IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

DERREL ANDERSEN, A.C., a minor proceeding by and through their Guardian ad Litem, CATHERINE NICOLE CLARKE, HELEN LARA, J.R.C., a minor proceeding by and through their Guardian ad Litem, SCOTT CAPEK, ARLENE SPENCER, V.M., a minor proceeding by and through their Guardian ad Litem, CATHERINE NICOLE CLARKE, FRED SPENCER, J.S.C., a minor proceeding by and through their Guardian ad Litem, SCOTT CAPEK, CATHERINE NICOLE CLARKE, C.C., a minor proceeding by and through their Guardian ad Litem, SCOTT CAPEK, SCOTT CAPEK,

Plaintiffs,

vs.

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

Defendants.

No. 25CV55121

DEFENDANTS PACIFICORP AND PACIFIC POWER'S MOTION FOR MISTRIAL

JAMES CLASS ACTION

Trial No. 22: April 6, 2026

Assigned to: Hon. Chanpone Sinlapasai (Trial)
Hon. Steffan Alexander (Motions)

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I. Introduction

PacifiCorp and Pacific Power (together, "PacifiCorp") move for a mistrial because, in the midst of this trial, the Oregon Court of Appeals reversed and remanded the judgment from Phase 1. *See James v. PacifiCorp*, 348 Or App 347, 368, __ P3d __ (2026).[1] Those verdicts could not stand because the jury had been mis-instructed that it could "simply 'assume that the evidence at the trial applies to all class members,'" which was prejudicial to PacifiCorp. *Id*. at 371, 377-78. The problem for this Court is that the Phase 1 verdict is woven into the fabric of this case and trial—and, indeed, the liability verdict from Phase I is the foundation of this damages trial. That verdict affected the scope of discovery, issues for this trial, jury instructions, and verdict form. In opening statement, counsel for plaintiffs reported that the parties were in court because of the verdict in Phase 1 and emphasized the jury's findings. Add to that, the Oregon Court of Appeals decision has been publicized extensively—that is, there is an substantial risk that one or more jurors learn of the Court of Appeals decision reversing the liability verdict, with that information then potentially ricocheting through deliberations to the prejudice of PacifiCorp. Because there is no basis for the jury to submit a damages verdict—and because any verdict would be unreliable and tainted by the inaccurate and misleading instructions in any event—a mistrial is required.

II. Factual and Procedural Background

A. The parties dispute the cause of and fault for the fires.

PacifiCorp has long denied liability for the fires being litigated in this class action. And on March 19, 2025—after the Phase 1 verdict—the Oregon Department of Forestry (ODF) released a report, agreeing that PacifiCorp was not at fault for the Santiam Canyon Fires:

> "The Santiam Canyon Wildfire Event is comprised of 19 reports of fire located within the protection boundaries of ODF's North Cascade District. Seven of which were caused by down powerlines but determined to not

[1] The decision is available at https://ojd.contentdm.oclc.org/digital/pdf.js/web/viewer.html?file=/digital/api/collection/p17027coll5/id/41610/download#page=1&zoom=auto

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> contribute to the spread of large fires in the Santiam Canyon. The seven ignitions were suppressed by residents and/or other fire personnel.
>
> "The remaining 12 reports of fire were determined to be caused by embers from the Beachie Creek Fire. The Oregon Department of Forestry did not investigate the Beachie Creek Fire because the U.S. Forest Service has jurisdiction over the fire."

See Or Dep't of Forestry, ODF publishes 2020 Santiam Canyon Wildfire Event investigation report (Mar. 19, 2025*), available at* https://odffire.com/2025/03/19/odf-publishes-2020-santiam-canyon-wildfire-event-investigation-report/. By the Labor Day 2020 weekend, the Beachie Creek Fire—which was likely started by lightening strikes—had been burning for several weeks.

Unlike the experts at ODF, the Phase 1 verdict blamed PacifiCorp for the Santiam Canyon Fire and others, with the jury finding that PacifiCorp was negligent, grossly negligent, reckless, and willful in causing class members' property damages, and its conduct was a public nuisance, private nuisance, and trespass. (Hern Decl., Ex. 1, 4/6/26 AM Tr. 51-54 (jury instructions).)

B. The Phase 1 verdict affected discovery and issues being tried.

As explained by the Court of Appeals, the Phase I verdict cannot stand, because the jury was erroneously instructed to "assume" that liability evidence applicable to one class member would apply to every other class member. It is simply not possible to isolate the trial court's use that instruction and later reliance on the jury's verdict from the litigation and trial of Phase II trials. Relying on the verdicts, it has limited that discovery that PacifiCorp may take, eliminating all ability to explore any individual issues of causation. It has affected the evidence that PacifiCorp may present, including eliminating all reference to alternative or other causes of harm that cannot simply be assumed away.

By way of one example of this dynamic, under Oregon law, the viability of certain defenses turn on the nature of liability. For example, the Court of Appeals has held that a defendant that has engaged in reckless or intentional misconduct cannot assert a contributory negligence defense. *See Shin v. Sunriver Preparatory School*, 199 Or App 352, 376, 111 P3d

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762 (2005) (holding that Oregon's comparative fault statute does not apply when a defendant is alleged to have engaged in an intentional tort because, "[b]efore the adoption of comparative fault, contributory negligence was not a defense to willful or intentional misconduct"); *Miller v. Agripac, Inc.*, 322 Or App 202, 223, 518 P3d 957 (2022), *rev den*, 370 Or 82 (2023) (similar as to recklessness).

As applied here, the jury's findings in Phase 1 that PacifiCorp recklessly and willfully harmed class members narrowed discovery and issues for trial. Per *Shin* and *Miller*, those findings negate a defense that any plaintiff is comparatively at fault for their own damages—*e.g.*, by failing to protect structures in forested areas with firebreaks, failing to remove personal property with high sentimental value from their residences in light of the already-burning Beachie Creek Fire, or delaying in evacuating upon learning of the combination of the Beachie Creek Fire.

In the absence of such discovery, PacifiCorp simply cannot know whether such a defense might be applicable to any of the individual plaintiffs in Trial 22, and it was precluded from litigating those issues to this jury.

C. The Phase 1 verdict affected the jury instructions and verdict form.

The jury instructions and verdict form in Trial 22 are replete with references to PacifiCorp's liability and culpability for damages, as determined in Phase 1. For example, all prospective jurors were instructed about a "first phase" in which the jury made twelve numbered finding in relation to PacifiCorp's specific forms of liability—negligence, gross negligence, recklessness, willfulness, and that PacifiCorp's conduct constituted private nuisance, public nuisance, and trespass—that in each instance was "the cause of harm to the entire class within the boundaries of the fire areas at issue in this trial." (Hern Decl., Ex. 1, 4/6/26 AM Tr. 51-53.)

In relation to each of those dozen findings, the Court instructed the jury:

> "*The rules of evidence allows the Court to take judicial notice of certain adjudicated facts. I instruct you to accept the above findings made by the jury in Phase 1 as conclusive.* That means that, although no party has

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> offered or will offer evidence to prove the above findings in this trial, you must accept the findings as conclusive.
>
> "'Conclusive' means that you may not question the above findings made in Phase 1 and must treat them as established in this trial."

(*Id*. at 53-54 (emphasis added.) The jury was then informed that they would be adjudicating plaintiffs' claims for "damages from PacifiCorp for harm plaintiffs contend *they suffered as a result of PacifiCorp's liability* for the fires in Phase 1 *based on the specific findings above*." (*Id*. at 54 (emphasis added.)

Beyond that, the concluding jury instructions and verdict form dictated by CMO 11 make extensive further use of the Phase 1 verdict, as described more fully in PacifiCorp's forthcoming objections and exceptions to the jury instructions in Trial 22.

D. In jury arguments, plaintiff repeatedly referenced the Phase 1 verdict.

Within seconds of beginning his opening statement, plaintiffs' counsel reiterated PacifiCorp's culpable conduct as found by the Phase 1 jury: "[PacifiCorp's actions, you heard yesterday, they were negligent. They were grossly negligent. They were reckless., and they were willful." (Hern Decl., Ex. 2, 4/7/26 AM Tr. 318-19; *see also id.* at 320, 321 (similar).) The evidence of that misconduct, plaintiffs counsel told the jury, had filed "about two months" of trial. (*Id*. at 321.) The jury then heard that "11 survivors in this trial" suffered "a lot of harm," and the jury was there "to account for all of that" in what is the "only shot at justice for "the survivors." (*Id*. at 322-24, 325-26.)

Toward the end of his opening, plaintiffs' counsel argued that the jury should disbelieve PacifiCorp in part because this culpable party had "refused to accept responsibility for the fire in the first instance"—specifically:

> "When you hear from PacifiCorp in this case, remember, this is the same company that *refused to accept responsibility* for the fires in the first instance. And almost six years after the fires, *it still refuses to hold itself fully accountable* for all of the harm and all of the loss that it caused.
>
> "Through your verdict in this case, you will have the power to *hold PacifiCorp accountable* for the harm that it's caused these 11 people.

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> This is not about punishment, but it is about accountability, about *telling PacifiCorp what it's really worth to put people through something like this* through no fault of their own."

(*Id*. at 346-47 (emphasis added).) Tagging onto that vilification of PacifiCorp, plaintiffs argued that a verdict would need to "fully account[] for everything they've been through," and that the jury would need to "do justice" because "[t]here is nobody else to give them justice after nearly six years." (*Id*. at 347-48.)

E. The Court of Appeals' decisions prompted substantial publicity.

This class action has prompted substantial publicity, including in relation to the Oregon Court of Appeals' recent decision. By April 9, 2026, the decision had been publicized extensively in local and national news media, including *The Oregonian*,[2] KWG,[3] Fox 12

[2] *Oregon appeal court hands big victory to PacifiCorp in wildfire class action suit* (Apr. 8, 2026), *see* https://www.oregonlive.com/business/2026/04/oregon-appeals-court-hands-big-victory-to-pacificorp-in-wildfire-class-action-suit.html

[3] *Oregon appeals court reverses ruling that found PacifiCorp liable in deadly 2020 Labor Day wildfires* (Apr. 8, 2026), *see* https://www.kgw.com/article/news/state/oregon-appeals-court-reverses-pacificorp-ruling-deadly-2020-labor-day-wildfires/283-c5e100b9-21b0-4963-af35-ec79b3f572f3

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Oregon,[4] KATU,[5] KOIN,[6] Oregon Public Broadcasting,[7] Reuters,[8] the Associated Press,[9] and ABC News.[10] And this publicity by legacy news organizations cannot convey the reach of the story on social media, which PacifiCorp simply does not know how to measure or convey, given the need to file this motion promptly. Based on the breath and reach of these stories, there is a substantial danger that some jurors will have been exposed to at least some headlines about the decision.

III. Legal Standard

While judges generally have wide discretion to grant or deny a mistrial, they are primarily guided by considering the potential prejudice to the moving party. *See, e.g.*, *State v. Jones*, 141 Or App 41, 48, 917 P2d 515 (1996) (courts are required to exercise discretion in granting or denying a mistrial "based on the criterion of prejudice," and a failure to do so warrants remand). A court abuses its discretion if, by denying a mistrial, it denies a fair trial to

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[4] *Oregon appeal court overturns PacifiCorp wildfire verdict, orders new trial* (Apr. 9, 2026), *see* https://www.kptv.com/video/2026/04/09/oregon-appeals-court-overturns-pacificorp-wildfire-verdict-orders-new-trial/

[5] *Oregon appellate ruling in PacifiCorp case could jeopardize $1B in wildfire victim damages* (Apr. 8, 2026), *see* https://katu.com/news/wildfire-season/oregon-appellate-ruling-in-pacificorp-case-could-jeopardize-one-billion-dollars-in-wildfire-victim-damages-santiam-canyon-echo-mountain-complex-south-obenchain-242-fires

[6] *Oregon appellate ruling in PacifiCorp case could jeopardize $1 billion in wildfire victim damages. Here's how* (Apr. 8, 2026), *see* https://www.koin.com/news/oregon/oregon-appellate-ruling-in-pacificorp-case-could-jeopardize-1-billion-in-wildfire-victim-damages-heres-how/

[7] *PacifiCorp Wins Victory in Oregon Wildfire Lawsuit Brought by 2020 Labor Day Survivors* (April 8, 2026), *see* https://www.opb.org/article/2026/04/08/pacificorp-wins-victory-oregon-wildfire-lawsuit/

[8] *Berkshire-owned PacifiCorp utility wins ruling that could reduce Oregon wildfire damages* (Apr. 8, 2026), *see* https://www.reuters.com/world/berkshire-owned-pacificorp-utility-wins-ruling-related-oregon-wildfire-damages-2026-04-08/

[9] *Oregon appellate ruling in PacifiCorp case could jeopardize $1 billion in wildfire victim damages* (Apr. 8, 2026), *see* https://apnews.com/article/pacificorp-wildfire-oregon-litigation-dd52933317bfdb786c56385812c52243.

[10] *Oregon appellate ruling in PacifiCorp case could jeopardize $1 billion in wildfire victim damages* (Apr. 8, 20206), see https://abcnews.com/Business/wireStory/oregon-appellate-ruling-pacificorp-case-jeopardize-1-billion-131859992

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the moving party. *See State v. Soprych*, 318 Or App 306, 307, 507 P3d 276 (2022) ("If the effect of improper comments or conduct at trial is to deny a defendant a fair trial, the court abuses its discretion in denying a motion for a mistrial."). The right to a fair trial "guarantees that a defendant shall be tried by a jury that will decide [issues] based on evidence—not emotion or prejudice[.]" *State v. Muniz*, 332 Or App 56, 60, 548 P3d 172 (2024) (internal quotation marks and citation omitted).

IV. Argument

Individually and collectively, the facts set forth above warrant a mistrial. Procedurally, Trial 22 is inextricably intertwined with the Phase 1 verdict. That is shown by the parties' dispute about PacifiCorp's liability for the fires, the narrow scope of discovery, evidence, and trial issues stemming from the verdict, the jury instructions, the verdict, and certainly plaintiffs' arguments at trial that the jury should disbelieve PacifiCorp specifically because of combination of its denials and the Phase 1 verdict. Given that the predicate findings have been reversed, a mistrial should be ordered. *See Deep Photonics Corp. v. LaChapelle*, 368 Or 274, 301-02, 491 P3d 60 (2021) (affirming trial court's denial of defendant's mid-trial motion to add affirmative defense after the close of plaintiff's evidence because "plaintiffs would have strategized about, shaped, and presented their case differently," meaning plaintiff would have been prejudiced from the lack of "opportunity to modify their theory of the case or their presentation of evidence"); *C.O. Homes, LLC v. Cleveland*, 366 Or. 207, 216, 221, 460 P.3d 494 (2020) (finding trial court abused its discretion by permitting defendant to add a new claim two days before trial because plaintiff did not have "a reasonable opportunity to research appropriate law, move against the pleading, avail [herself] of discovery procedures, and prepare requested instructions" and "already had made certain consequential strategic decisions regarding her case"); *Rogers v. Meridian Park Hosp.*, 307 Or 612, 619, 772 P2d 929 (1989) (remanding for new trial because jury instruction was "unduly confusing and incorrectly states the law").

PacifiCorp anticipates that plaintiffs will respond by arguing that the class intends to seek

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review in the Oregon Supreme Court. The possibility of further review—which is speculative—simply does not matter. That is because the instructions in Phase 1 relating to PacifiCorp's alleged tortious conduct and the related findings are not valid and cannot be relied upon for judicial notice. Indeed, it is axiomatic that, unless and until reversed, an Oregon appellate court's published decisions is binding on trial courts in this state. Stated differently, this Court is not at liberty to simply disregard the Court of Appeals' decision based on plaintiffs' supposition that they may be able to interest the Oregon Supreme Court in review. As things sit today, the Court of Appeals has overturned the Phase 1 verdict, meaning its liability finds are invalid. There is thus is no liability to support an award of damages here.

Next, PacifiCorp anticipates that plaintiffs may argue that this Court should not implement the Court of Appeals' decision because it has not yet been reduced to an appellant judgment. Such an argument, at best, elevates form over substance. An appellate judgment is merely "the mechanism to enforce [the appellate court's] resolution." *State v. Moore*, 308 Or App 724, 727, 482 P3d 222, 225 (2021). It is the ***decision*** of the appellate court "that is the resolution of the case or controversy presented on appeal." *Id*. As such, Oregon's appellate courts do not let parties seek procedural advantage in the interim period between issuance of a decision and issuance of an appellate judgment. *See id.* (declining appellant's motion to dismiss appeal, which was filed in attempt to circumvent appellate decision).

Finally, the prejudice of continuing to verdict on the basis of inaccurate instructions is plain. First impressions matter, and the prejudice cannot be erased from the inaccurate introductory instructions and the basis on which this trial has proceeded. The jury was instructed that PacifiCorp engaged in highly culpable misconduct, and plaintiffs argued that PacifiCorp should be disbelieved because of its prior denial of liability and held "accountable." Some of the cognitive biases implicated here are:

- Focalism. This is a bias whereby people experience overreliance on the information that they learn first.

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- Confirmation bias. This is a bias whereby people are receptive to information in a way that confirms one's preconceptions and discount information that conflicts with the person's preconceptions.

- Conservatism bias. This is a tendency to favor prior evidence or information over newer evidence or information and therefore revise one's belief insufficiently to account for the new evidence.

- Selective perception. This is a bias whereby a person's expectations tend to affect their perception of information.

See generally Shana Lebowitz and Samantha Lee, *20 Cognitive Biases that Screw Up Your Decisions*, BUSINESS INSIDER (Aug. 26, 2015), *available at* https://www.businessinsider.com /cognitive-biases-that-affect-decisions-2015-8 (summarizing other sources).[11]

Cognitive biases are often subtle to the decision maker and, consequently, highly prejudicial. *See, e.g.*, *Busch v. McInnis Waste Sys.*, 366 Or 628, 669, 468 P3d 419 (2020) (Balmer, J., dissenting) (discussing cognitive bias associated anchoring); *see also, e.g., State v. Rose*, 305 Conn 594, 614, 46 A3d 146, 158 (2012) (holding it is improper for a prisoner to stand trial in prison clothing because it is "potentially highly prejudicial in a manner the effects of which may be very difficult to measure because they involve a subtle but ever present cognitive bias"); *State v. Jackson*, 352 Wis 2d 249, 304 n 19, 841 NW2d 791 (2014) ("cognitive biases can contribute in powerful ways to a conclusion that the defendant was indeed guilty" (quoting Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS L REV 291, 349-50 (2006)).

Here, plaintiffs' evidence and argument about damages has always been supercharged by the fact that damages were being contested by a party identified to the jury by the Court as highly culpable. Indeed, plaintiffs made that argument expressly in opening, arguing that PacifiCorp should be disbelieved here because it had unsuccessfully denied liability in an earlier trial in which it was found at fault on a half-dozen theories. In other words, all of PacifiCorp's evidence

[11] By listing these cognitive biases, PacifiCorp does not imply that these are the only cognitive biases that are implicated.

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and arguments about damages in this trial have been saddled by negative impressions of PacifiCorp as a reckless and willful wrongdoer. In light of the fact that the Court of Appeals has now overturned the Phase 1 verdict, this is no longer a fair trial of any issue.

The same is true of the risks posed by mid-trial publicity. At this juncture, it is simply impossible to identify what information reached jurors nor the impact such information had on them. Even if polling jurors could prompt the disclosure of some such information, it is wholly foreseeable that some jurors might conceal what they have seen. That is because some may have legitimate concerns that their knowledge may require a mistrial; others might be concerned about being perceived as having disobeyed prior instructions; and others still may have biases that are triggered by the Court of Appeals' decision, leading them to a conscious desire to hold PacifiCorp "accountable" and "do justice"—particularly having already invested substantial time in the trial. Those risk are only heightened by the nature of the headlines. Some headlines reference PacifiCorp's relationship to Berkshire Hathaway, term plaintiffs' "victims," include the cumulative damages verdicts, and reference the existence of fatalities. *See* Notes 3, 5-10, *supra*. Others imply that the appellate decision was unwarranted, including by suggesting that the "big victory" was "hand[ed]" PacifiCorp or that "victim damages" are now "jeopardiz[ed]." *See* Notes 6-7, 9-10, *supra*.

In short, there is a substantial and unmitigated danger that jurors have been infected by inaccurate instructions about the Phase I liability verdict and related findings, as well as information about the Court of Appeals' decision. Any verdict from this damages trial is unreliable because of the prejudice to PacifiCorp. A mistrial is required. In other words, this is no longer a fair trial of plaintiffs' claims.

V. Conclusion

For each of these reasons, PacifiCorp requests that the Court order a mistrial.

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Dated this 9th day of April, 2026.

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I hereby certify that on the 9th day of April, 2026, I served the foregoing **DEFENDANTS PACIFICORP AND PACIFIC POWER'S MOTION FOR MISTRIAL** on the following party at the following address:

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by:

- ☐ U.S. Postal Service, ordinary first class mail
- ☐ U.S. Postal Service, certified or registered mail
- ☐ return receipt requested
- ☐ hand delivery
- ☐ facsimile
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- ☒ other (specify) Email pursuant to agreement dated November 21, 2025, consenting to service via email.

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