 (noting differences

in vegetation throughout PacifiCorp service area); 7348:6-21 (discussing need to focus on different areas for vegetation management).)

2. Causation Was Not Susceptible to Common Proof

Even if Plaintiffs could have resolved some questions using class-wide proof, that alone is not enough to support certification when the central question of causation is not susceptible to class-wide adjudication. *See Pearson*, 358 Or at 135 n 25, 136; *Bernard*, 275 Or at 153. To satisfy Plaintiffs' burden as to every class member, class certification required common proof that a PacifiCorp-caused fire specifically caused harm to every single individual class member without the need for individualized inquiries. *See Chapman v. Mayfield*, 358 Or 196, 205, 361 P3d 566 (2015) (causation is element of negligence claim); *Daniels v. Johnson*, 306 Or App 252, 255, 473 P3d 1133 (2020) (nuisance); *Martin v. Reynolds Metals Co.*, 221 Or 86, 90, 342 P2d 790 (1959) (trespass). Contrary to the trial court's opinion, merely showing that PacifiCorp equipment caused *some* fire at *some* location within "a defined geographic area" did not prove that a PacifiCorp fire *caused harm* to each class member throughout that entire defined geographic area. (ER-71.) And because Plaintiffs sought, and the trial court certified, a single class, Plaintiffs had to meet that threshold requirement for all four fire areas.

Plaintiffs' failure to satisfy ORCP 32 for the class (as they defined it) is apparent from how the trial played out with respect to the Santiam Canyon fire

area. Before trial, Plaintiffs repeatedly promised that they would establish class-wide causation through a fire progression expert—Brewer—who would opine that every single class member who owned property within the artificial "Santiam Canyon" class boundary was burned by "one conflagration" caused by multiple utility ignitions before the arrival of the Beachie Creek Fire. That was the premise of Plaintiff's "red line" on the map dividing the Beachie Creek Fire from the class area. Brewer's supposed opinion was the sole basis on which Plaintiffs claimed that the "same evidence" would make the causation question susceptible to common proof.

At trial, however, Brewer never testified (likely because her tentative opinions were unsupported), and Plaintiffs abandoned the "one conflagration" theory. The evidence that Plaintiffs did present was radically different from their pretrial representations in two key respects. First, Plaintiffs pointed to various, independent spot fires or utility line activity that occurred in the middle of the canyon (including small brush fires that were extinguished (Tr-4403:5-4409:15)), without any evidence of whether, when, or how far those spot fires spread. (Tr-3353:14-3354:4, 4453:13-4454:8.) Second, rather than introducing evidence of "Santiam Fires" affecting the entire class area "before those fires merged with the Beachie Creek Fire" Plaintiffs' expert, Bailey, proved that the reverse was true: the Beachie Creek Fire entered the Santiam Canyon *before* any utility-caused ignitions. (*See* ER-188-91; Tr-3894:1-20, 3897:10-25.) His

testimony was also confirmed by the fact that there was no evidence of any utility-caused ignitions in the entire eastern half of the Santiam Canyon (the portion affected by the Beachie Creek Fire first), further demonstrating that there was no proof of causation—and thus no proof of liability—as to the entire class.

The shift from what Plaintiffs represented before trial to their actual trial proof demonstrated that class treatment could not continue consistent with ORCP 32. Even assuming PacifiCorp's equipment ignited a fire somewhere in the Santiam Canyon and that the ignition was negligent, Plaintiffs still needed to establish that the ignition (1) spread and caused harm to every class member property below the red line, and (2) reached those properties and harmed them at the same time as or before the Beachie Creek Fire. That would be the only way for "proof as to one class member" to be proof as to all without the need for individualized inquiries. *Pearson*, 358 Or 114. But Plaintiffs failed completely in both respects. The *only* possible way to determine whether a property was damaged by a utility ignition would have been to conduct an individualized assessment of class member properties within the Santiam Canyon portion of the class boundary.

The ODF Report confirms not only that common questions were not susceptible to common proof in the Santiam Canyon, but PacifiCorp's lack of responsibility for class-wide harm. As ODF explained, (1) "wildland fire starts caused by down powerlines * * * were suppressed by local residents and/or local

municipal fire departments," (2) there was "no evidence of powerline ignitions contributing to the spread of the fire in the Santiam Canyon," and (3) the "most probable explanation" for "other ignitions in areas where no roads or powerlines was present" was "spot fires from the main Beachie Creek Fire." (ER-850.)

C. A Class Action Is an Inferior Method of Adjudicating These Cases in Light of Each Plaintiff's Substantial Interest in Pursuing Individual Claims

Class certification was also improper here because the claims are not "insufficient in the amounts" to justify standalone claims. ORCP 32 B(8). Each of the Plaintiffs to try their claims has alleged the destruction of their home and has recovered multiple millions of dollars. These are far from negative-value claims that would be abandoned if not aggregated in a class action. There is no reason to allow Plaintiffs the procedural shortcut of a class action, particularly where doing so strips PacifiCorp of its rights to dispute liability and causation as to each individual plaintiff. Individual trials are already required on damages, and the "superior" method of adjudication would be to follow "the usual rule that litigation is conducted by and on behalf of individual named parties only." *Wal-Mart Stores Inc. v. Dukes*, 564 US 338, 348, 131 S Ct 2541, 180 L Ed 2d 374 (2011). And here, litigation and settlement outside of this class-action litigation has proven effective—PacifiCorp has already paid over $1.3 billion in claims and settled over 2000 claims outside of this error-ridden class action.

The trial court's initial class certification decision and refusal to decertify should be reversed, and the Phase II judgments predicated on those decisions should be vacated.

THIRD ASSIGNMENT OF ERROR

The trial court erred when it failed to grant judgment to PacifiCorp on the class claims, given the absence of evidence that a PacifiCorp-caused fire harmed every member of the class.

A. Preservation of Error

PacifiCorp moved for a directed verdict because Plaintiffs failed to present class-wide evidence of causation. (TCF-05/16/2023 (Defendants' Motion for Directed Verdict); TCF-06/05/2023 (DV Motion (Close of Evidence)).) After the trial court reserved ruling on that motion over objection pursuant to ORCP 63 B and ORCP 32 E, PacifiCorp renewed its arguments in post-trial motions and again during both Phase II trials. (TCF-08/11/2023 (JNOV Motion); TCF-01/15/2024 (DV Motion); TCF-03/01/2024 (DV Motion and Renewed DV Motion (Close of Evidence)).) The trial court denied PacifiCorp's motion each time. (ER-319-20; ER-527-28; ER-693-94.)

PacifiCorp repeatedly moved—before trial, at the close of Plaintiffs' case, and after trial—to decertify the class in light of the evidence that had developed and was presented. (TCF-03/17/2023 (Defendants' Motion); TCF-05/31/2023

(Renewed Motion); TCF- 06/19/2023 (Renewed Motion).) The trial court denied each motion. (ER-319-20; ER-527-28; ER-693-94.)

B. Standard of Review

In reviewing a denial of a directed verdict motion, this court considers "if there is any evidence from which the jury could find all the facts necessary to establish the elements of the plaintiff's cause of action." *Miller v. Columbia County*, 282 Or App 348, 349, 385 P2d 1214 (2016), *rev den* 361 Or 238, 391 P3d 797 (2017). A defendant is entitled to a directed verdict if, "on the basis of the evidence viewed in the light most favorable to the plaintiff, and all reasonable inferences that may be drawn from it, [the defendant] was entitled to prevail as a matter of law." *Ballard v. City of Albany*, 221 Or App 630, 639, 191 P3d 679 (2008). But the question of whether an inference is "reasonable" and "[w]hether particular circumstantial evidence is sufficient to support a particular inference * * * is a legal question for a court to decide." *State v. Bivins*, 191 Or App 460, 467, 83 P3d 379 (2004).

ARGUMENT ON THIRD ASSIGNMENT OF ERROR

Plaintiffs did not prove that PacifiCorp caused harm to the entire class. Plaintiffs produced no evidence (and no reasonable inference from the evidence suggests) that the entire area below the Santiam Canyon red line on Plaintiffs' class map was even affected—much less destroyed—by a PacifiCorp-caused fire. As Plaintiffs and their experts conceded, the entire Santiam Canyon was

burned by the lightning-caused Beachie Creek Fire. And Plaintiffs did not introduce evidence of a single fire in the entire eastern half of the canyon that was even allegedly started by PacifiCorp equipment. Indeed, Plaintiffs were so concerned with their failure to prove any PacifiCorp-caused fires in the eastern half of the canyon that they asked the trial court to ***remove*** that part of the canyon from the class after they had presented their case. Because the jury's finding that PacifiCorp caused harm to every class member was unsupported by any evidence, it must be reversed and judgment rendered for PacifiCorp.

A. Plaintiffs Were Required to Present Non-Speculative Evidence of Causation for Each Class Member

Causation is an element of all the claims on which Plaintiffs obtained a favorable verdict—negligence, nuisance, and trespass. Plaintiffs were therefore obligated to present non-speculative evidence that ***every*** class-member was harmed by a fire caused by PacifiCorp's negligence. A plaintiff must present evidence "sufficient to establish that such a causal relationship is reasonably probable," not simply possible. *Feist v. Sears & Roebuck*, 267 Or 402, 407, 517 P2d 675 (1973); *see also Trees v. Ordonez*, 354 Or 197, 218, 311 P3d 848 (2013); *Horton v. Oregon Health & Sci. Univ.*, 277 Or App 821, 828, 373 P3d 1158 (2016). Where a plaintiff's trial evidence only allows for "a mere possibility of * * * causation" or "pure speculation or conjecture," judgment for the defendant is required. *Griffin v. K.E. McKay's Mkt. of Coos Bay, Inc.*, 125

Or App 448, 452, 865 P2d 1320 (1993), *rev den* 319 Or 80 (1994) (quoting *Prosser & Keeton on Torts*, § 41 at 269 (5th ed 1984)).

That requirement exists regardless of the specific causation test. Under either "but for" or "substantial factor" causation, a threshold requirement is sufficient evidence that the harm would not have occurred but for PacifiCorp's negligent conduct, or that PacifiCorp's conduct "operating alone, would have been sufficient to cause the same result." *Haas v. Estate of Carter*, 370 Or 742, 748-50, 525 P3d 451 (2023); *see also Joshi v. Providence Health Sys. of Oregon Corp*., 342 Or 152, 160-61, 149 P3d 1164, (2006). If no evidence exists that a PacifiCorp-fire damaged an individual property at all, then no amount of rejiggering of the standards would fix that failure.

In a class action, the causation requirement extends to every member of the class. *See Pearson*, 358 Or at 111. "[T]he fact that a case is proceeding as a class action does not in any way alter the substantive proof required to prove up a claim for relief." *Cimino v. Raymark Indus., Inc.*, 151 F3d 297, 312 n 30 (5th Cir 1998); *see also Bernard*, 275 Or at 159-60 (holding that class action procedure cannot "deprive the defendants of valuable procedural and substantive rights by preventing them from asserting what appears to be a bona fide defense" to the claims of individual "claimants"). So just as an individual plaintiff must present non-speculative evidence of causation to prove up her own claim, claims brought on behalf of a class can only be proven if non-speculative evidence

shows that ***every*** member of the class was injured by culpable conduct of the defendant. *See id.*; *Cimino*, 151 F3d at 312 n 30; *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., 259 F3d 154, 192 (3d Cir 2001) ("defendants have the right to raise individual defenses against each class member").

B. Plaintiffs Did Not Prove the Entire Class Was Injured by a Fire Caused by PacifiCorp

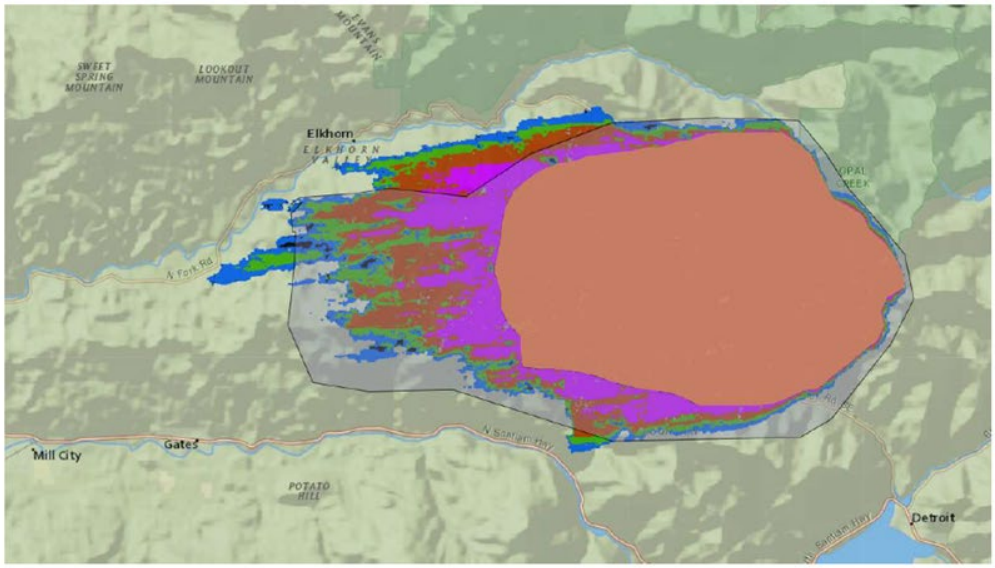
Plaintiffs did not even attempt to prove that ***every*** one of the class members with property in the Santiam Canyon was harmed by a PacifiCorp-caused fire. To the contrary, the undisputed evidence at trial was that much of the canyon was burned by the lightning-caused Beachie Creek Fire. Although Plaintiffs introduced evidence purportedly showing that PacifiCorp equipment caused a handful of spot fires in the middle of the canyon, Plaintiffs made no effort to show that these fires burned in every direction—including upwind—and reached every class member's property in the canyon before the Beachie Creek Fire did. Yet that is what they were required to show.

The Santiam Canyon class area was roughly 20 miles long (and sometimes several miles wide). (*See* ER-177; Tr-3356:6-13.) It was undisputed that, on the night of Labor Day 2020, the Beachie Creek Fire—propelled by the windstorm—entered the canyon at the northeastern end and was pushed west by the wind throughout the night until it had consumed practically the entire canyon. (*Cf.* Tr-8319 (Plaintiffs' counsel argues that because of the wind, the fires were

"going from east to west").) According to Plaintiffs' expert's model, by 8 p.m. on the night of Labor Day—before Plaintiffs alleged any fire had been started by PacifiCorp equipment—the Beachie Creek Fire had ***already*** entered the northeastern part of the canyon and consumed the property of at least some class members. *See supra* 27 (Plaintiffs' expert Pelton did not identify any PacifiCorp-caused fire before 8:37 p.m.). And a few hours later the Beachie Creek Fire had engulfed over half the class area.

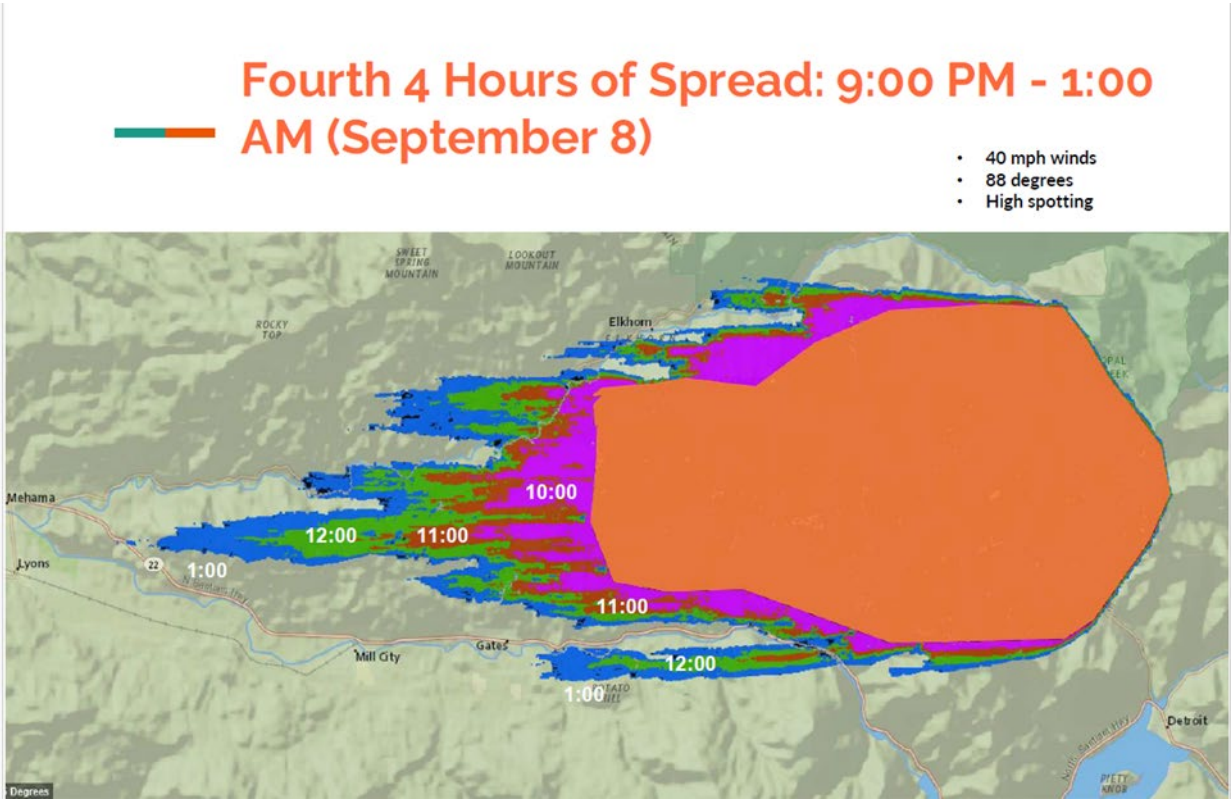
Comparing Plaintiffs' fire progression model with their map of the class properties in the canyon confirms that point. The map below shows Plaintiffs' fire progression model, with the shaded areas (except the area in blue) representing Bailey's model's estimate of the area burned by the Beachie Creek Fire by 8 p.m. (Tr-3896:23-3898:13.)

Third 4 Hours of Spread: 5:00 - 9:00 PM



- 30 mph winds
- 82 degrees
- 70% spotting

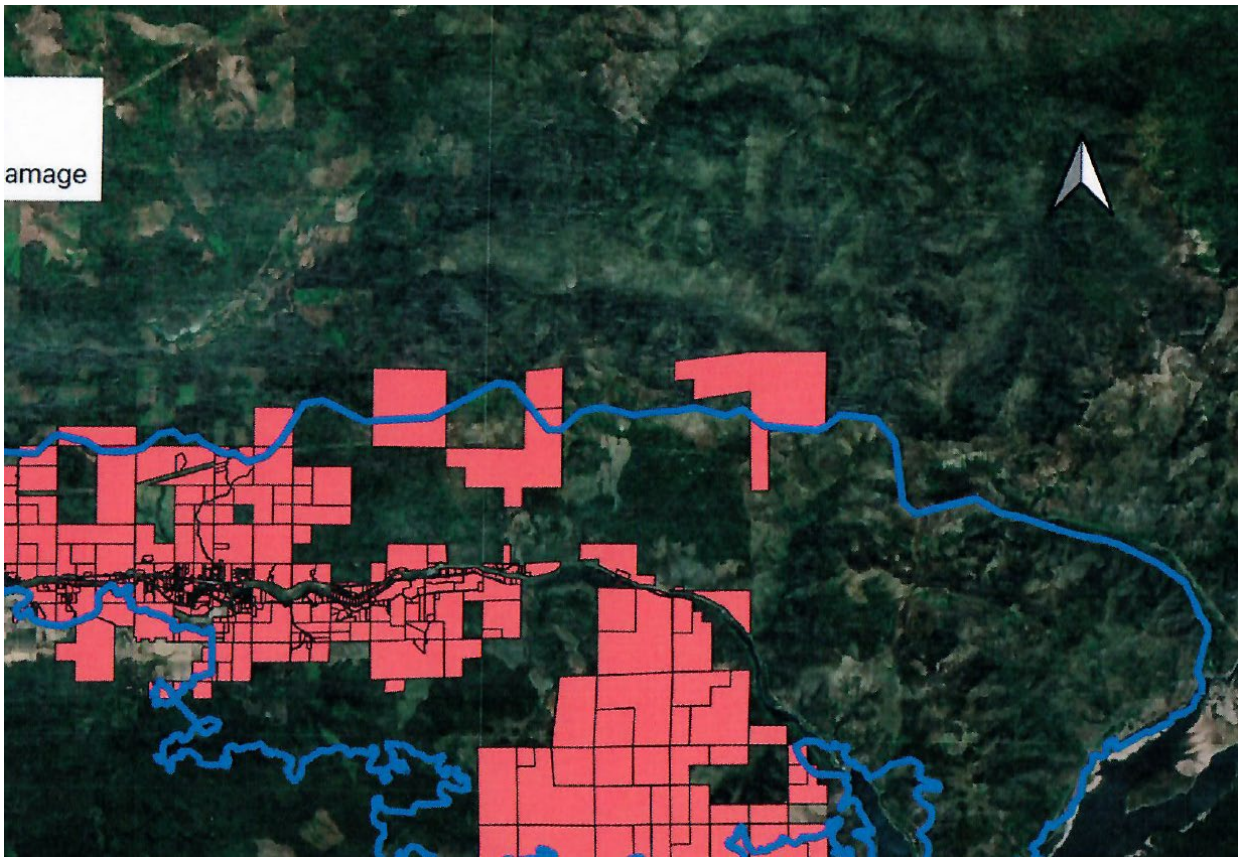
According to Bailey, within the next two hours, driven by 40-mile-per-hour winds, the Beachie Creek Fire had progressed throughout the class area, nearly surrounding Gates and engulfing areas above and below Highway 22 and where no utility ignitions were identified:



(ER-190-91; Tr-3897:18-21 (explaining that blue color represents 9 p.m. fire progression, with older time periods represented by other colors); Tr-3899:9-3900:10; Tr-3905:14-15 ("The blue line is the 1:00 model perimeter."); *see also* Tr-3894:12-20.[5])

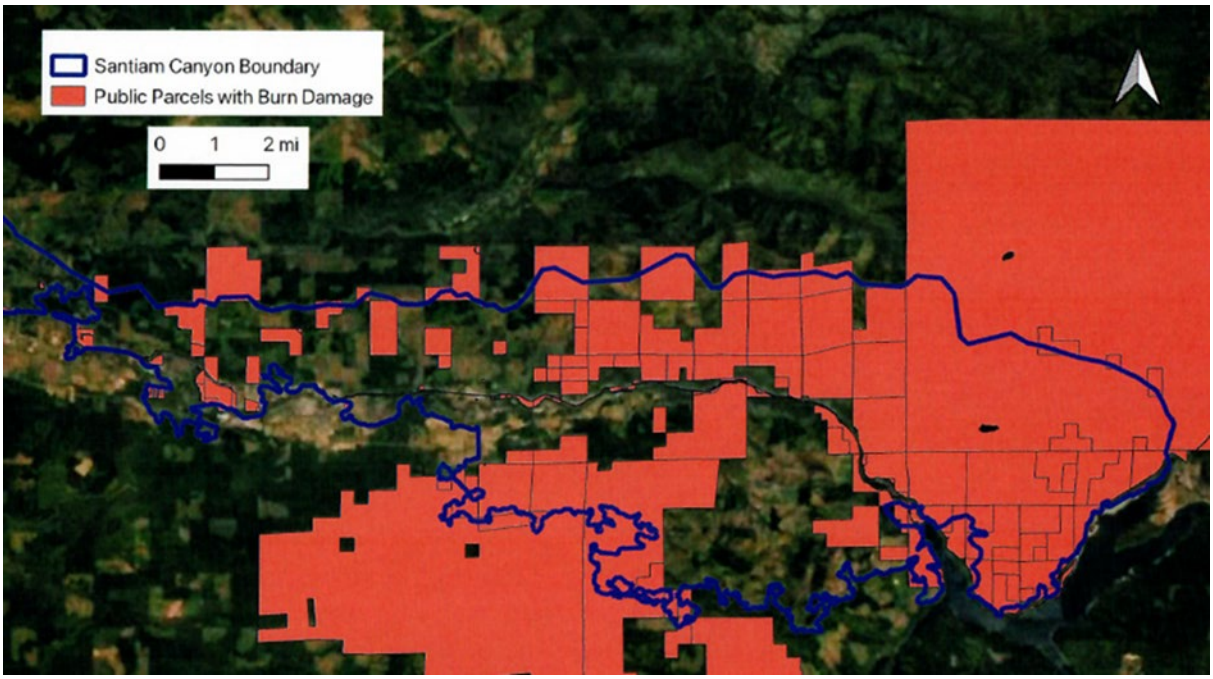
The next map shows roughly the same area, but with the blue line designating the Santiam Canyon class area, and red-shaded parcels representing real property owned by class members (divided by Highway 22) that suffered "low soil burn severity":

[5] Notably, the progression above was based on ***Plaintiffs'*** expert's ***modeling***. As PacifiCorp demonstrated through its experts, actual data and scientific measurements in real time showed the Beachie Creek Fire moving faster and farther into the canyon. (Tr-4814:7–21; DTX-8526, 8528, 8537.)



(ER-177.)

And another map offered by Plaintiffs identified the parcels of public land on which class members had personal property and that suffered "low soil burn severity":



(ER-185.)

A comparison of Bailey's first map with the two "soil burn" maps shows that, according to Plaintiffs' own model, by 8 p.m., property belonging to class members in the northeastern part of the canyon had already been consumed by the Beachie Creek Fire, before *any* PacifiCorp fire even started. This, alone, is dispositive of Plaintiffs' class claims because PacifiCorp therefore cannot be the cause of damage to *every* class member's property.

In fact, as Bailey's "Fourth Four Hours of Spread" maps showed, the Beachie Creek Fire was the *only* fire that could have destroyed a number of the individual class member's properties. (TCF-05/16/2023 (Defendants' Motion for Directed Verdict).) For example, according to Bailey's model, by 1 a.m. on Labor Day 2020, the Beachie Creek fire was just two miles away from the

residence of two class representatives, Jeanyne James and Robin Colbert. Up until that moment, however, there was no other visible fire near the property, or even visible in the "distance." (Tr-2436:14-20.) There were no utility-caused fires near the James/Colbert property, and even if there had been, their property was not even within PacifiCorp's service territory. (Their electric utility was Consumers Power.) (Tr-2438:10-19.) The only evidence of any fire that progressed to the James/Colbert residence was the Beachie Creek Fire. (Tr-2437:22-2438:9; 2438:20-2439:4; *see also* Tr-3849:8-14 (explaining that Lyons was "right in the crosshairs of the main direction of the wind flow").) Put plainly, there was no evidence that a *PacifiCorp-caused* fire damaged the James/Colbert property, which necessarily means that PacifiCorp did not cause the harm to every class member. (*See* TCF-05/16/2023 (making same point as to other named class representatives).)

The jury's class-wide causation finding also fails because Plaintiffs did not even try to show that the few Santiam Canyon fires Plaintiffs attributed to PacifiCorp spread in every direction and burned every class-member's property. Pelton, Plaintiffs' fire origin expert, attributed several spot fires to PacifiCorp. But the only fires Pelton claimed were started by PacifiCorp equipment were in the middle of the canyon; *none* were in the eastern ten miles or western seven miles of the class area, where the Beachie Creek Fire had already progressed. (*See* ER-192; Tr-7483:8-9.)

Pelton's testimony also confirmed that none of the utility fires he identified could have reached the northeast part of the canyon before it was consumed by the Beachie Creek Fire. The earliest utility-caused fire Pelton identified was a grass fire at Gates Bridge East, which he opined began around 8:37 p.m. (Tr-2654:6-21, 4400:3-8.) But Pelton admitted that firefighters extinguished that fire before it spread, making clear that it could not have caused harm to the entire class area. (Tr-4398:25–4399:04.) The same is true of each of the other fires Pelton identified, all of which started after 9 p.m.—when Bailey testified that the northeastern Santiam Canyon was already aflame because of the Beachie Creek Fire. (*See, e.g.*, Tr-4401:13-19 (Gates Bridge East fire at 8:37 p.m. was "before every other fire" Pelton identified); Tr-4295:19-21 (Gates School fire "ignited between 9:30 and 9:45 p.m."); Tr-4314:16-18 (Potato Hill fire began "[s]hortly before 9:30 p.m."); Tr-4326:17-21 (call indicated Kelly Lumber fire started around "11:12 p.m.").)

Nor did Pelton offer any testimony showing that any of the fires in the middle of the canyon could have reached any other part of the canyon. Pelton had no idea whether any of the spot fires had spread elsewhere, and "offer[ed] no opinion on the spread of or the direction of spread or the rate of spread of any one spot fire in this case." (Tr-4453:22-4454:8.) And multiple witnesses (including Plaintiffs' expert Bailey) testified—and Plaintiffs' counsel argued—that the wind was blowing the fires from east to west on Labor Day night, so

there was no way a fire in the middle of the canyon could travel ten miles upwind to the eastern end of the canyon. (*See, e.g.*, Tr-2433:8-11, 2785:22-24, 2834:22-24, 2878:18-20, 3884:14-15, 3952:14-15; 8319:10-21.)

Finally, while Plaintiffs also introduced testimony from several lay witnesses, their testimony was also confined to fires in the middle of the Santiam Canyon. (*See* Tr-2654:6-23 (51330 Gates Bridge East fire—in the middle of the canyon—which was extinguished); Tr-5122:1-3 (fire near Schroeder Road—in the middle of the canyon—which was extinguished); Tr-2779:12-20, 3006:6-15 (fires at the Gates School, in the middle of the canyon); Tr-2856:23-2857:20 (fire near Fishermen's Bend, in the middle of the canyon).) None of them testified about these fires' spreading or linked them to damage miles away. There was no testimony, for example, linking a utility fire to James, who resided *outside* of PacifiCorp's service area and never saw any utility-caused fire. (Tr-2428:23-2429:11, 2438:10-19.)

Put simply, no witness testified that *any* utility fire caused damage to the eastern half or western end of the class area. The mere *possibility* that a fire *could* have spread from the middle of the canyon to the eastern or western ends "is not enough to give rise to an inference" that would support a finding of causation. *State v. Olson*, 296 Or App 687, 692, 439 P3d 551 (2019). Rather, there must be "a 'logical probability that an ultimate fact will follow a stated narrative or historical fact'" to give "the jury * * * the opportunity to draw a

conclusion because there is a reasonable probability that the conclusion flows from the proven facts." *Id.* There were no facts presented at trial that made Plaintiffs' theory probable. *See SAIF Corp. v. Alton*, 171 Or App 491, 501-02, 16 P3d 525 (2000) ("No principle in logic declares that if several things are possible, and none is selected as being probable, then a specific one of the possible things must be more probable than the others.").

Indeed, Plaintiffs *acknowledged* their inability to prove their case for the eastern half of the Santiam Canyon when they filed a motion asking to eliminate the eastern half of the Santiam Canyon from the class definition and offered the trial court a map that "Xed out" the entire eastern half of the canyon. (Tr-8145:16-25; ER-256, 259-62, 246; Tr-8147-8155.) Plaintiffs essentially conceded that the evidence at trial did not show that it was even *possible* that PacifiCorp harmed the class members in the eastern half of the Santiam Canyon. And the trial court denied Plaintiffs' motion, keeping that portion of the canyon in the class. (ER-263.)

The ODF Report confirms that PacifiCorp did not cause the fire damage in the Santiam Canyon. The ODF found that although "there were wildland fire starts caused by down powerlines in the Gates and Mill City area" of the Santiam Canyon, "all these ignitions, which were investigated, were suppressed by local residents and/or local municipal fire departments." (ER-850.) The ODF Report concluded:

- "Reported ignitions in the Santiam Canyon … caused by powerlines did not contribute to the spread of the fire in the Santiam Canyon."

- There was "no evidence of powerline ignitions contributing to the spread of the fire in the Santiam Canyon."

- There was "no evidence that these general human causes were a factor in the spread of the fire in the Santiam Canyon: … equipment, … power generation/transmission/distribution."

(ER-848-49.)

In short, Plaintiffs failed to establish causation. Because Plaintiffs did not introduce any evidence that any PacifiCorp-caused fire harmed the class members in this part of the canyon—as they tacitly acknowledged—the verdict should be reversed.

C. Plaintiffs' Alternative Causation Theories Cannot Cure Their Failure of Proof

Having all but conceded that they did not show that a PacifiCorp-caused fire burned every single class member property in the Santiam Canyon, Plaintiffs briefly pivoted to two alternative theories of causation. ***First***, they argued that PacifiCorp diverted firefighting resources away from the Beachie Creek Fire and caused firefighters to leave the Santiam Canyon, thereby allowing the Beachie Creek Fire to spread into and burn the canyon. ***Second***, they claimed that PacifiCorp had spoliated evidence because it had repaired power lines in the aftermath of Labor Day 2020, so the jury could rely on that inference to assume that PacifiCorp must have caused fires that burned all the Santiam Canyon.

Neither of these arguments overcomes the fundamental failure of proof of causation.

1. There Is No Evidence That Firefighters Would Have Stopped the Beachie Creek Fire but for PacifiCorp

At the outset, it is important to put Plaintiffs' "firefighter diversion" theory into perspective, as it reflects Plaintiffs' desperation to create some basis for class-wide causation after their pretrial theory collapsed. Plaintiffs' theory was that, but for some undefined utility fire in some undefined location at an undefined time, federal wildland firefighters would not have evacuated in the face of a wind-driven, 190,000-acre megafire, but would have stayed to extinguish the Beachie Creek Fire before it entered the Santiam Canyon class boundary, thereby rescuing every class member's property from fire damage. Plaintiffs' theory is, on its face, absurd. Plaintiffs cited no circumstance (in Oregon or elsewhere) when a party has been held responsible for "diverting" a firefighter, ambulance, or other first responder under those (or any) circumstances.

Even if such legal authority existed, Plaintiffs did not support this theory with any evidence, any expert testimony, or any attempt to create a timeline of what occurred and when. To the contrary, the undisputed evidence established that at least some class member's real and personal property was burned by the Beachie Creek Fire by 8:00 p.m., ***before*** any alleged PacifiCorp-caused fire even

started. As detailed above, the earliest alleged PacifiCorp fire started at 8:37 p.m. and was extinguished shortly after that by a member of the local fire department, not the federal firefighting team. (Tr-4400:3-19.) PacifiCorp cannot be responsible for diverting emergency services at a time when it had not even allegedly caused a fire. For that reason alone, Plaintiffs' firefighter-diversion theory fails.

Even setting that aside, Plaintiffs did not introduce evidence establishing that, but for some PacifiCorp-caused fire, firefighters would have stopped the Beachie Creek Fire from harming any property in the canyon. The only evidence about *why* the firefighters moved their command post came from a single firefighter, who testified that "[b]oth" the "Beachie Creek Fire" and "power line-caused fires" caused the firefighters to move. (Tr-3027:17-3028:5.) So even if there were no alleged power line fires, the Beachie Creek Fire would still have forced the firefighters to move their post. And even if the firefighters somehow could have stayed longer than they did, no witness testified about what, if any, fire damage they allegedly could or would have prevented.

Plaintiffs' firefighter diversion theory has no basis in fact or law and relies entirely on speculation, which is not enough. *See Griffin*, 125 Or App at 451-52 (speculation cannot support causation).

2. PacifiCorp's Repair of Damaged Power Lines Cannot Support a Class-wide Causation Finding

Plaintiffs also relied on an adverse inference instruction the trial court gave, which told the jury that if it found that PacifiCorp "willfully destroyed or failed to preserve evidence relating to the cause of the fires at issue," then PacifiCorp "had the burden of proving that the evidence destroyed or preserved would not have been adverse" to it. (Tr-8062:8-19.) According to Plaintiffs, PacifiCorp failed to preserve "evidence" when it fixed its power equipment after the fire. Therefore, according to Plaintiffs, the jury could have inferred that the power equipment PacifiCorp replaced would have supported their case. That argument makes no sense, for at least two reasons.

First, the jury could not have relied on the adverse inference instruction at all, because there was no evidence that PacifiCorp "willfully" destroyed any evidence. "[W]illfully" generally means "'intentionally and with knowledge' that the act or omission 'was forbidden conduct.'" *L&A Designs, LLC v. Navarro*, 285 Or App 167, 176, 396 P3d 931 (2017). But there was no evidence that PacifiCorp intentionally destroyed evidence in the Santiam Canyon. The only evidence was that PacifiCorp repaired downed lines at some point after the fires were extinguished. (*See* Tr-7588:11-12, 4468:23-4469:1.) While Plaintiffs' expert, Pelton, claimed that PacifiCorp should have done more to preserve evidence when performing its repairs, even he admitted that he did not

have any evidence that PacifiCorp intentionally engaged in spoliation. When asked whether he had "any reason to think that PacifiCorp made these repairs deliberately to destroy evidence," Pelton acknowledged that he did not "have any evidence of that effect." (Tr-4471:2-23.) The spoliation instruction was thus irrelevant.

Second, even if Plaintiffs could have shown that PacifiCorp willfully failed to preserve some evidence somewhere, there was nothing in the record showing PacifiCorp "destroyed or failed to preserve evidence" that could possibly support an inference that its equipment ignited fires or burned the entire class area. Indeed, PacifiCorp *did not even service* the northwestern area (where Plaintiff Jeanyne James lived) or the eastern end of the Santiam Canyon. (Tr-2429:9-11, 7482:24-7483:23.) The only allegedly unpreserved evidence that Plaintiffs and Pelton identified was in the middle of the canyon, near the town of Gates. (Tr-4468:4-4469:11.) Even if the jury believed that PacifiCorp failed to preserve this evidence, the most the jury could permissibly infer is that one or more additional fires near Gates were caused by PacifiCorp. But there was no evidence, whether preserved or unpreserved, from which the jury could have reasonably drawn conclusions about where, when, and how far those unknown fires spread, much less that PacifiCorp caused damage to every property in the canyon.

FOURTH ASSIGNMENT OF ERROR

The trial court erred in instructing the Phase I jury that it could "assume that the evidence at the trial applies to all class members," and by doing so denied PacifiCorp its due process right to present every available defense.

A. Preservation of Error

PacifiCorp objected during trial to the trial court's instruction that the jury could "assume that the evidence at the trial applies to all class members." (Tr.7813-14, 8007:7-8008:6). The trial court gave the instruction over PacifiCorp's objection, and PacifiCorp excepted to the instruction as given. (Tr-7814:4-16; TCF-06/13/2023 (ORCP 59 H Notation of Exceptions).)

B. Standard of Review

This Court reviews a trial court's decision to give improper jury instructions over a defendant's objection de novo for legal error. *State v. Moore*, 324 Or 396, 427, 927 P2d 1073 (1996); *see also*, *e.g.*, *Wallach v. Allstate Ins. Co.*, 344 Or 314, 329, 180 P3d 19 (2008) (party entitled to lawful instructions). When an "incorrect instruction permits the jury to reach a legally erroneous result, a party has established that the instructional error substantially affected its rights." *Id.* at 329.

ARGUMENT ON FOURTH ASSIGNMENT OF ERROR

Plaintiffs convinced the trial court to certify a class action based on the unfulfilled promise that liability and causation of damages could be established

using common proof across all class members. But after failing to meet that burden, Plaintiffs asked the trial court to instruct the jury that it "may assume that the evidence at the trial applies to all class members." (Tr-8071:13-16.) The trial court adopted this instruction over PacifiCorp's objections. (Tr-8071:9-16.)

That instruction was legally erroneous. By allowing the jury to apply the evidence relating to some individual class members to ***all*** class members, it expressly relieved Plaintiffs of their evidentiary burden of presenting evidence and proving their claims as to each individual class member. *See Strawn v. Farmers Ins. Co. of Or.*, 350 Or 336, 358, 258 P3d 1199 (2011) (plaintiff "must prove" each element of each claim "on the part of all class members"); *Cimino*, 151 F3d at 312 n30 (class action does "not in any way alter the substantive proof required to prove up a claim for relief"). And it deprived PacifiCorp of its due process right "to present every individual defense." *Lindsey v. Normet*, 405 US 56, 66, 92 S Ct 862 (1972).

A. The Instruction Allowed Plaintiffs to Evade Their Evidentiary Burden of Proving Their Claims as to Every Class Member

The jury should not have been allowed to simply ***assume*** that if one class member presented evidence supporting their individual claims, then that evidence could also support the claims of every other class member. Instead, ORCP 32 and due process required Plaintiffs to present evidence supporting the claims of ***every*** absent class member. Yet Plaintiffs failed to do that, especially

when it came to the question of causation of harm in the Santiam Canyon where there was "no evidence" that PacifiCorp powerlines contributed to the spread fire. (*See supra* at 48-57; *see also* ER-948-50.) That alone should have been dispositive of Plaintiffs' liability claims.

There may be circumstances where a jury may infer that individual evidence applies to the whole class. But "for that inference to arise" and be reasonable, the same conduct "must have [occurred] ***without material variation*** to the members of the class." *Strawn*, 350 Or at 358-59 (emphasis added). That was not the case here. In this case, at the bare minimum, the jury needed to consider four different sets of liability and causation evidence applicable to the four different fire areas within the class boundary. And even *within* each of the fire areas—and in particular within the Santiam Canyon—there was substantial variation.

For example, the jury was instructed to "assume" that if there was a utility-caused ignition near one class member property in the Santiam Canyon that may have burned that individual's property, then the same must be true across the entire 20-mile-long Santiam Canyon—even though PacifiCorp's service territory does not even extend into the eastern and northwestern portion of the Santiam Canyon. But testimony that some properties near Mill City may have been damaged by utility-caused spot fires did not show that properties miles away in Niagara were also damaged by such fires—particularly when Plaintiffs'

own expert opined that the Niagara area was burned by the Beachie Creek Fire before any utility fire could have reached it. The jury was similarly allowed to erroneously "assume" that if a property in Gates located 0.1 miles away from an alleged utility ignition was damaged by PacifiCorp, then a property in Lyons located 10 miles away from that same ignition must have also been damaged by PacifiCorp.

Under the circumstances in the Santiam Canyon—where all of the alleged utility ignitions identified by Plaintiffs were concentrated in the towns of Gates and Mill City, where PacifiCorp did not even have powerlines in other portions of the class boundary like Lyons and Niagara and Detroit Lake, and where the Beachie Creek Fire indisputably burned some (if not all) of the class boundary—the ***only*** way to establish that PacifiCorp caused harm to every single class member would have been to conduct a "property-by-property assessment" of whether each property was burned by a utility fire caused by unlawful conduct by PacifiCorp.

The court's analysis in *Ebert v. General Mills, Inc*., 823 F3d 472 (8th Cir 2016), is instructive. There, the claims of a class of property owners alleging damage from industrial discharge could not be proven through class-wide proof because the question of whether "each individual property" was contaminated and whether the contamination was "attributable to [the defendant] in each instance" had to be evaluated individually. *Id*. at 479. Cases reaching similar

conclusions under similar circumstances abound. *See Parko v. Shell Oil Co.*, 739 F3d 1083, 1085-87 (7th Cir 2014); *Gates v. Rohm & Haas Co.*, 655 F3d 255, 272 (3d Cir 2011); *Robertson v. Monsanto*, 287 F App'x 354, 362-63 (5th Cir 2008); *Amchem Prods., Inc. v. Windsor*, 521 US 591, 625, 117 S Ct 2231, 138 L Ed 2d 689 (1997) (underscoring that "mass tort claims arising from a common cause or disaster * * * are ordinarily not appropriate for class treatment") (cleaned up). So too here: Which fire burned each property, the degree to which that fire was attributable to PacifiCorp versus the Beachie Creek Fire or some other source, and the level of damage caused by PacifiCorp presented substantial variation that defied common proof and could not be "assumed."

B. The Instruction Deprived PacifiCorp of Its Due Process Right to Present Every Individual Defense

The "assume the evidence applies" instruction also violated PacifiCorp's due process rights. Class actions—like any other case—must comply with due process. *See, e.g.*, *Ticor Title Ins. Co v. Brown*, 511 US 117, 121, 114 S Ct 1359, 128 L Ed 2d 33 (1994). If it means nothing else, due process includes the right to mount every available defense. *See, e.g.*, *Lindsey*, 405 US at 66. To preserve that due process right, class actions merely join individual claims together without changing the substance of what each individual plaintiff must prove. Specifically, the class action device "merely enables a * * * court to adjudicate

claims of multiple parties at once, instead of in separate suits," but it otherwise "leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co*., 559 US 393, 408, 130 S Ct 1431, 176 L Ed 2d 311 (2010). Therefore, "the fact that a case is proceeding as a class action does not in any way alter the substantive proof required to prove up a claim for relief." *Cimino*, 151 F3d at 312 n30. "A defendant in a class action has a due process right to raise individual challenges and defenses to claims, and a class action cannot be certified in a way that eviscerates this right or masks individual issues." *Carrera v. Bayer Corp.*, 727 F3d 300, 307 (3d Cir 2013); *Bernard*, 275 Or at 159-60 (class action may not be used to "deprive the defendants of valuable procedural and substantive rights by preventing them from asserting what appears to be a bona fide defense" to the claims of individual "claimants").

In this case, by instructing the jury that it could simply "assume" that the evidence as to the individual class representatives applied to the entire class, the trial court violated PacifiCorp's due process rights, including the right to require each class member to individually prove each of its claims and PacifiCorp's right to contest liability. PacifiCorp "cannot be liable to an entire class" unless it is liable to "each of" the absent class members and unless PacifiCorp had an opportunity to defend itself against each class member's claims. *Bowerman v. Field Asset Servs.*, 60 F4th 459, 479 (9th Cir 2023). Given the potential

differences between fires, ignition points, conduct, and location (among other factors), PacifiCorp was "entitled" to mount a defense (affirmative or otherwise) with individualized evidence. *Pearson*, 358 Or at 114, 132; *see also Lindsey*, 405 US at 66 ("present every available defense"). But the trial court's instruction allowed the jury to forgo any consideration of whether Plaintiffs had actually proven the claims of all the absent class members. If the jury believed that the evidence supported the individual named Plaintiffs' claims, then it could "assume" that ***every*** class member's claim was proven as well. And this is exactly what the jury did. Forcing the jury to find causation, harm, and damage as to everyone or no one based on evidence that was relevant to only a small subset of the class violated settled class-action rules and impermissibly eviscerated PacifiCorp's due process rights.

Because the trial court's erroneous instruction invited the jury to find liability without adequate proof, it was reversible error. When an "incorrect instruction permits the jury to reach a legally erroneous result, a party has established that the instructional error substantially affected its rights." *Wallach*, 344 Or at 329. A new trial must be granted where the jury is properly instructed that it must find that PacifiCorp negligently caused harm to every single class member and may not simply assume that evidence related to an individual class member automatically applies to every other class member.

FIFTH ASSIGNMENT OF ERROR

The trial court erred in changing the class from an issues class to a liability class without undertaking any class certification analysis.

A. Preservation of Error

PacifiCorp objected to the verdict form on the ground that it did not list out the issues identified in the class certification order and shifted the class to a liability class. (TCF-05/15/2023 (Defendants' Preliminary Objections to Plaintiffs' Verdict Form); TCF-06/05/2023 (Defendants' Submission re Draft Jury Instructions and Draft Verdict Forms); Tr-8023-29; TCF-06/08/2023 (ORCP 59 H Notation to Verdict Form).) PacifiCorp also argued that the shift from an issues class to a liability class was improper in its post-trial motions. (TCF-08/11/2023 (JNOV and New Trial Motions).)

B. Standard of Review

This Court reviews a trial court's failure to give proper jury instructions, including as reflected in a verdict form, de novo for legal error. *Moore*, 324 Or at 427. This court "review[s] class certification for abuse of discretion, but * * * review[s] legal issues underlying the decision * * * for legal error." *Bellshaw*, 326 Or App at 620; *see also, e.g.*, *Bernard*, 275 Or at 153-54 (predominance inquiry and other legal issues reviewed for legal error).

ARGUMENT ON FIFTH ASSIGNMENT OF ERROR

Plaintiffs sought and the trial court certified an *issues* class. Fourteen discrete issues were identified in the class certification order and listed on the class notice. Nevertheless, in the middle of the trial when deciding what jury instructions and verdict form to provide to the jury, the trial court adopted Plaintiffs' proposal and asked the jury to resolve *liability* for each claim, both as to the individual Plaintiffs and on a class-wide basis. In making this shift, the trial court neither redid its certification analysis nor provided notice to the absent class members. And, because this decision was made during trial, PacifiCorp had no opportunity to prepare for this sudden change in the scope of the class, the issues to be decided, and its impact on PacifiCorp's defenses. Thus, the trial court violated ORCP 32 and the due process rights of both the absent class members and PacifiCorp. Both failings require decertification.

First, the shift from an issues to a liability class deprived the absent class members of notice and an opportunity to opt out of the new class. ORCP 32 E(2) requires that notice and the opportunity "to be excluded from the class" be given to class members "for [their] protection." Federal due process likewise requires that absent class members must be given notice of the scope and content of the class claims (or, as was the case here, issues), as well as the right to opt out of the class. *See Phillips Petroleum Co. v. Shutts*, 472 US 797, 812, 105 S Ct 2965, 86 L Ed 2d 628 (1985). Whenever a class definition is amended, those

requirements must be satisfied anew. *See Bobadilla-German v. Bear Creek Orchards, Inc.*, No. 07-cv-03058, 2009 WL 1726342, at *2 (D Or June 17, 2009). That is because due process requires that a notice inform class members not only of the nature of the pending action, but also of sufficient information so that they can decide whether to exclude themselves. *See Gooch v. Life Inv'rs Ins. Co. of Am.*, 672 F3d 402, 422-23 (6th Cir 2012). An "incomplete or erroneous notice" is "ineffective to ensure due process." 7B Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1797.6 (3d ed. 2024).

The class definition here was effectively amended by the jury instructions and verdict form. The class issues identified in the class certification order were nowhere to be found, replaced instead by broad liability questions. This was not the same class that was certified, nor the same class that absent class members were given an opportunity to opt out of.

The original issues-class certification order and notice repeatedly affirmed that the class was an issues class only. (ER-53-77, 87.) The class notice told class members that "this lawsuit is a class action as to the Certified Issues only," and "each Class Member will be responsible for proving * * * whether they are entitled to any damages." (ER-87, 91.) The notice did not tell class members that liability would be resolved at trial; just the opposite: it made clear that they would still have to prove their entitlement to damages, subject to specific circumstances and defenses. In fact, the notice stated that "PacifiCorp is * * *

entitled to present its defenses to ***liability*** and to individual Class Members' claims" in subsequent proceedings. (ER-91 (emphasis added).)

Nonetheless, during the trial itself, the trial court shifted the entire case from a certified issues class to what was effectively a liability class without providing any updated notice or chance to opt out of the new class. And it did so even though there is a fundamental difference between, on the one hand, being bound by a class jury's findings on a number of issues while retaining the right to litigate the ultimate question of liability, and, on the other hand, having liability decided—whether in one's favor or not.

That violation of due process created a situation where the absent class members would be bound by a liability finding *only* if it was in their favor. *See, e.g.*, *Rose v. City of Hayward*, 126 Cal App 3d 926, 937, 179 Cal Rptr 287 (1981) (holding that "one-way intervention" violates due process); *Am. Pipe & Constr. Co. v. Utah*, 414 US 538, 547, 94 S Ct 756, 38 L Ed 2d 713 (1974) (discussing "considerable criticism" associated with "one-way intervention"). If PacifiCorp had prevailed at trial on liability, due process would have prohibited that adverse finding from being used against the class. This one-sided right for the class to selectively choose to be bound by the results of the class trial amounted to a lose-lose proposition for PacifiCorp that must be vacated.

Second, PacifiCorp was denied its due process right to notice and an opportunity to prepare a defense. *Forte v. Schwartz*, No 13–cv–01980–LJO–

MJS, 2018 WL 684825, at *1 (ED Cal Feb. 2, 2018); *see also Goldberg v. Kelly*, 397 US 254, 267-68, 90 S Ct 1011, 25 L Ed 2d 287 (1970). Up until mid-way through trial, PacifiCorp was expecting—and prepared for—a trial that would center on specific issues. Only after the verdict form and jury instructions were finalized did PacifiCorp learn that it had to defend against liability. That switch violated PacifiCorp's due process right by shifting the landscape on which it was litigating and depriving PacifiCorp of the opportunity to prepare a defense to the scope of the issues to be presented to the jury.

SIXTH ASSIGNMENT OF ERROR

The trial court erred when it denied PacifiCorp's motions for directed verdict and judgment as a matter of law on the issue of noneconomic damages.

A. Preservation

PacifiCorp moved for a directed verdict on the issue of noneconomic damages, arguing that controlling Oregon cases barred those damages in this case as a matter of law. (TCF-05/16/2023 (Motion for Directed Verdict).) At Plaintiffs' request, and over PacifiCorp's objection, the trial court deferred ruling on PacifiCorp's motion pursuant to ORCP 63 B and ORCP 32 E. (Tr-4716:1-4718:20, 7998:19-7999:13.) PacifiCorp then moved for judgment notwithstanding the verdict on the issue of noneconomic damages. (TCF-08/11/2023 (Defendants' Motions).) The trial court denied the motion. (ER-ER-319-20.)

During the Phase II trials, PacifiCorp again moved for a directed verdict on the issue of noneconomic damages, and the Court again deferred rulings on those motions. (TCF-01/14/2024 (Motion for Directed Verdict); Phase II, Trial 1 (01/16/2024) Tr-1317:22-1318:5; TCF-03/01/2024 (Motion for Directed Verdict); Phase II, Trial 2 (03/01/2024) Tr. 1434:24-1435:15.) After the Phase II trials, PacifiCorp moved on the same basis for judgment notwithstanding the verdict on the issue of noneconomic damages. (TCF-02/12/2024 (JNOV Motion); TCF-03/29/2024 (JNOV Motion).) The trial court denied those motions. (ER-527-28; ER-693-94.)

B. Standard of Review

The availability of noneconomic damages is a purely legal issue reviewed by this court for "legal error." *Fatehi v. Johnson*, 207 Or App 719, 723, 143 P3d 561 (2006).

SEVENTH ASSIGNMENT OF ERROR

The trial court erred when it instructed the jury that noneconomic damages were available in this case without evidence of physical injury.

A. Preservation

PacifiCorp objected to the uniform civil jury instruction on noneconomic damages and argued the trial court should not instruct the jury on the issue of noneconomic damages, given the absence of evidence of physical injury. (Tr-7994-99.) The trial court rejected PacifiCorp's argument and gave the

instruction. (Tr-7998-99, 8046-49; ER-273.) PacifiCorp expressly noted its objections to the instructions given and not given in Phase I and Phase II. (TCF-06/06/2023 (Defendants' ORCP 59 H Notations); TCF-01/22/2024 (Defendants' ORCP 59 Notations); TCF-03/01/2024 (Defendants' ORCP 59 H Notations).)

B. Standard of Review

The same standard applies as in the Fourth Assignment of Error.

EIGHTH ASSIGNMENT OF ERROR

The trial court erred when it denied PacifiCorp's request for jury instructions explaining when noneconomic damages were and were not permitted and defining when noneconomic damages may not be awarded.

A. Preservation

Before the Phase I jury was instructed, PacifiCorp submitted a proposed jury instruction stating that (1) the jury may not award noneconomic damages for unintentional conduct that damaged or destroyed Plaintiffs' property; and (2) the jury may not award noneconomic damages for loss of community, harm to a sense of identity or loss of personal attachment to property or pets. (TCF-06/06/2023 (Defendants' ORCP 59 H Notation at 5); TCF-06/07/2023 (Defendant's Jury Instruction Submission Ex. 8).) After argument, the trial court declined to give PacifiCorp's proposed instruction. (Tr-7998-99, 8046-49; ER-264-89.)

Before the Phase II trials, PacifiCorp proposed additional and peremptory jury instructions on the issue of noneconomic damages, which the trial court rejected. (TCF-12/20/2023 (Defendants' Proposed Jury Instructions); TCF-01/14/2024 (Defendants' Additional Proposed Jury Instructions); Phase II, Trial 1 (01/05/2024) Tr-164-65; Phase II, Trial 1 (01/16/2024) Tr-1350-51; Phase II, Trial 2 (03/01/2024) Tr-1250-51, 1256.).) PacifiCorp expressly noted its objections to the instructions given and not given in Phase I and Phase II. (TCF-06/06/2023 (Defendants' ORCP 59 H Notations); TCF-01/22/2024 (Defendants' ORCP 59 Notations); TCF-03/01/2024 (Defendants' ORCP 59 H Notations).)

B. Standard of Review

The court reviews the refusal to give a requested jury instruction for errors of law. *Yeatts v. Polygon Nw. Co*., 313 Or App 220, 229, 496 P3d 1060, 1068 (2021). "Generally, the parties in a civil action are entitled to a jury instruction on their theory of the case if the requested instruction correctly states the law, is based on the operative pleadings, and is supported by the evidence." *Id*.

NINTH ASSIGNMENT OF ERROR

The trial court erred when it denied PacifiCorp's motions in limine to preclude evidence and argument on unrecoverable avenues of emotional distress caused by, *inter alia*, the loss of real property, loss of personal property, harm to animals, and witnessing the emotional impact of the fire on friends and family members.

A. Preservation

Before the Phase II trials, PacifiCorp moved in limine to restrict evidence of emotional distress associated with real and personal property damage, harm to animals, and impact on friends and family members. (TCF-12/13/2023 (Defendants' Omnibus Motions *in Limine*).) The trial court denied the motions. (ER-323.)

B. Standard of Review

The trial court's ruling denying a motion in limine on relevance grounds is reviewed for errors of law. *Durette v. Virgil*, 272 Or App 545, 555, 356 P3d 639 (2015), *rev den*, 358 Or 527 (2015). "A trial court's decision to admit evidence over an objection that its probative value is outweighed by its prejudicial effect is reviewed for an abuse of discretion." *State v. Raney*, 331 Or App 693, 705, 547 P3d 172 (2024).

COMBINED ARGUMENT ON SIXTH THROUGH NINTH ASSIGNMENTS OF ERROR

Oregon law restricts the award of noneconomic damages to cases involving either physical injury, intentional misconduct, or the invasion of a special, legally protected interest. In cases involving unintentional property damage, noneconomic damages are not available. Because this case did not involve any physical injury, any evidence of intentional misconduct, or the

invasion of any legally protected interest, noneconomic damages should not have been recoverable.

Despite that clear rule and PacifiCorp's repeated objections, Plaintiffs argued that they could recover noneconomic damages based on the emotional impact they felt from the loss of property. Throughout the three trials, Plaintiffs offered testimony on, and argued the emotional impact they felt from, the loss or destruction of their property, family heirlooms and photographs, personal possessions, pets, and their sense of community and home. Consistent with Plaintiffs' class definition, however, physical harm or impact was never part of this case. In fact, two Plaintiffs in Phase I (Shariene Stockton and Kristen Montoya) were not even home at the time of the fires. Yet all three juries, believing noneconomic damages were available to compensate Plaintiffs for the distress they felt at the loss of their property, awarded a total of $146,750,000 in noneconomic damages—over ***12 times*** the total amount of economic damages.

Those awards are unlawful. No court in Oregon has ever held that unintentional property damage caused by a fire can serve as the legal basis for noneconomic damages. To the contrary, damage to a house or personal property caused by an unintentional fire cannot, as a matter of law, support noneconomic damages. *See Meyer v. 4-D Insulation Co., Inc.*, 60 Or App 70, 652 P2d 852 (1982). The judgments should be reversed as to such damages. At a minimum, the verdicts should be reversed and a new trial should be ordered so that the

juries can be properly instructed that noneconomic damages cannot be awarded for the loss of property.

A. Damage to Property Caused by an Unintentional Fire Cannot Support an Award of Noneconomic Damages.

1. Absent Physical Injury, Noneconomic Damages Are Only Available in Specific and Limited Circumstances.

Emotional distress and inconvenience in daily life are common experiences arising from any number of causes, including negligent or unintentional conduct. *See Philibert v. Kluser*, 360 Or 698, 703-04, 385 P3d 1038 (2016). The law recognizes, however, that not every negative emotional experience or inconvenience can be the source of noneconomic damages. The lack of any objective way to measure those damages—combined with the understandable empathy for the plaintiff's experience and potential anger at the person who caused harm—creates the potential for noneconomic damages that are extra-compensatory and expand liability beyond what the law permits. "Without some limiting principle in addition to foreseeability, permitting recovery for emotional injuries would create indeterminate and potentially unlimited liability." *Philibert*, 360 Or at 704.

Recognizing that fact, Justice Linde's 1982 opinion in *Norwest v. Presbyterian Intercommunity Hospital*, 293 Or 543, 652 P2d 318 (1982), created the current test for availability of noneconomic damages. Since then, recognizing the significant policy impacts of unlimited expansion of

noneconomic damages, Oregon courts have thoughtfully and carefully limited when noneconomic damages are available. Beyond physical injuries or intentionally inflicted harm, any expansion of the availability of noneconomic damages has been incremental, carefully reasoned, and limited to specific and unique circumstances when the compensatory purpose of the law can be fulfilled without inviting unlimited liability. *See Moody v. Or. Comm. Credit Union*, 371 Or 772, 784, 542 P3d 24 (2023) (allowing noneconomic damages to surviving spouse who was financially dependent on decedent arising out of failure to reasonably investigate and pay life insurance proceeds to which she was contractually entitled); *Philibert*, 360 Or at 711-14 (allowing bystander to recover noneconomic damages for "serious emotional distress" if they witness "a sudden, serious physical injury" to a "close family member" "as [it] occurred").

The trial court's decision in this case to allow unlimited noneconomic damages arising out of harm to real and personal property is a radical deviation from existing law. It completely upended the law in this area and discarded the careful balancing of interests that Oregon courts have performed.

2. Noneconomic Damages Are Not Available for Unintentional Property Loss.

Noneconomic damages are available only in limited and defined circumstances: (1) when the plaintiff is physically harmed, (2) when the

defendant acts with malicious intent, or (3) when the defendant invades a special "legally protected interest" recognized by caselaw. *Philibert*, 360 Or at 702; *see also I. K. v. Banana Republic, LLC*, 317 Or App 249, 254-55, 505 P3d 1078, 1082 (2022) (summarizing elements). None of those circumstances apply in this case. There was no evidence that any individual class member was physically injured. Indeed, to remove a significant hurdle to class certification, Plaintiffs consistently asserted that they were *not* seeking damages for personal injuries, which would have introduced additional individualized issues (beyond those that already existed) and further undermined their arguments for class certification. And, throughout the case, the trial court confirmed that liability for bodily injuries had never been established during the Phase I trial, bodily injuries were not covered by the Phase I verdict, and damages related to bodily injuries could therefore not be supported by the Phase I liability verdict. (ER-322.)

Nor was there any evidence that PacifiCorp acted with malicious intent. Plaintiffs claimed that PacifiCorp acted negligently or recklessly, but even recklessness cannot support recovery of emotional distress damages. *See, e.g.*, *Snead v. Metro. Prop. & Cas. Ins. Co.*, 909 F Supp 775, 779 (D Or 1996) ("[T]here is no cognizable claim for the reckless infliction of emotional distress under the laws of the State of Oregon.") (citing *McGanty v. Staudenraus*, 321 Or 532, 550, 901 P2d 841 (1995)). Actual intent to cause harm is required, and there is no dispute that PacifiCorp did not intend to cause harm or distress to

anyone. *See Moody*, 371 Or at 784 (intent prong of emotional distress test requires showing that "the defendant intentionally cause[d] the emotional distress"); *see also Hammond v. Cent. Lane Commc'ns Ctr.*, 312 Or 17, 22, 816 P2d 593 (1991).

Finally, there was no basis to conclude that the damage to Plaintiffs' property implicated a "legally protected interest" that was "of sufficient importance as a matter of public policy to merit protection from emotional impact." *Lockett v. Hill*, 182 Or App 377, 380, 51 P3d 5 (2002) (quoting *Hilt v. Bernstein*, 75 Or App 502, 515, 707 P2d 88 (1985)). On the contrary, this court has already held that property damage from fire does not support any award of noneconomic damages.

In *Meyer*, the plaintiff alleged that a negligently caused fire damaged his house, apparently so significantly that he had to obtain "substitute living quarters" during repairs. *Meyer*, 60 Or App at 72, 80 n 6. Although the plaintiff alleged the fire damage to his home caused him emotional distress, this court held that noneconomic damages were unavailable as a matter of law. *Id.* at 79-80. As *Meyer* explained, "[e]xtension of the right to recover damages for mental distress in a given case is basically a policy decision." *Id.* at 79. And allowing noneconomic damages in cases involving unintentional property damage could open the floodgates to crushing noneconomic damages liability in a vast range of negligence cases. *See id.* (explaining that, as a matter of policy, "harm to

property interests" cannot generally give rise to claims for emotional distress). Based on *Meyer* alone, Plaintiffs cannot recover noneconomic damages based on the loss of their property to fire.

A recent federal case that followed *Meyer* (under circumstances almost identical to those in this case) reinforces that conclusion. *Bailey v. Polygon Nw. Co., LLC*, No 22-cv-00292-YY, 2022 WL 17184309, at *7 (D Or Aug. 23, 2022) (You, M.J.), *report and recommendation adopted in relevant part*, 2022 WL 17178268 (D Or Nov. 23, 2022) (Hernandez, D.J.). In *Bailey*, the plaintiffs sued after their homes were destroyed in "the largest fire in Wilsonville history." 2022 WL 17184309, at *1. "As the fire, fueled by 200-foot flames, spread to nearby properties, neighbors 'watched as their homes, belongings, priceless family heirlooms, memorabilia, and memories were engulfed in flames.'" *Id*. (quoting complaint). Like Plaintiffs here, the *Bailey* homeowners brought claims for negligence and nuisance, and demanded both economic damages and noneconomic damages for "emotional distress." *Id.* But the court held that *Meyer* barred their noneconomic damages claims. *See id.* at *6-8. As the court explained, in an analysis that applies fully here, "[t]he similarity between the facts in *Meyer* and those alleged by plaintiffs—negligent conduct that led to a fire, property damage, and emotional damages sought despite the absence of physical injury—militates a similar result: a dismissal of claims that seek mental distress without physical injury." *Id.* at *7.

In short, noneconomic damages are not available for damage to property, even if emotional distress is a foreseeable outcome of the property loss. "[A]s a policy matter, neither the quality of a defendant's conduct nor the predictability of distress as a result of property damage alone or together form a basis for an award of compensatory damages for emotional distress." *Meyer*, 60 Or App at 74. If "the underlying loss is an economic or property loss that predictably also results in emotional distress, the invasion is not of sufficient importance to warrant an award of damages for emotional distress." *Shin v. Sunriver Preparatory Sch., Inc.*, 199 Or App 352, 371, 111 P3d 762 (2005) (citing *Meyer*, 60 Or App at 74-75).

3. Allowing Noneconomic Damages in This Case Would Undermine Oregon Law and Logic.

Other Oregon cases have declined to recognize noneconomic damages even in emotionally compelling circumstances. In *Lockett*, the defendant's dogs negligently mauled and killed the plaintiffs' cat in the plaintiffs' presence. 182 Or App at 379. The plaintiffs sought damages for emotional distress and loss of companionship and sense of identity arising from the death of their cat, but this court held as a matter of law the plaintiffs could not recover those damages. *Id*.; *see also id*. at 382 ("No Oregon court has recognized that a person's interest in a sense of identity is legally protectible."); *Restatement (Third) of Torts*, § 47

cmt. m. ("Recovery for emotional harm resulting from negligently caused harm to personal property is not permitted.").

Cases involving harm to family members underscore that principle. In *Norwest*, the court denied a child's claim for "loss of his mother's society and companionship." 293 Or at 586. And in *Philibert*, after distilling the cases and principles in this area, the court allowed bystanders to recover for "serious emotional distress" only when observing a sudden, serious injury to a close family member as it happened. 360 Or at 711-14.

Plaintiffs have ***never*** reconciled their theory of noneconomic damages with *Meyer*, *Lockett*, *Philibert*, *Norwest*, or any other Oregon case or authority explaining both the content of, and the reasoning supporting, limitations on recovery for noneconomic damages arising out of real or personal property loss. *See Melton v. Allen*, 282 Or 731, 736, 580 P2d 1019 (1978) (emotional distress damages not available in a case involving unintentional trespass to an automobile (which had been erroneously towed away).) Nor have they reconciled their theory with logic. As the Supreme Court has explained, any decision to expand the law to allow noneconomic damages is "a matter of public policy." *Philibert*, 360 Or at 705. If noneconomic damages are permitted in this case, as a matter of public policy, the law would effectively elevate (through allowing compensation) a person's emotional attachment to inanimate objects such as furniture and tools above a person's relationship with close friends or

extended family members (*Philibert*), companionship of a parent (*Norwest*), or pets (*Lockett*) that is affected by negligent conduct. Such an approach can hardly be squared with reason, experience, or common sense.

In sum, this case illustrates why limitations on noneconomic damages exist. At Plaintiffs' counsel's urging through extensive evidence and argument, the juries have awarded over $146 million to Plaintiffs to compensate them for their lost belongings, heirlooms, and memorabilia in the Labor Day fires. Regardless of the very real impact that such losses may engender, the law draws a clear line. Noneconomic damages are not available in this case as a matter of law.

B. There Is No Basis to Depart from Established Precedent Rejecting Noneconomic Damages for Property Damage

Plaintiffs previously argued that noneconomic damages are recoverable in this case because (1) Plaintiffs brought nuisance claims, and Oregon courts have allowed noneconomic damages recovery in nuisance cases; and (2) Plaintiffs witnessed the fires and had to evacuate their homes. Both arguments should be rejected.

First, the mere existence of nuisance claims does not support an award of noneconomic damages for unintentional conduct that damages property. To the contrary, *Meyer* expressly rejected the argument that a one-time fire can constitute the kind of "nuisance" that supports noneconomic damages. In *Meyer*,

just as here, the plaintiff argued that two prior cases involving "nuisance" claims—*Macca v. Gen. Tel. Co. of Nw*., 262 Or 414, 495 P2d 1193 (1972) and *Edwards v. Talent Irrigation Dist*., 280 Or 307, 570 P2d 1169 (1977)—demonstrated that noneconomic damages are available when a fire causes damage to a home. *Meyer*, 60 Or App at 75 ("Plaintiff contends … that this case is governed by *Macca* and *Edwards*.").

But the court in *Meyer* rejected that argument, explaining that fire damage to property is categorically different from the kind of ongoing, repeated acts of interference that were at issue in *Macca* and *Edwards*. The court explained that *Macca* involved "repeated telephone calls" to the same house, over a prolonged period, and that this kind of *repeated*, intentional conduct supported mental distress damages. *Meyer*, 60 Or App at 75. The court made the same point about *Edwards*, which involved ongoing flooding of the plaintiff's land from the defendant's irrigation ditch. *See id.* at 76. The court contrasted the ongoing, repeated intrusions at issue in *Macca* and *Edwards* with "property damage to a house" caused by a one-time fire and explained that the latter does not support noneconomic damages. *Id.* at 75-76. Following *Meyer*, the *Bailey* court likewise held that one-time fires—no matter how destructive—do not involve the kind of "pervasive, repeated, or continuously negligent actions [] that allowed the plaintiff to obtain emotional distress damages" in *Macca* and *Edwards*. *Bailey*, 2022 WL 17184309, at *8.

The courts' reasoning in *Meyer* and *Bailey* is consistent with the current and controlling approach to noneconomic damages first outlined in *Norwest* and followed since that time: namely, that the cause of action does not dictate whether noneconomic damages are available. Instead, it is whether the special, legally protected interest is of sufficient importance to merit protection from emotional harm. One-time damage to property does not satisfy that condition.

While Plaintiffs have brought "nuisance" claims, the label of their causes of action does not control whether noneconomic damages are available. Were it otherwise, *Meyer* would be a nullity, because any plaintiff could avoid its holding by simply changing the label on their claims from negligence to nuisance. Indeed, in both *Edwards* and *Macca*, the plaintiffs did *not* bring "nuisance" claims at all, but the courts held that the *facts* at issue—rather than the label of the causes of action—showed that the cases involved the kind of ongoing "nuisance" that supported noneconomic damages. *See Edwards*, 280 Or at 310 n 2. This court has described the interests that *Edwards* and *Macca* protect narrowly, explaining that *Macca* "recognized a legally protected interest in not being subjected to the mental distress resulting from the negligent, erroneous listing of a telephone number" and *Edwards* "upheld recovery for the emotional distress caused by the defendant irrigation district's negligence in causing the plaintiffs' property to be flooded." *I. K.*, 317 Or App at 262-63. Neither interest is implicated here. In short, Plaintiffs cannot avoid *Meyer* and

cases following *Meyer* merely by including a nuisance action in their complaint. Because this case involves one-time damage from fire, not an ongoing intentional nuisance over a prolonged period, noneconomic damages are not available.

Second, the fact that Plaintiffs witnessed the fires or had to evacuate as an indirect result of the soil burn activity on their property also does not support noneconomic damages. As previously explained, noneconomic damages require either (1) physical injury, (2) intentional misconduct, or (3) invasion of a special protected interest. No Oregon case has ever held that witnessing or evacuating from a fire or similar event is enough to support noneconomic damages. *See Philibert*, 360 Or at 703-04; *see also Bailey*, 2022 WL 17184309, at *1.

TENTH ASSIGNMENT OF ERROR

The trial court erred when it denied PacifiCorp's motions for directed verdict on the alternative grounds that noneconomic damages arising from property damage are barred by ORS 477.089.

A. Preservation

PacifiCorp moved for a directed verdict on the issue of noneconomic damages. (TCF-05/16/2023 (Defendants' Motion for Directed Verdict).) At Plaintiffs' request, and over PacifiCorp's objection, the trial court deferred ruling on PacifiCorp's motion. (Tr-4716:1-4718:20.) PacifiCorp then moved for judgment notwithstanding the verdict on the issue of noneconomic damages.

(TCF-08/11/2023 (Defendants' Post-Trial Motions).) The trial court denied PacifiCorp's motion. (ER-319-20.) In the Phase II trials, PacifiCorp again moved for directed verdict (and after trial, for judgment notwithstanding the verdict) on the issue. (TCF-01/04/2024 (Directed Verdict); TCF-02/12/2024 (JNOV); TCF-03/01/2024 (Directed Verdict); TCF-03/29/2024 (JNOV.) The trial court denied those motions. (ER-527-28; ER-693-94.)

B. Standard of Review

Whether ORS 477.089 permits recovery of noneconomic damages is a purely legal issue reviewed by this Court for "legal error." *Fatehi*, 207 Or App at 723.

ARGUMENT ON TENTH ASSIGNMENT OF ERROR

In addition to being unsupported by the common law, the noneconomic damages awards here are barred by statute. "[E]conomic and property damages" are the "***exclusive*** remedies for damages or injury to property caused by a wildfire"—foreclosing the recovery of noneconomic damages in wildfire cases that do not involve personal injury, like this one. (App-1 (ORS 477.089(2)) (emphasis added).) The parties here stipulated that the fires in this case are each a "wildfire" under the statute such that ORS 477.089 applies and governs the recoverable damages. (TCF-03/24/2023 (Parties' Factual Stipulations).) Because Plaintiffs' claims in this case arise solely from wildfire damage to property, and because ORS 477.089 states that the exclusive remedies for such

damages are economic, the court should vacate the noneconomic damages award as barred by ORS 477.089.

The plain text of ORS 477.089 is straightforward. (App-1.) It states that "in a civil action for property damage caused by a wildfire, the recoverable damages are" (1) "economic and property damages" if a case does not involve grossly negligent, reckless, or willful conduct, or (2) "twice the amount of economic and property damages" if it does. ORS 477.089(2)(a)-(b). Critically, the statute provides that such economic damages are "the ***exclusive remedies*** for damages or injury to property caused by a wildfire." ORS 477.089(4) (emphasis added). If economic damages are the "exclusive remedies" for property losses caused by wildfire, then that necessarily excludes ***other*** remedies for property damage, including noneconomic damages.

That interpretation is confirmed by the relevant legislative history and context in which the statute was enacted. *See Oregon AFSCME Council 75 v. Oregon Judicial Dept. - Yamhill Cty.*, 304 Or App 794, 826 n 27, 469 P3d 812, 832 (2020) ("Context, for purposes of statutory interpretation, includes * * * extant circumstances that give rise to the need for legislation."). The bill that introduced the wildfire-damages bar was spurred by the 2007 Moonlight Fire litigation in California—another wildfire case involving runaway damages. (TCF-10/27/22 (Chase Decl., Ex 5 at 1).) In the Moonlight Fire case, the federal

government claimed $791 million for damages to federal timber land with a fair market value of only $20 million on the open market. (*Id*.)

In enacting the wildfire-damages bar, the legislature sought to prevent similar runaway damages in Oregon, particularly in light of public criticism that the federal government's claims far exceeded the "market value" of the land. (*Id*., Exs. 1, 3-5.) As the bill's sponsors recognized, that entailed "better defining the legal exposure for wildfire damages," to ensure that "Oregon's landowners" would not "face legal claims of such massive scale that they are forced to choose between gambling the company and settling for outrageous sums." (*Id.* Ex. 5 at 1.) In short, the legislative goal of ORS 477.089 was to eliminate the possibility of "undue windfalls" by "creative lawyers" and instead bring predictability and objectivity to the wildfire liability sphere through enactment of a quantifiable damages scheme. (*Id.* Ex. 4 at 2, Ex. 5 at 2.) The statute therefore embodies a careful legislative compromise: in exchange for making it absolutely clear that the only recoverable damages in a wildfire property damage case would be quantifiable economic and property damage, the legislature granted the ability to recover double damages in cases of gross negligence or higher degrees of culpability for damage to property.

Plaintiffs are improperly attempting to circumvent that legislative compromise by claiming the benefits of ORS 477.089 (by receiving double economic damages) without having to abide by its restrictions (which prevent

the recovery of noneconomic damages). To justify this end-run, Plaintiffs argued that ORS 477.089 was merely intended to clarify how economic damages should be calculated, without limiting the types of damages that may be sought. (TCF-11/28/22 (Plaintiffs' Opposition at 9-12).) But Plaintiffs' interpretation ignores the plain text of the statute, which states unambiguously that economic damages are "the ***exclusive*** remedies for damages or injury to property caused by a wildfire." ORS 477.089(4) (emphasis added). Plaintiffs' interpretation would render the statutory term "exclusive remedies" meaningless. Plaintiffs also ignore the statutory context and purpose of the statute. An award of noneconomic damages in this case would subvert, not support, the structure and purpose of the statute, because it would upset the careful balance struck by the legislature and permit the sweeping damages that the legislature sought to prevent.

Put simply, the statute was meant to prevent Plaintiffs from using creative theories to aggravate their damages beyond the economic value of their property. Allowing noneconomic damages in a wildfire case like this one would frustrate that purpose. ***Any*** property owner whose property is damaged in a wildfire could claim that the loss of their property caused them mental distress. If that was all that it took to avoid ORS 477.089's limitation on remedies, then the limitation would be meaningless. The noneconomic damages award must be vacated because it is barred by ORS 477.089.

ELEVENTH ASSIGNMENT OF ERROR

The trial court erroneously granted summary judgment on PacifiCorp's causation defenses before the Phase II trials.

A. Preservation of Error

After the Phase I trial, Plaintiffs moved for partial summary judgment on, *inter alia*, PacifiCorp's affirmative defenses of "No Causation," "Intervening/Superseding Cause," "Negligence/Fault of Others," and "Unavoidable Accident/Act of God," arguing that the Phase I verdict established that PacifiCorp was the sole cause of the Labor Day 2020 fires. (TCF-11/03/2023 (Plaintiffs' Motion for Partial Summary Judgment).) PacifiCorp opposed Plaintiffs' motion, explaining that the Phase I verdict did not establish that PacifiCorp was the ***only*** cause of all fire-related damages to class members' property, only that it was ***a*** cause. (TCF-11/27/2023 (Defendants' Opposition).)

The trial court granted summary judgment on the "No Causation," "Intervening/Superseding Cause," "Negligence/Fault of Others," and "Unavoidable Accident/Act of God" defenses "for the reasons stated in Plaintiffs' motion and reply briefs"—i.e., because the Phase I verdict purportedly foreclosed the possibility that any fire-related damage was not caused by PacifiCorp. (ER-346-50.)

B. Standard of Review

When reviewing the grant of summary judgment, this court "view[s] the facts in the light most favorable to the nonmoving party," and "review[s] the trial court's decision to grant summary judgment * * * for legal error." *Fields v. City of Newport*, 326 Or App 764, 767, 533 P3d 384 (2023).

TWELFTH ASSIGNMENT OF ERROR

The trial court erroneously prohibited PacifiCorp from introducing evidence in Phase II that the specific harms complained of by the Phase II Plaintiffs were caused by the lightning-caused Beachie Creek Fire.

A. Preservation of Error

Before the Phase II trials, Plaintiffs moved *in limine* to preclude PacifiCorp from offering evidence that the Beachie Creek Fire caused any of the Phase II Plaintiffs' damages, arguing the Phase I verdict established PacifiCorp alone was at "fault" for any damages. (TCF-12/13/2023 (Plaintiffs' Motion *in Limine*).) PacifiCorp opposed Plaintiffs' motion. (TCF-12/20/2023 (Defendants' Opposition).) The trial court sided with Plaintiffs, ruling that the Phase I jury's findings precluded PacifiCorp from arguing that it was not at "fault" for the fires, and established that the "lightning-caused Beachie Creek Fire" was *not* the cause of class members' injuries. (ER-344.) PacifiCorp also moved after each Phase II trial for a new trial based on the trial court's rulings prohibiting PacifiCorp from discussing the Beachie Creek Fire. (TCF-

02/12/2024 (Defendants' Motion for New Trial); TCF- 03/29/2024 (Defendants' Motion for New Trial).) The trial court denied each of PacifiCorp's motions. (ER-527-28; ER-693-94.)

B. Standard of Review

The trial court's ruling excluding evidence and argument based on the conclusion that it was legally irrelevant due to the prior jury's findings is reviewed for errors of law. *Durette*, 272 Or App at 555.

THIRTEENTH ASSIGNMENT OF ERROR

The trial court erroneously instructed the Phase II juries that PacifiCorp was the sole cause of all fire-related property damage that affected the class members.

A. Preservation of Error

PacifiCorp objected to the trial court's instruction to the Phase II juries that the Phase I verdict established that PacifiCorp was "the cause" of all the injuries the class members suffered. (ER-458-59; ER-495-96.) The trial court overruled PacifiCorp's objection. (ER-459-60; ER-497.) PacifiCorp also filed a motion for a new trial in each Phase II trial, based on this erroneous instruction. (TCF- 02/12/2024 (Defendants' Motion for New Trial); TCF-03/29/2024 (Defendants' Motion for New Trial).) The trial court declined to grant a new trial. (ER-527-28; ER-693-94.)

B. Standard of Review

This Court reviews a trial court's ruling on a motion for a new trial for "errors of law," and "if the trial court made no predicate legal error," then this Court reviews for "abuse of discretion." *State v. Shaffer*, 328 Or App 439, 442 (2023). Whether a "trial court erred in instructing the jury" is "review[ed] for legal error." *State v. Morales*, 307 Or App 280, 287, 476 P3d 965 (2020).

COMBINED ARGUMENT ON ELEVENTH THROUGH THIRTEENTH ASSIGNMENTS OF ERROR

The trial court instructed the Phase II juries that the Phase I verdict had already determined that PacifiCorp was the ***sole*** cause of ***all*** fire-related injuries the class members suffered. (Phase II Trial I, Tr-30:15-32:24 ("***the*** cause") (emphasis added), ER-463-79, ER-499-516.) The trial court then precluded PacifiCorp from offering any evidence that individual class members suffered injuries because of the lightning-caused Beachie Creek Fire. (ER-344.) This was error because the Phase I jury only found that PacifiCorp was ***a*** cause of ***some*** injury to class members. (ER-279 (in instructing on negligence, court stated that plaintiff must prove that defendant's "conduct was ***a*** cause of harm to the plaintiff"); ER-284 (in instructing on "substantial factor" causation, court stated "you may find that the defendant's conduct caused the harm even though it was not the only cause"); ER-290-312 ("***a*** cause of harm") (emphasis added);.)

The Phase I jury's finding that PacifiCorp was ***a*** cause of harm to the entire class was not supported by the evidence. But even if it were, the determination that PacifiCorp was ***a*** cause of ***some*** injury did not establish that PacifiCorp was the ***sole*** cause of ***all*** class member injuries. The only evidence of class-wide injury presented to the Phase I jury was Buckley's testimony regarding "soil burn." But that evidence did not resolve whether PacifiCorp was ultimately responsible for ***particular injuries*** or whether it was the cause of ***all*** injuries alleged by ***every*** class member.

This was particularly true in the Santiam Canyon, where the lightning-caused Beachie Creek Fire indisputably damaged class member properties. By precluding PacifiCorp from even mentioning the Beachie Creek Fire, the trial court closed the door on PacifiCorp's ability to show that a whole host of injuries directly or indirectly stemming from the soil burn activity on class member properties—including fire burn damage to homes and structures, smoke and ash damage, mental and emotional distress years after the fire, and evacuation-related harms like the stress of seeing fire along the highway or encountering traffic from residents evacuating from the Beachie Creek Fire—were caused solely by the Beachie Creek Fire.

A court presiding over a jury trial cannot engage in judicial fact finding and find facts not found by the jury in its verdict. *Fiore v. Ladd*, 29 Or 528, 533, 46 P 144 (1896) (rejecting judge's modification of verdict, because judge

"cannot * * * usurp the functions of a jury, or substitute his verdict or judgment for theirs"). But here, the trial court rewrote the Phase I jury's findings by ruling that the Phase I verdict conclusively established PacifiCorp's responsibility for ***all*** fire-related damage to the class members' property, including all direct and indirect harms stemming from "low level soil burn." In doing so, the trial court went beyond even its own original bifurcated trial plan, which contemplated that "potential property and plaintiff specific variations are related to damages issues that can be resolved in a bifurcated second phase and do not preclude * * * inquiry into individual damages in phase two to determine whether each plaintiff's damages are a result of PacifiCorp's fault." (ER-71.)

These errors usurped the role of the jury and deprived PacifiCorp of its due-process and jury-trial rights to test every claim from every class member. *See, e.g.*, *E. Tex. Motor Freight Sys. Inc. v. Rodriguez*, 431 US 395, 404 n 9, 97 S Ct 1891, 52 L Ed 2d 453 (1977); *Philip Morris USA v. Williams*, 549 US 346, 353, 127 S Ct 1057, 166 L Ed 2d 940 (2007) (right to raise "every available defense"). If the trial court had not precluded PacifiCorp from mounting its defenses—and instructed the jury that PacifiCorp was the sole cause of harm—PacifiCorp would have been able to introduce evidence showing that individual class members' injuries were caused by the lightning-caused Beachie Creek Fire, consistent with the trial court's original contemplated bifurcated trial plan.

The Court should reverse the trial court's rulings granting summary judgment on PacifiCorp's Phase II causation defenses, precluding the introduction of evidence of the lightning-caused Beachie Creek Fire as an alternative cause of individual class member injuries, and instructing the jury that PacifiCorp was "the cause" of harm. The Court should grant PacifiCorp new Phase II trials so that it can demonstrate to the Phase II juries that the class members' injuries were not caused by PacifiCorp.

VI. CONCLUSION

The trial court's decisions below—which resulted in the largest wildfire verdicts in Oregon history—must be reversed, because they violate several well-established legal principles. They violated class-certification rules. They ignored foundational causation standards. They permitted the award of hundreds of millions in unlimited noneconomic damages that are plainly unavailable under Oregon law. And the juries that issued those awards were improperly instructed. Any one of these errors alone would be serious enough to warrant reversal. Altogether, they demand it. The Court should decertify the class, direct the entry

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of a verdict in PacifiCorp's favor on the class claims, vacate the noneconomic damages awards, and/or vacate the Phase II trial verdicts.

DATED: April 1, 2025

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CERTIFICATE OF COMPLIANCE

The court granted a motion to exceed the length limit for this brief. The order granting that motion was dated March 18, 2025, and limits a brief of up to 22,000 words. I certify that (1) this brief complies with that order and (2) the word count of this brief is 21,722.

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes.

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CERTIFICATE OF FILING AND SERVICE

I certify that on April 1, 2025, I filed the original of this **APPELLANTS' OPENING BRIEF** with the Appellate Court Administrator by the Court of Appeals' eFiling system.

I further certify that on April 1, 2025, I caused true copies of this **APPELLANTS' OPENING BRIEF** to be served upon the parties listed via e-service on the Oregon Court of Appeals website.

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