IN THE COURT OF APPEALS OF THE STATE OF OREGON

JEANYNE JAMES, ROBIN COLBERT, JANE DREVO, SAM DREVO, BROOK EDGE AND BILL EDGE, SR., LORI FOWLER, IRIS HAMPTON, JAMES HOLLAND, RACHELLE MCMASTER, KRISTINA MONTOYA, NORTHWEST RIVER GOUIDES, LLC, SHARIENE STOCKTON, VICTOR PALFREYMAN, PALFREYMAN FAMILY TRUST, DUANE BRUNN, individually and on behalf of all others similarly situated, ALFRED CUOZZO, DEBORAH JO FAWCETT, DAVID GILLER SR., RICHARD JENSEN, SCOTT JOHNSON, FRANK KING & FRANK KING IN HIS CAPACITY AS TRUSTEE OF THE KING REVOCABLE TRUST, STEPHEN DAVID NIELSEN, CORY STANIFORTH, DEBORAH TANK, CHRISTIAN BIGNESS, KELLY DAVIS, CHRISTINE GROM, MARIA GUADALUPE ELIOSA MARTINEZ, ESTATE OF DELORES STOWELL, CARL SEYBOLDT & SEYBOLDT REVOCABLE LIVING TRUST, DIANE TURNBULL, UPWARD BOUND CAMP FOR PERSONS WITH SPECIAL NEEDS, INC., and JOY WILSON AND RICHARD WILSON, Plaintiffs-Respondents, Cross-Appellants, and	)	CA No. A183140 Multnomah County Circuit Court Case No. 20CV33885

04/2025

MARY KATHLEEN BECHERER, et al.,	)
Plaintiff,	)
and	)
OREGON DEPARTMENT OF JUSTICE	)
Creditor-Respondents,	)
vs.	)
PACIFICORP, an Oregon corporation; and PACIFIC POWER, an Oregon registered electric utility and assumed business name of PACIFICORP,	)
Defendants-Appellants.	)

OREGON ASSOCIATION OF DEFENSE COUNSEL'S AMICUS BRIEF IN SUPPORT OF APPELLANTS PACIFICORP AND PACIFIC POWER

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BRIEF OF AMICUS CURIAE

OREGON ASSOCIATION OF DEFENSE COUNSEL

A. Introduction and Interest of Amicus Curiae

The Oregon Association of Defense Counsel ("OADC") is a non-profit association of members of the Oregon State Bar who devote a substantial portion of their practice to representing defendants in civil litigation. OADC's mission is, in part, to advocate for concerns of defense counsel in Oregon, as well as protect and enhance the civil justice system.

The present case arises from wildfires that occurred in 2020. The plaintiff class includes individuals who experienced damage to real and personal property in the fires. The appeal presents numerous issues for this court's consideration. However, OADC's interest and argument is relatively narrow: The trial court awarded the plaintiffs over $145 million in non-economic damages, but without evidence of any plaintiff suffering a bodily injury. OADC submits this brief to address that single issue.

The trial court's decision raises significant concerns for OADC's membership. As discussed below, allowing non-economic damages in the present case affects a significant expansion of Oregon law and erodes the clear boundaries that both this court and the Supreme Court have placed on the availability of such damages. The trial court's decision has the potential to expand the scope of litigation and potential damages far beyond anything

previously contemplated, creating a burden on the courts, counsel, and litigants.

OADC requests that this court reverse the decision of the trial court and reinforce the limiting principles already in place to restrict the allowance of non-economic damages. As numerous cases have outlined in the past, without these limiting principles, litigants would face "indeterminate and potentially unlimited liability" for alleged emotional harms.

B. Discussion

The evidence, the trial court's ruling, and the current state of Oregon law are all ably briefed by representative counsel. OADC touches on those issues only insofar as necessary to discuss its direct concerns. With this brief, OADC intends to focus on the purpose behind Oregon's law restricting emotional distress damages and the reasons why the limiting principles already in place should be maintained.

i. History of Emotional Distress Damages

Oregon law regarding psychic injuries and damages began to solidify in 1982, with the Supreme Court's decision in *Norwest v. Presbyterian Intercommunity Hosp.*, 293 Or 543 (1982). In that case, the court noted the absence of case law – both in Oregon and elsewhere – on the subject, and attempted to synthesize the existing authorities into a framework useable in future cases.

The court recognized three categories of cases in which emotional distress damages are potentially available to a claimant:

- When a claimant is "physically injured";
- When a defendant "act[s] intentionally" to cause emotional distress; and
- "When a defendant negligently causes foreseeable, serious emotional distress and also infringes some other legally protected interest."

Philibert v. Kluser, 360 Or 698, 702 (2016) (explaining *Norwest*).

Regarding the third category of cases, the courts have emphasized repeatedly that the plaintiff must establish a legally protected interest "*apart from causing the claimed distress*" itself. *E.g.*, *Norwest*, 293 Or at 559 (emphasis added).

Since *Norwest*, courts have been hesitant to recognize and accept claims within the "legally protected interest" category. In *Hammond v. Central Lane Communications Center*, 312 Or 17 (1991), the court refused to recognize a claim against a group of defendants responsible for operating a 911 service, finding "no legal source of liability for [the plaintiff's] emotional injury." In *Anderson v. Fisher Broadcasting*, 300 Or 452 (1986), the court rejected an emotional distress claim against a news organization for the same reason – the plaintiff failed to establish that the defendant's

conduct was "wrongful in some respect apart from causing the plaintiff's hurt feelings."

And in the less common cases recognizing a legally protected interest sufficient to give rise to emotional distress damages, courts have been careful to emphasize the narrowness of their holdings as well as the limiting principles governing emotional distress claims in general.

For example, in *Philibert*, the court recognized a "bystander" emotional distress claim, but only in carefully circumscribed circumstances – *i.e.*, the observed injury must have been "serious," and the bystander must have been a "close family member" of the injured person. 360 Or at 707. Severely narrowing the scope of such a claim, as the court explained, was necessary to avoid the dangers always present when permitting emotional distress recovery:

> In contrast to physical harms, emotional harms occur frequently. Any number of people may suffer emotional distress as the foreseeable result of a single negligent act. * * * For that reason, foreseeability, standing alone, is not a useful limit on the scope of liability for emotional injuries [and] allowing recovery * * * on the basis of foreseeability, without requiring more, would invite * * * "liability in an indeterminate amount for an indeterminate time to an indeterminate class." Emotional distress * * * ripples throughout society as a foreseeable result of negligent conduct. Without some limiting principle in addition to foreseeability, permitting recovery for emotional injuries would create indeterminate and potentially unlimited liability.

360 Or at 703-704 (internal citations omitted).

Other examples of recognized emotional distress claims follow a similar pattern. In *Moody v. Or. Cmty. Credit Union*, 371 Or 772 (2023), the court recognized a claim for emotional distress premised on an insurance company's violation of the Unfair Claim Settlement Practices Act, ORS 746.230. The court found a "legally protected interest" arising from the statute and from the insurer's contractual obligations. But the court cautioned against expanding the scope of its holding beyond the narrow parameters of the case before it:

> We caution that our conclusion here does not make every contracting party liable for negligent conduct that causes purely psychological damage, nor does it make every statutory violation the basis for a common-law negligence claim for emotional distress damages. Far from it. Few contracting parties promise to provide [benefits at issue] knowing that their obligation to act reasonably in doing so is required by statute. And few statutes impose obligations on contracting parties designed to protect the parties from the type of emotional harm that plaintiff in this case allegedly suffered. Our decision in this case is a narrow one that applies and accords with the limiting principles that have guided our past decisions and does not unfairly expose [the] defendant to liabilities that it could not have expected and guarded against.

Moody, 371 Or at 805-806.

In short, Oregon's treatment of pure emotional distress claims demonstrates the narrow scope of such claims and the limiting principles applicable when a claim is allowed. Generally, emotional distress claims without physical injury are rare – the plaintiff must establish "serious

emotional distress" and a "legally protected interest" of sufficient importance to warrant judicial protection. And when a claim is permitted, it is generally allowed only on narrow terms, with significantly limited scope.

ii. Claims for Damage to Property

Applying the principles outlined above, Oregon courts have consistently rejected claims for emotional distress based only on damage to property.

In *Meyer v. 4-D Insulation Co., Inc.*, 60 Or App 70 (1982), this court rejected a claim for emotional distress after a fire caused damage to the plaintiff's home. In so doing, this court articulated the same careful reasoning outlined above in other emotional injury cases – due to the frequency of emotional injuries and the ease of fabrication, limiting principles are necessary to avoid potentially unlimited claims. 60 Or App at 74-79.[1] As the court explained, "it is difficult to imagine a circumstance in

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[1] Among numerous authorities discussed in *Meyer*, this court quoted with approval the following discussion from Professor Prosser:

> The temporary emotion of fright, so far from serious that it does no serious harm, is so evanescent a thing, so easily counterfeited, and usually so trivial, that the courts have been quite unwilling to protect the plaintiff against mere negligence, where the elements of extreme outrage and moral blame which have had such weight in the case of the intentional tort are lacking.

which damage to any property does not directly, naturally and predictably result in some emotional upset." *Id.* Thus, some interest beyond the interest in avoiding the distress itself must exist to support a claim:

> It is entirely common and predictable, for example, that a person will be disturbed and upset when someone negligently breaks the headlight of his or her cherished automobile or causes a softball to crash through a picture window. We do not yet live, however, in an "eggshell society" in which every harm to property interests gives rise to a right of action for mental distress. As Justice Peterson said in his dissent in *Mooney*, "A certain amount of emotional distress and anxiety is an unavoidable part of living in our complex society." Some emotional upset is still left uncompensated.

Meyer, 60 Or App at 79 (internal citations omitted).

Allowing a claim for emotional distress premised on property damage, the court explained, would create unlimited liability – "inconvenience and distress always result[s]" on some level when property is damaged. *Meyer*, 60 Or App at 75.

The same rule and reasoning apply to personal property. As succinctly stated in the Restatement (Third) of Torts, Sec. 47, "[r]ecovery for emotional harm resulting from negligently caused harm to personal property is not permitted." (Comment m.). And this court in *Lockett v. Hill*, 182 Or App 377 (2002), confirmed that general rule, finding no "legally protectible interest" applicable to the loss of personal property, even pets. *See also Justice v.*

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60 Or App at 79 (quoting Prosser, Law of Torts 328, §54 (4th ed 1971).

Vercher, 321 Or App 439 (2022) (animals, including domestic pets, constitute personal property of their owners).[2]

Essentially, the general limitations on emotional distress claims apply to prohibit such claims based on damage to property. Beyond the interest in avoiding emotional harm itself, no protected legal interest exists. And recognizing a protected interest applicable to property damage would open the gates to the sort of "indeterminate and potentially unlimited liability" warned of in prior cases.[3]

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[2] From the Restatement:

> Recovery for emotional harm resulting from negligently caused harm to personal property is not permitted under this Section. Emotional harm due to harm to personal property is insufficiently frequent or significant to justify a tort remedy. While pets are often quite different from other chattels in terms of emotional attachment, an actor who negligently injures another's pet is not liable for emotional harm suffered by the pet's owner. This rule against liability for emotional harm secondary to injury to a pet limits the liability of veterinarians in the event of malpractice and serves to make veterinary services more readily available for pets. Although harm to pets (and chattels with sentimental value) can cause real and serious emotional harm in some cases, lines—arbitrary at times—that limit recovery for emotional harm are necessary. Indeed, injury to a close personal friend may cause serious emotional harm, but that harm is similarly not recoverable under this Chapter.

Restatement (Third) of Torts, Sec. 47, cmt. m.

[3] Oregon law is consistent with the majority approach among courts throughout the United States. *Seminole Pipeline Co. v. Broad Leaf Partners, Inc.*, 979 SW2d 730, 755 (Tex App 1998) (discussing "majority rule").

iii. Plaintiffs' Arguments

In light of the principles outlined above, plaintiffs' arguments must fail.

Before the trial court, plaintiffs argued that their psychic injury claims should survive due to the trauma inherent to wildfire damage. Plaintiffs argued that "seeing and experiencing fire, losing their communities and way of life, and the general trauma that comes with being the victim of a wildfire" all justify an award of non-economic damages. (Plaintiffs' Response to Defendant's Motion for JNOV, at 13).

But that is the exact line of reasoning rejected repeatedly by both this court and the Supreme Court. As emphasized in numerous cases addressing the issue, the "protected interest" giving rise to a claim for emotional distress must be something more than the interest in avoiding the claimed distress itself. *E.g.*, *Norwest*, 293 Or at 559. Plaintiffs' claim is nothing more than that – that the law should recognize an interest in avoiding the trauma and emotional distress inherent to wildfire damage.

As that argument is foreclosed by existing case law, and although not expressly advanced before the trial court, plaintiffs will likely contend before this court that they have a "special relationship" with the defendant giving rise to a claim for emotional distress.

Depending on the circumstances, the existence of a "special relationship" can create a "legally protected interest" sufficient to justify an emotional distress claim. *Shin v. Sunriver Preparatory Sch., Inc.*, 199 Or App 352, 365 (2005). For example, in *Shin*, this court found a "special relationship" between a boarding school and a "homestay" student. In finding a "special relationship" in that case, this court carefully circumscribed the boundaries of the law, identifying the unique facts before it. The school was described as taking on a "parental role" for the students in its care. *Id.* at 367, 370. "The school's agents exercised a significant measure of responsibility and control over some of the most personal matters in [the student's] young life." *Id.* at 369. And the school was distinctively unlike a "typical high school." *Id.* at 367.

In the present case, the defendant is a power company, responsible for delivering service to thousands of customers over vast areas of land. The relationship between the homeowners and the defendant is inherently impersonal and is purely transactional – the defendant power company has no personal interactions with the plaintiff homeowners and has no knowledge of their personal needs. In short, their "relationship" is not "special." It is indistinguishable from the innumerable other service contracts entered into every day by customers around the country.

As the court explained in *Moody*, most contractual relationships do not create the type of "special relationship" that gives rise to a claim for emotional distress. "Few contracting parties promise to provide" the type of service that would justify such a finding. *Moody*, 371 Or at 806. Recognizing a "special" relationship between a power company and the homeowners within its service area would open the door for recognizing a special relationship between contracting parties of essentially every other kind.

In assessing potential emotional distress claims, Oregon courts have always proceeded carefully, cautious to allow mental distress claims only in circumstances of sufficient importance, and cautious to not open the floodgates of litigation to indeterminate and unlimited damages. Finding a "special relationship" in these circumstances would move the line far beyond anything previously recognized, and would increase the universe of potential claims to a truly unmanageable size.

iv. Impact on Defendants and Defense Counsel

As a group primarily engaged in the defense of litigated claims, OADC is particularly concerned about the expansion of non-economic and emotional distress claims. Defendants in litigation must evaluate and attempt to predict outcomes, counsel for defendants must advise clients regarding

settlement and settlement value, and ultimately, defendants and their lawyers must attempt to negotiate compromise resolutions.

But emotional distress is often ephemeral, difficult to verify, and impossible to value. Broadening the scope of emotional distress claims makes defendants' obligations even more difficult than they already can be – defendants and their attorneys cannot predict with any reliability the value of an emotional distress claim and, consequently, are regularly hobbled in their ability to evaluate and resolve claims.

Making matters worse, discovery in emotional distress cases poses its own unique set of issues. Plaintiffs claiming emotional injury commonly have no formal treatment, either before or after the allegedly traumatic event. Thus, formal documentation of history, symptoms, diagnoses, and progress may not exist.

And when treatment records do exist, federal law places unique limitations of discovery. Unlike virtually all other medical records, under 45 CFR 164.508 (part of HIPAA's authorizing rules), "psychotherapy notes" are generally held confidential and not subject to subpoena.

For all of those reasons, OADC is particularly concerned with the plaintiff class's attempt in this case to expand the scope of emotional injury liability. In developing the law related to any element of damages, consistency and predictability are essential. Parties, attorneys, and the

judicial system all benefit when the law sets clear boundaries on recovery. And this has been the concern of the courts since the earliest cases recognizing emotional distress claims. The clear policy of the courts has been to create specific "limiting principle[s]" to avoid "indeterminate" liability.

CONCLUSION

OADC submits this brief in the interest of protecting the civil justice system from an unjustified expansion of Oregon law. It is clear that plaintiffs' claim for emotional distress is not recognized by current case law — prior cases from this court and the Supreme Court unambiguously reject emotional injury claims based solely on damage to property. Expanding the law to capture these claims and allow indeterminate non-economic damages would run afoul of the principles articulated throughout the applicable case law: Plaintiffs cannot identify any "interest" beyond the interest in avoiding mental distress itself, and nothing about the relationship between the plaintiffs and the defendants is sufficiently "special" to support the claim either.

Indeed, recognizing either a protected interest in the plaintiffs' foreseeable mental anguish or recognizing a special relationship could open the door to emotional distress claims in virtually all property damage cases. Emotional distress is predictable in innumerable scenarios – everything from

vehicle damage to injured pets to damaged dry cleaning – and the relationship between the parties to this case is indistinguishable from essentially all other relationships arising from a service contract.

Service contractors cannot feasibly be held responsible for emotional harm caused by the damage to property that occurs virtually every day. And the attorneys who represent the defendants in such actions cannot reasonably be expected to effectively manage such claims or advise their clients about the likely results.

For all of those reasons, OADC strongly supports the position of the appellants in this case and requests that this court reverse the decision of the trial court.

DATED this 8th day of April 2025.

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CERTIFICATE OF COMPLIANCE

I certify that this memorandum complies with the word count limitation for briefs pursuant to ORAP 5.05(1)(b)(ii)(B); the word count is 2977. I further certify that this brief is produced in a type font not smaller than 14 point in both text and footnotes pursuant to ORAP 5.05(1)(d)(ii).

In addition, I certify that this document was converted into a searchable PDF format from the original Word document for electronic filing and was scanned for viruses.

DATED this 8th day of April 2025.

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On the same date, I served the foregoing OREGON ASSOCIATION OF DEFENSE COUNSEL'S AMICUS BRIEF IN SUPPORT OF APPELLANTS PACIFICORP AND PACIFIC POWER on the following attorneys on the date stated below by electronic delivery from the Court of Appeals e-filing system and emailing to:

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