IN THE COURT OF APPEALS OF THE STATE OF OREGON

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

Plaintiffs,

and

JUDITH COATES, et al.,

Plaintiffs-Respondents Cross-Appellants,

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. A187954

Multnomah County Circuit Court Case No. 20CV33885

APPELLANTS PACIFICORP AND PACIFIC POWER'S OPENING BRIEF

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

(*Counsel listed on following page*)

December 2025

Per A. Ramfjord, OSB No. 934024
Brad S. Daniels, OSB No. 025178
Reilley D. Keating, OSB No. 073762
STOEL RIVES LLP
760 S.W. 9th Ave., Suite 3000
Portland, Oregon 97205
Telephone: (503) 224-3380
Email: per.ramfjord@stoel.com
brad.daniels@stoel.com
reilley.keating@stoel.com

Alison L. Plessman
Rajan S. Trehan
Stephanie W. Xiao
HUESTON HENNIGAN LLP
523 West 6th Street, Suite 400
Los Angeles, California 90014
Telephone: (213) 788-4340
Email: aplessman@hueston.com
rajan.trehan@hueston.com
sxiao@hueston.com

Douglas J. Dixon
HUESTON HENNIGAN LLP
620 Newport Center Drive, Suite 1300
Newport Beach, California 92660
Telephone: (949) 229-6840
Email: ddixon@hueston.com

Blaine H. Evanson, *pro hac vice*
GIBSON, DUNN & CRUTCHER LLP
3161 Michelson Drive
Irvine, California 92612
Telephone: (949) 451-3800
Email: bevanson@gibsondunn.com

Attorneys for Defendants-Appellants, Cross-Respondents

Keith A. Ketterling, OSB No. 913368
Timothy S. DeJong, OSB No. 940662
Cody Berne, OSB No. 142797
Carsen Nies, OSB No. 224623
STOLL STOLL BERNE LOKTING
& SHLACHTER P.C.
209 SW Oak Street, Suite 500
Portland, Oregon 97204
Telephone: (503) 227-1600
Email: kketterling@stollberne.com
tdejong@stollberne.com
cberne@stollberne.com
cnies@stollberne.com

Nicholas A. Kahl, OSB No. 101145
NICK KAHL, LLC
209 SW Oak St., Suite 400
Portland, Oregon 97204
Telephone: (971) 231-1342
Email: nick@nickkahl.com

Daniel Mensher, OSB No. 074636
KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, Washington 98101
Telephone: (206) 623-1900
Email: dmensher@kellerrohrback.com

Matthew J. Preusch, OSB No. 134610
KELLER ROHRBACK L.L.P.
1129 State Street, Suite 8
Santa Barbara, California 93101
Telephone: (805) 456-1496
Email: mpreusch@kellerrohrback.com

Yoona Park, OSB No. 980904
Sarah R. Osborn, OSB No. 222119
KELLER ROHRBACK L.L.P.
601 SW Second Avenue, Suite 1900
Portland, Oregon 97204
Telephone: (971) 253-4600

Email: ypark@kellerrohrback.com
sosborn@kellerrohrback.com

John M. Coletti, OSB No. 942740
PAULSON COLETTI
385 1st St., Suite 217
Lake Oswego, Oregon 97034
Telephone: (503) 226-6361
Email: john@paulsoncoletti.com

William Keith Dozier, OSB No. 012478
WM. KEITH DOZIER LLC
385 1st St., Suite 217
Lake Oswego, Oregon 97034
Telephone: (503) 594-0333
Email: keith@wkd-law.com

Nadia Dahab, OSB No. 125630
SUGERMAN DAHAB
101 SW Main Street, Ste. 910
Portland, Oregon 97204
Telephone: (503) 228-6474
Email: nadia@sugermandahab.com

Attorneys for Plaintiffs-Respondents, Cross-Appellants

Denise Fjordbeck, OSB No. 822578
Marcus Hull, OSB No. 990621
Senior Assistant Attorney General
OREGON DEPARTMENT OF JUSTICE
400 Justice Building
1162 Court St., NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402
Email: denise.fjordbeck@doj.oregon.gov

Attorneys for Creditor-Respondent

TABLE OF CONTENTS

I. INTRODUCTION 1
II. STATEMENT OF THE CASE 2
A. Nature of the Action and Relief Sought 2
B. Nature of the Judgments 3
C. Basis of Appellate Jurisdiction 3
D. Effective Dates for Appellate Purposes 4
III. QUESTIONS PRESENTED 4
1. Did the trial court err in certifying the class, adjudicating and finding classwide causation, and awarding noneconomic damages? 4
2. Did the trial court err in granting summary judgment on causation and prohibiting PacifiCorp from contesting causation? 4
3. Did the trial court err in awarding unlimited noneconomic damages, double damages, and punitive damages? 4
IV. SUMMARY OF ARGUMENT 4
A. Preserved Errors 4
B. Causation Errors 5
C. Damages Errors 5
V. STATEMENT OF FACTS 6
A. Plaintiffs Sue PacifiCorp for Wildfire Damage to Their Property. 6
B. The Trial Court Certifies the Property-Damage Class and Bifurcates Proceedings. 8
C. The Phase I Trial Proceedings Exacerbate Problems for the Class—Particularly in the Santiam Canyon. 8
D. The Trial Court Enters the Phase I Limited Judgment and Starts Entering Phase II Limited Judgments. 9
E. The Trial Court Holds Phase II, Trial 3—and Enters a $45 Million Limited Judgment for Eight Individual Plaintiffs. 10
1. Santiam Canyon 10

2. South Obenchain....11
3. Echo Mountain....12
4. Verdict and Summary....12
FIRST ASSIGNMENT OF ERROR....14
The trial court erred when it granted Plaintiffs' motion for class certification and declined to decertify the class....14
A. Preservation....14
B. Standard of Review....14
SECOND ASSIGNMENT OF ERROR....15
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....15
A. Preservation....15
B. Standard of Review....15
THIRD ASSIGNMENT OF ERROR....16
The trial court erred by granting summary judgment to Plaintiffs on PacifiCorp's causation defenses in advance of all Phase II trials....16
A. Preservation....16
B. Standard of Review....16
FOURTH ASSIGNMENT OF ERROR....17
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....17
A. Preservation....17
B. Standard of Review....17
FIFTH ASSIGNMENT OF ERROR....18
The trial court erroneously instructed the Phase II juries that PacifiCorp was the cause of all injuries asserted by the class members....18
A. Preservation....18
B. Standard of Review....18

COMBINED ARGUMENT ON FIRST THROUGH FIFTH ASSIGNMENTS OF ERROR 18

A. The Trial Court Should Not Have Certified the Class and Should Have De-Certified the Class After Phase I. 18

B. Plaintiffs Failed to Prove Classwide Causation in the Santiam Canyon. 20

C. The Trial Court Erroneously Deprived PacifiCorp of Challenging Causation as to These Phase II Plaintiffs. 21

D. The Trial Court Erred by Usurping the Jury's Role and Deciding the Scope of PacifiCorp's Liability Itself. 27

SIXTH ASSIGNMENT OF ERROR 30

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. 30

A. Preservation 30

B. Standard of Review 31

SEVENTH ASSIGNMENT OF ERROR 31

The trial court erred when it instructed the jury that noneconomic damages were available in this case without evidence of physical injury. 31

A. Preservation 31

B. Standard of Review 32

EIGHTH ASSIGNMENT OF ERROR 32

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. 32

A. Preservation 32

B. Standard of Review 32

NINTH ASSIGNMENT OF ERROR 33

The trial court erred when it denied PacifiCorp's motions in limine to preclude evidence and argument on unrecoverable avenues of emotional distress. 33

A. Preservation 33
B. Standard of Review 33
COMBINED ARGUMENT ON SIXTH THROUGH NINTH ASSIGNMENTS OF ERROR 33
A. The Noneconomic Damages Awards Were Unlawful. 34
1. Oregon Common Law Does Not Permit Noneconomic Damages for Property Loss. 34
2. Oregon's Wildfire Damages Statute Bars the Claims for Noneconomic Damages. 35
B. The Trial Court Erroneously Permitted Plaintiffs to Recover Noneconomic Damages from Every Source of Emotional Distress. 36
TENTH ASSIGNMENT OF ERROR 41
The trial court erred when it refused to instruct the jury regarding the existing award of punitive damages but permitted instructions on evidence of PacifiCorp's culpability. 41
A. Preservation 41
B. Standard of Review 42
ELEVENTH ASSIGNMENT OF ERROR 42
The trial court erred by awarding double economic damages as a matter of law without presenting that issue to the jury. 42
A. Preservation 42
B. Standard of Review 43
TWELFTH ASSIGNMENT OF ERROR 43
The trial court erred by awarding double economic damages in addition to punitive damages. 43
A. Preservation 43
B. Standard of Review 43
COMBINED ARGUMENT ON TENTH THROUGH TWELFTH ASSIGNMENTS OF ERROR 43
A. The Trial Court Erred by Refusing to Instruct the Jury on the Prior Award of Punitive Damages. 44

B. The Trial Court Improperly Usurped the Jury's Role by Awarding Double Damages. 46

C. The Double Damages Were Duplicative. 47

VI. CONCLUSION 49

TABLE OF AUTHORITIES

Page(s)

Cases

Bailey v. Polygon Nw. Co.,
No. 3:22-cv-00292, 2022 WL 17184309 (D Or Aug. 23, 2022).....34

Ballard v. City of Albany,
221 Or App 630, 191 P3d 679 (2008).....15

Bell v. Burson,
402 US 535, 91 S Ct 1586, 29 L Ed 2d 90 (1971).....28

Bellshaw v. Farmers Ins. Co. of Or.,
326 Or App 605, 533 P3d 40 (2023).....14

Bernard v. First Nat'l Bank of Or.,
275 Or 145, 550 P2d 1203 (1976).....24, 25

Bixler v. First Nat'l Bank of Or.,
49 Or App 195, 619 P2d 895 (1980).....46

Brasch v. Quan,
162 Or App 472, 986 P2d 1183 (1999).....46

Carrera v. Bayer Corp.,
727 F3d 300 (3d Cir 2013).....26

Cimino v. Raymark Indus., Inc.,
151 F3d 297 (5th Cir 1998).....25

Durette v. Virgil,
272 Or App 545, 356 P3d 639 (2015).....17, 33

Ettinger v. Denny Chancler Equip. Co.,
139 Or App 103, 910 P2d 420 (1996).....47

Fatehi v. Johnson,
207 Or App 719, 143 P3d 561 (2006).....31

Fields v. City of Newport,
326 Or App 764, 533 P3d 384 (2023).....16

Fiore v. Ladd,
29 Or 528, 46 P 144 (1896).....30

Horton v. Or. Health & Sci. Univ.,
359 Or 168, 376 P3d 998 (2016) 29

James v. PacifiCorp,
323 Or App 764, 524 P3d 506 (2023) 3, 19, 22

Kline v. Elkins,
207 Or 179, 294 P2d 1118 (1956) 41

Lockett v. Hill,
182 Or App 377, 51 P3d 5 (2002) 38, 39, 40

Lowe v. Philip Morris USA,
344 Or 403, 183 P3d 181 (2008) 40

McHargue v. Calchina,
78 Or 326, 153 P 99 (1915) 47

Meyer v. 4-D Insulation Co., Inc.,
60 Or App 70-80, 652 P2d 852 (1982).....34, 35, 37

Oakleigh-McClure Neighbors v. City of Eugene,
269 Or App 176, 344 P3d 503 (2015) 47

Pearson v. Philip Morris, Inc.,
358 Or 88, 361 P3d 3 (2015) 19

Philibert v. Kluser,
360 Or 698, 385 P3d 1038 (2016) 34, 40

Simington Gardens, LLC v. Rock Ridge Farms, LLC,
308 Or App 661, 481 P3d 396 (2021) 43

State Farm Mut. Auto. Ins. Co. v. Campbell,
538 US 408, 123 S Ct 1513, 155 L Ed 2d 585 (2003) 45

State v. Bivins,
191 Or App 460, 83 P3d 379 (2004) 15

State v. Moore,
324 Or 396, 927 P2d 1073 (1996) 32

State v. Morales,
307 Or App 280, 476 P3d 965 (2020) 18

Twigg v. Admiral Ins. Co.,
373 Or 445, 568 P3d 156 (2025) 25

Tyrrell v. Marine Propulsion Servs., Inc.,
178 Or App 392, 37 P3d 1027 (2001) 48

Wal-Mart Stores, Inc. v. Dukes,
564 US 338, 131 S Ct 2541, 180 L Ed 2d 374 (2011) 24

State ex rel. Washington Cnty. v. Betschart,
72 Or App 692, 697 P2d 206 (1985) 47

Yeatts v. Polygon Nw. Co.,
313 Or App 220, 496 P3d 1060 (2021) 32, 42, 44, 45

Statutes

ORS 19.205(1) 3

ORS 30.876(1) 47

ORS 105.810(1) 47

ORS 477.089 ..... 5, 36, 39, 42, 43, 44, 46, 47

ORS 477.089(1), (4) 39

ORS 477.089(2) 46

ORS 477.089(2)(a)-(b) & (4) 35

ORS 477.089(2)(b) 46, 48

ORS 659.785(2) 47

Rules

ORCP 32 19

ORCP 59 H 31

Constitutional Provisions

Fourteenth Amendment 27

Oregon Constitution, Article I, section 17 .....27, 29, 48

Oregon Constitution, Article VII, section 3 48

Other Authorities

Restatement (Third) of Torts*: Physical and Emotional Harm* § 47 cmt m (2012).....38

INDEX TO EXCERPT OF RECORD

DATE	DOCUMENT	PAGE
05/23/2022	Opinion and Order Granting Plaintiffs' Motion for Issues Class Certification	ER-1
04/17/2023	Fifth Amended Class Action Complaint	ER-26
05/09/2023	Plaintiffs' Exhibit 2877	ER-105
05/11/2023	Plaintiffs' Exhibit 2889	ER-114
05/15/2023	Plaintiff's Exhibit 2893	ER-118
05/17/2023	Defendants' Exhibit 8527	ER-119
05/17/2023	Defendants' Exhibit 8528	ER-120
06/06/2023	Picture	ER-121
06/12/2023	Excerpt of Trial Transcript	ER-122
06/14/2023	Final Jury Instructions	ER-126
06/14/2023	Final Verdict	ER-152
06/14/2023	Verdict Form-Punitive Damages	ER-175
09/11/2023	Defendants' Opposition to Plaintiffs' Motion for Entry of Limited Judgment and Money Award	ER-181
10/13/2023	Excerpt of Transcript of Motions Hearing	ER-202
12/01/2023	Order Granting Plaintiff's Motion for Limited Judgment and Money Award	ER-207

DATE	DOCUMENT	PAGE
12/01/2023	Order Denying Defendants' Motion for Judgment Notwithstanding the Verdict, Motion for a New Trial; and Renewed Motion for Decertification	ER-209
01/02/2024	Order Regarding Defendants' Omnibus Motions in Limine (Phase II, Damages Trial 1)	ER-211
01/02/2024	Omnibus Order Regarding Plaintiffs' Motions in *Limine* (Phase II, Damages Trial 1)	ER-226
01/02/2024	Order Granting, in Part, Denying, in Part, Plaintiffs' Motion for Partial Summary Judgment (Affiramtive Defenses – Phase II, Damages Trial No. 1)	ER-236
01/04/2024	Limited Judgment and Money Award	ER-241
01/05/2024	Excerpt of Transcript of January 5, 2025, Pretrial Hearing	ER-347
01/05/2024	Excerpt of Trial Transcript of January 5, 2025	ER-352
01/16/2024	Excerpt of Trial Transcript of January 16, 2025	ER-356
01/22/2024	Defendants' ORCP 59 H notation of Exceptions to Jury Instructions (Phase II, Trial 1)	ER-363
01/24/2024	Final Jury Instructions	ER-376
01/24/2024	Final Verdict	ER-393
02/12/2024	Defendants' Motion to Vacate Motion for Judgment Notwithstanding the Verdict, Motion for a New Trial, and renewed Motion for Decertification	ER-403
02/23/2024	Excerpt of Transcript – Pretrial Conference	ER-467

DATE	DOCUMENT	PAGE
02/23/2024	Order Granting, in Part, Denying, in Part, Plaintiffs' Motion for Partial Summary Judgment (Affirmative Defenses – Phase II, Damages Trial No. 2)	ER-476
03/01/2024	Excerpt of Trial Transcript – Phase II, Damages Trial 2	ER-480
03/01/2024	Defendants' ORCP 59 H Notation of Exceptions (Phase II, Trial 2)	ER-485
03/05/2024	Final Jury Instructions	ER-502
03/05/2024	Final Verdict	ER-520
03/25/2024	Order Denying Defendants' Motion to Vacate, Motion for Judgment Notwithstanding the Verdict, Motion for a New Trial, and Renewed Motion for Decertification (Phase II, Damages Trial 1)	ER-530
03/29/2024	Defendants' Motion for Judgment Notwithstanding the Verdict, Motion for a New Trial, and Renewed Motion for Decertification	ER-532
05/23/2024	Order Denying Defendants' Motion for Judgment Notwithstanding the Verdict, Motion for a New Trial, and Renewed Motion for Decertification (Phase II, Damages Trial 2)	ER-587
10/02/2024	Order Granting, in Part, Entry of Case Management Order No. 10	ER-589
10/31/2024	Second Amended Short Form Complaint and Jury Demand (Individual and Entity Plaintiffs) (DDD's LLC)	ER-600
10/31/2024	Second Amended Short Form Complaint and Jury Demand (Individual and Entity Plaintiffs) (Misti Rooney)	ER-614

DATE	DOCUMENT	PAGE
10/31/2024	Second Amended Short Form Complaint and Jury Demand (Individual and Entity Plaintiffs) (Gregory J. Denton)	ER-628
10/31/2024	Second Amended Short Form Complaint and Jury Demand (Individual and Entity Plaintiffs) (Judith Coates)	ER-642
10/31/2024	Second Amended Short Form Complaint and Jury Demand (Individual and Entity Plaintiffs) (Lisa Dillingham)	ER-656
10/31/2024	Second Amended Short Form Complaint and Jury Demand (Individual and Entity Plaintiffs) (Michael Sims)	ER-671
10/31/2024	Second Amended Short Form Complaint and Jury Demand (Individual and Entity Plaintiffs) (Ronald Ross)	ER-685
10/31/2024	Second Amended Short Form Complaint and Jury Demand (Individual and Entity Plaintiffs) (Wayne Michele)	ER-699
12/06/2024	Plaintiffs' Motion for Partial Summary Judgment, Phase II, Trials 3-5 (Affirmative Defenses)	ER-713
02/04/2025	Omnibus Order Regarding Plaintiffs' Motions in *Limine* (Phase II, Damages Trial 3)	ER-730
02/05/2025	Defendants' Motions for Directed Verdict and/or to Strike for Peremptory Instruction (Phase II, Trial 3; Close of Plaintiffs' Case)	ER-738
02/05/2025	Order Granting, in Part, Denying, in Part, Plaintiffs' and Defendants' Motions for Partial Summary Judgment (As to Phase II, Trial 3 Plaintiffs)	ER-746
02/05/2025	Plaintiffs' Exhibit 72	ER-747

DATE	DOCUMENT	PAGE
02/05/2025	Plaintiffs' Exhibit 73	ER-760
02/06/2025	Defendants' ORC 59H Notation Exceptions (Phase II, Trial 3)	ER-763
02/06/2025	Defendants' Renewed Motions for Directed Verdict and/or to Strike for Peremptory Instruction (Phase II, Trial 3; Close of Evidence)	ER-772
02/06/2025	Excerpt of Transcript, Trial 3	ER-780
02/07/2025	Excerpt of Transcript, Trial 3	ER-784
02/07/2025	Final Jury Instructions	ER-788
02/07/2025	Final Verdict (Phase II, Trial 3)	ER-805
03/19/2025	Excerpt of Oregon Department of Forestry Incident Investigation Report	ER-814
04/18/2025	Limited Judgment and Money Award (Phase II, Trial 3)	ER-835
05/02/2025	Defendants' Motion for Judgment Notwithstanding the Verdict, Motion for a New Trial, and Renewed Motion for Decertification (Phase II, Trial 3)	ER-935
06/13/2025	Supplemental Judgment and Money Award for Costs and Disbursements (Phase II, Trial 3)	ER-957
07/28/2025	Case Management Order No. 11	ER-971
12/10/2025	OECI Register	ER-1042

I. INTRODUCTION

This case is the latest in a string of flawed limited judgments against PacifiCorp—awarding tens of millions of dollars to another group of class members alleging damage to their property from the Labor Day 2020 wildfires. This class action has violated Oregon law from the beginning. The trial court erred by certifying the class—which consists of over 1,800 plaintiffs alleging different harms from different fires. The trial court erred on causation—papering over Plaintiffs' failure to establish causation as to each class member by telling jurors they could assume classwide causation and that PacifiCorp was the sole cause of class harms. The trial court also erred on remedies—allowing Plaintiffs to recover noneconomic damages for the loss of real and personal property, notwithstanding a controlling statute and common law precedent to the contrary. Those errors have resulted in jury verdicts awarding hundreds of millions of dollars in damages against PacifiCorp—and the trial court doubled down on these erroneous holdings in awarding over $45 million to the eight class members here.

Those errors—which PacifiCorp raised in its pending appeal of the initial classwide trial and the first two damages trials—require reversal. During this third damages trial, the trial court made additional, reversible errors. First, the trial court deprived PacifiCorp of its right to contest causation as to these specific class members. Plaintiffs introduced no evidence that a PacifiCorp-related fire

actually harmed them. And the trial court prevented PacifiCorp from introducing evidence to contest causation. Second, the trial court awarded improper noneconomic damages. Oregon law prohibits noneconomic damages for this property-damage class. And Oregon law plainly prohibits many of the noneconomic damages categories here—which included things from burned dolls to lost views. Third, the court erred in doubling Plaintiffs' economic damages (which should have been left to the jury), awarding double damages (which duplicated the punitive damages award), and permitting the jury to punish PacifiCorp while refusing to tell them that Plaintiffs had already received punitive damages. If left uncorrected, the errors in this class action will continue to infect the trials of thousands of individuals whose claims against PacifiCorp are scheduled for hundreds of future trials.

II. STATEMENT OF THE CASE

A. Nature of the Action and Relief Sought

This is a class action for damage to property during the Labor Day 2020 wildfires. Phase I adjudicated classwide issues and named class representative liability and damages. Phase II—including the limited judgment here—is adjudicating additional class member claims. (ER-600-712)

B. Nature of the Judgments

This appeal arises from the limited and supplemental judgments entered after Phase II, Trial No. 3, (ER-835-934; ER-957-970), two of several judgments on appeal:

Judgments Currently on Appeal			
Limited Judgment	**Plaintiffs**	**Award**	**Status**
Phase I	17 (*James*)	$92.4 million	On appeal (A183140)
Phase II, Trial #1	9 (*Cuozzo*)	$79.6 million	On appeal (A183140)
Phase II, Trial #2	10 (*Bigness*)	$37.6 million	On appeal (A183140)
Phase II, Trial #3	8 (*Coates*)	$45.3 million	Current appeal
Phase II, Trial #4	8 (*Doege*)	$46.7 million	On appeal (A188286)
Phase II, Trial #5	9 (*Blachowski*)	$17.6 million	On appeal (A188883)
Phase II, Trial #6	10 (*Eddy*)	$48.3 million	On appeal (A188629)
Phase II, Trial #7	10 (*W. Allen*)	$43.8 million	On appeal (A188884)
Phase II, Trial #8	11 (*R. Allen*)	$52.8 million	On appeal (A189268)

C. Basis of Appellate Jurisdiction

Appellate jurisdiction is based on ORS 19.205(1).

D. Effective Dates for Appellate Purposes

The limited judgment was entered on April 18, 2025. The supplemental judgment was entered on June 13, 2025. Notice of appeal from the judgments was filed on June 27, 2025.

III. QUESTIONS PRESENTED

1. Did the trial court err in certifying the class, adjudicating and finding classwide causation, and awarding noneconomic damages?

2. Did the trial court err in granting summary judgment on causation and prohibiting PacifiCorp from contesting causation?

3. Did the trial court err in awarding unlimited noneconomic damages, double damages, and punitive damages?

IV. SUMMARY OF ARGUMENT

A. Preserved Errors

The judgment suffers from several critical flaws that have infected the entire class action. First, the trial court violated established class-action requirements by certifying a class consisting of thousands of people living hundreds of miles apart, affected by different fires, and subject to location-specific defenses. Second, the trial court violated established class-causation standards and due-process safeguards by entering judgment for the class despite Plaintiffs' failure to establish classwide causation. Third, the trial court violated

Oregon law by awarding noneconomic damages for property-damage claims—which are unavailable under common law and barred by ORS 477.089.

B. Causation Errors

The trial court allowed Plaintiffs to recover damages for injuries PacifiCorp did not cause. First, the trial court precluded PacifiCorp from introducing any evidence to challenge causation on an individual basis, both by granting summary judgment to Plaintiffs on PacifiCorp's causation-based affirmative defenses and by granting Plaintiffs' motion in limine to exclude individualized evidence of causation. Second, the trial court allowed Plaintiffs to recover damages ranging from property burn losses to smoke damage to emotional distress that were never established in Phase I.

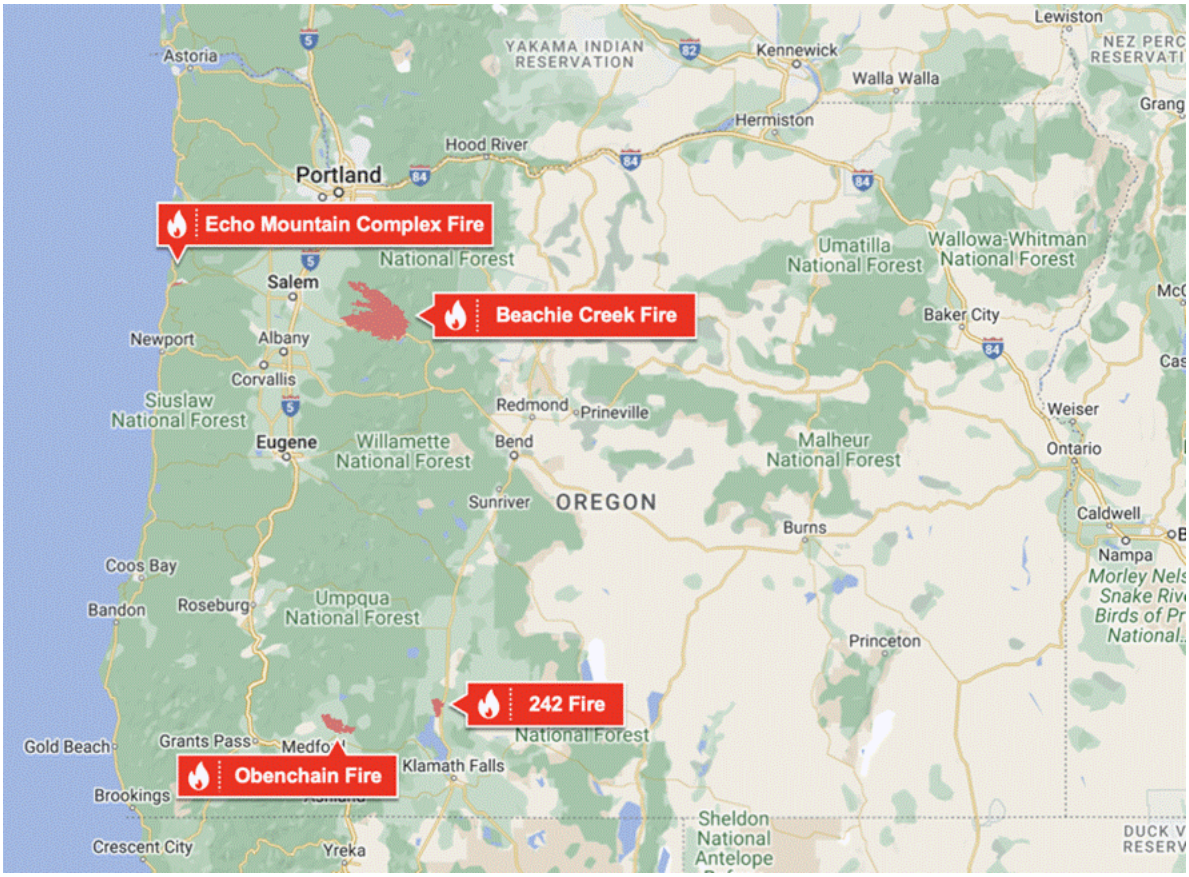
C. Damages Errors

The damages awards are unlawful. First, the trial court permitted the jury to award improper categories of noneconomic damages—ranging from burned dolls to diminished views—that are unavailable under Oregon law. While noneconomic damages should not have been permitted in the first place, the wide range of noneconomic damages awarded here swept beyond any conceivable limits and require judgment for PacifiCorp or at least a new trial. Second, the trial court erred in awarding punitive damages and double economic damages.

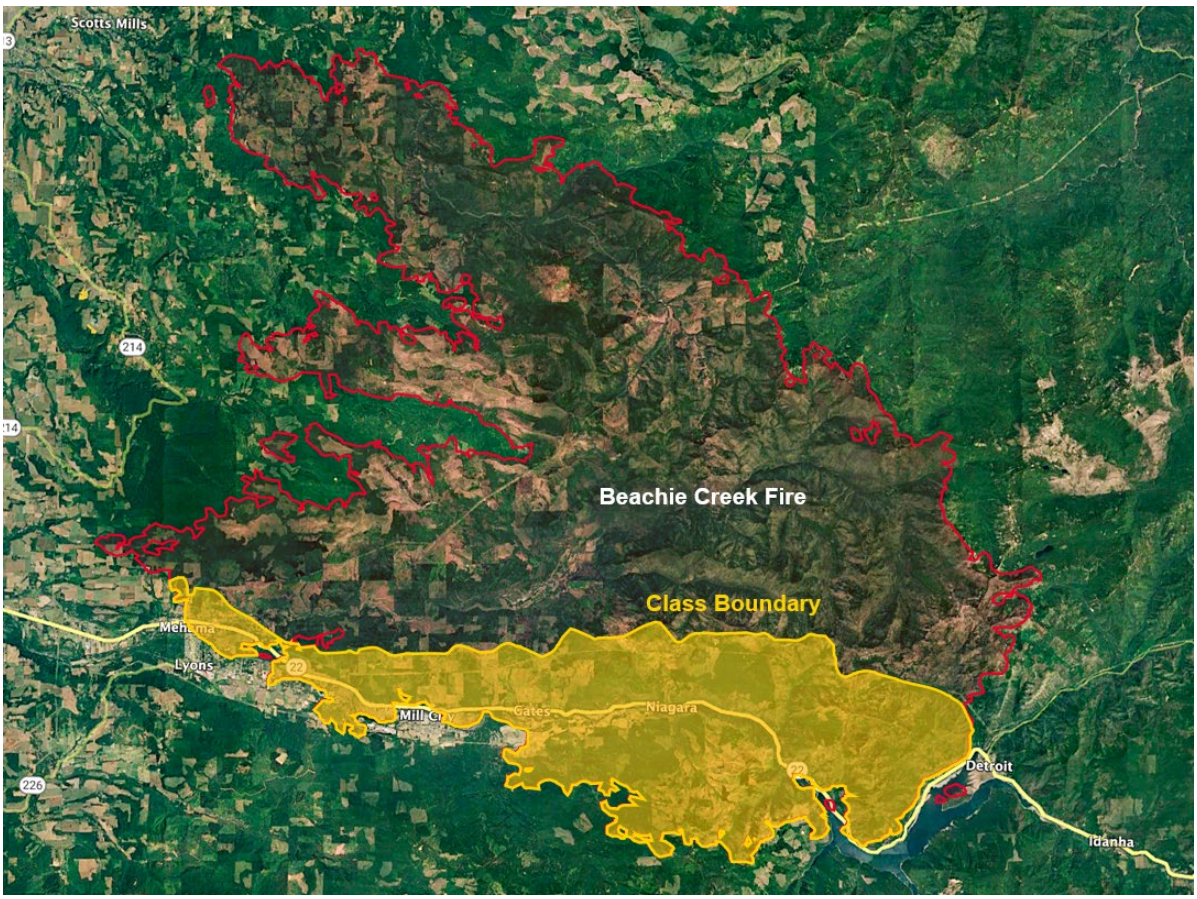
V. STATEMENT OF FACTS

A. Plaintiffs Sue PacifiCorp for Wildfire Damage to Their Property.

Plaintiffs brought a class action complaint seeking billions of dollars for property damage during the Labor Day 2020 wildfires. (ER-26-104.) Plaintiffs moved to certify an issues class of 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 four distinct fire areas: Echo Mountain, South Obenchain, 242, and Santiam Canyon. (TCF-10/27/21 (Motion for Issues Class Certification).)



The class consisted of thousands of individuals alleging different harms from different fires. Class certification was particularly problematic for the Santiam Canyon. First, no alleged power-equipment ignition from PacifiCorp existed that could spread to cause all damage in the canyon. (ER-118.) Second, the lightning-caused Beachie Creek Fire indisputably burned class properties (which were within the broader Beachie Creek Fire boundary) *before* any PacifiCorp fire—as the Oregon Department of Forestry found. (ER-114-120; ER-814-834; TCF-08/11/2023 (Post-Trial Motions).)



B. The Trial Court Certifies the Property-Damage Class and Bifurcates Proceedings.

The trial court certified the property-damage class and bifurcated the case—based on Plaintiffs' promise to establish classwide causation. (ER-1-25.) Phase I would resolve the individual claims of the class representatives along with 14 specific classwide issues. Phase II would permit absent class members to prove their individual claims to relief. (TCF-05/23/22 (Bifurcation Order).) 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-19.)

C. The Phase I Trial Proceedings Exacerbate Problems for the Class—Particularly in the Santiam Canyon.

The Phase I trial confirmed that each fire area had its own distinct causation and liability theory, its own distinct set of fact and expert witnesses, and its own distinct set of relevant documentary and physical evidence. The Phase I trial also confirmed that the Santiam Canyon was particularly unsuitable for class certification. Plaintiffs offered no evidence that there was one PacifiCorp-caused fire in the Santiam Canyon, and/or that PacifiCorp-caused fires spread and burned the entire canyon. (ER-118.) Plaintiffs' own experts confirmed the Beachie Creek Fire had already damaged at least some class member properties *before* any PacifiCorp fires even ignited—a fact confirmed

by the Oregon Department of Forestry. (ER-114-116; ER-814-834; 05/11/2023 Tr-3896-3900.)

D. The Trial Court Enters the Phase I Limited Judgment and Starts Entering Phase II Limited Judgments.

On June 12, 2023, the Phase I jury returned a verdict in favor of the individual plaintiffs and the class on five claims. (ER-152-174.) The jury awarded the class representatives $4.38 million in economic damages, and $67.5 million in noneconomic damages. (ER-168-171.) The jury also awarded a 25-percent classwide punitive-damages multiplier, and the trial court awarded double economic damages. (ER-175-180.) The trial court ultimately awarded the individual plaintiffs $92.4 million. (ER-241-346.)

The first two Phase II juries rendered verdicts for plaintiffs on January 23, 2024, and March 5, 2024. (ER-393-402; ER-520-529.) Contrary to the trial plan—which reserved individual defenses for Phase II—the juries were instructed that liability and causation had already been decided, and that the only issue for resolution was the amount of damages owed to individual class members. (ER-346-392; ER-502-519.) The juries awarded those plaintiffs well over $100 million—with noneconomic damages constituting several times the economic damages. (TCF-01/24/2024 (Verdict); TCF-03/05/2024 (Verdict).)

E. The Trial Court Holds Phase II, Trial 3—and Enters a $45 Million Limited Judgment for Eight Individual Plaintiffs.

The third Phase II trial adjudicated the claims of an additional group of individual class members—including property owners harmed by the Beachie Creek Fire in the Santiam Canyon. As explained below, Plaintiffs never introduced evidence that a PacifiCorp fire caused their damages. And the trial court prohibited PacifiCorp from introducing evidence that their harms were caused by the lightning-caused Beachie Creek Fire (even though ODF found as much).

1. Santiam Canyon

Plaintiff Rooney lost her yard—but not her house. She was displaced for approximately three months while her house was being cleaned of smoke and ash damage (Tr-625:16-25)[1], and she was "sad about the loss of the vegetation on her property." (Tr-782:13-21.) She explained she formerly enjoyed the yard but has since spent less time outside because of "reduced enjoyment since the fire" and unrelated "health conditions." (Tr-786:2-11.) By trial, she was "a lot better" and had returned "back to more typical functioning." (Tr-782:13-25.)

Plaintiff Michele and his wife evacuated by driving their cars through fire blowing across the road—but both were unharmed. (Tr-670:7-16).) He misses

[1] Unless otherwise noted, all "Tr" citations are to the transcript of the Phase II, Trial No. 3 transcript filed in this appeal (01/24/2025-02/07/2025).

the trees on his property and his view of trees that were on BLM land—not his property. (Tr-674:5-8.) He has since rebuilt his home. (Tr-668:22-25.) Despite experiencing "intrusive recollections" of the fire, he was a "psychologically healthy man" by the time of trial (Tr-829:2-3) and has "recovered emotionally" (Tr-830:1-3).

2. South Obenchain

Plaintiffs Denton, Dillingham, and Sims lost their homes in the South Obenchain Fire. Plaintiff Denton was home when he received an evacuation notice. His damages include the loss of three cats, heirlooms (like a Civil-War-type sword), and memorabilia (like photos of his children). (Tr-549:6-25.)

Plaintiff Dillingham was at her home when a sheriff warned her and her family about the South Obenchain Fire. (Tr-321:4-8.) They spent a night in a parking lot after evacuating. (Tr-481:3-8.) Dillingham and her husband lost their home, tools, several sheep, a donkey that protected their sheep, a wedding ring, and "Christmas ornaments." (Tr-487:16-488:20, 777:1-6.) They ultimately rebuilt their home on a different part of their lot. (Tr-490:1-14.)

Plaintiff Sims was similarly alerted to the fire by sheriffs. (Tr-372:6-23.) He and his wife evacuated along with their horses. (Tr-371:6-372:3, 378:20-379:3.) The fire burned his home, his horse equipment, an arena, and art (Tr-380:8-382:17, 388:22-389:8), as well as his barn, which "was kind of his special

place to be with his horses" when he had disagreements with his wife. (Tr-771:20-25, 804:10-805:7.)

3. Echo Mountain

Plaintiff Coates' home burned in the Echo Mountain Fire. She evacuated her mobile home in Otis after being woken up by a neighbor. (Tr-441:1-442:2.) She lost her home, cat, koi pond, gazebo, and bird sanctuary in the fire. (Tr-443:19-445:4, 798:2-6.) She also lost some of her art and doll collection. (*Id*.) Coates also misses the "spirit" of her daughter, who passed away in the mobile home before the fire. (Tr-445:14-22, 799:2-9.) She since has purchased a new mobile home, resumed her favorite activities, and moved in with an "old friend of hers from Oregon" and "really enjoys having the * * * company." (Tr-787:25-788:5.) She has repeatedly told a psychologist she is "fine," "except when * * * lawyers [are] asking her about it." (Tr-788:6-18.)

Plaintiff Ross was alerted to the fire by a neighbor and evacuated to a friend's home, where he spent the night. (Tr-586:15-587:8.) After the fire, his wife died (for reasons unrelated to the fire), making him miss home, where he had all of his memories with her. (Tr-576:22-577:1, 601:14-25.)

4. Verdict and Summary

The jury awarded Plaintiffs damages of $49 million (ER-805-813):

Phase II, Trial 3 Limited Judgment				
#	Plaintiff[2]	Noneconomic	Economic	Examples of Harm
1	Coates	$6 million	$50,000	1. Doll collection 2. Art supplies 3. Fish 4. Bird sanctuary 5. Deceased cat
2	Denton	$4.5 million	$855,607	1. Deceased cats 2. Civil War-type sword 3. Photos
3	Dillingham	$6 million	$670,715	1. Deceased donkey 2. Deceased sheep 3. Tools 4. Photos 5. Christmas ornaments
4	Michele	$3 million	$746,335	1. Views 2. Furniture 3. Photos
5	Rooney	$0.65 million	$527,028	1. Trees and garden 2. View
6	Ross	$4 million	$137,504	1. Deceased cats 2. Guns 3. Penny collection 4. Memories of his wife (who later passed)
7	Sims	$8 million	$598,616	1. Horse equipment 2. Art (purchased and created) 3. Gave away horses
Aggregated Damages Total: $45,359,070 Noneconomic: $32,150,000 Economic: $3,795,806 (2x multiplier added for total of $7,591,612)				

[2] Plaintiff DDD's LLC received $210,000 in economic damages but was not awarded any noneconomic damages.

Punitive: .25x multiplier on compensatory damages Insurance Offset: $3,368,992

FIRST ASSIGNMENT OF ERROR

The trial court erred when it granted Plaintiffs' motion for class certification and declined to decertify the class.

A. Preservation

PacifiCorp has repeatedly opposed class-certification and sought decertification throughout this case, including in advance of this trial (TCF-12/23/2021 (Defendants' Opposition); TCF-03/17/2023 (Motion to Decertify); TCF-05/31/2023 (Motion to Decertify); TCF-06/09/2023 (Motion to Decertify); TCF-08/11/2023 (Motion to Decertify); TCF-02/12/2024 (Motion for Decertification, Phase II, Trial 1); TCF-03/29/2024 (Defendants' Motion for Decertification, Phase II, Trial 2), ER-935-956.) The trial court certified the class in a written opinion and denied all of PacifiCorp's motions to decertify. (ER-209-210; ER-530-532; ER-587-588.)

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 Or.*, 326 Or App 605, 620, 533 P3d 40 (2023).

SECOND 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

PacifiCorp repeatedly argued that Plaintiffs failed to establish classwide causation, including in directed verdict motions made during this trial. (TCF-05/16/2023 (Directed Verdict Motion); TCF-06/05/2023 (Directed Verdict Motion); *see also* TCF-08/11/2023 (JNOV Motion); TCF-01/15/2024 (Directed Verdict Motion); TCF-03/01/2024 (Directed Verdict Motion); ER-738-745; ER-772-779.) The trial court denied all of PacifiCorp's motions. (ER-209-210; ER-530-531; ER-587-588; ER-782.)

B. Standard of Review

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); *State v. Bivins*, 191 Or App 460, 467, 83 P3d 379 (2004) (reasonableness of inferences is "legal question").

THIRD ASSIGNMENT OF ERROR

The trial court erred by granting summary judgment to Plaintiffs on PacifiCorp's causation defenses in advance of all Phase II trials.

A. Preservation

Plaintiffs moved for partial summary judgment on PacifiCorp's causation defenses, arguing that the Phase I verdict established that PacifiCorp was the sole cause of the Labor Day 2020 wildfires. (TCF-11/03/2023 (Plaintiffs' Motion for Partial Summary Judgment).) PacifiCorp opposed Plaintiffs' motion. (TCF-11/27/2023 (Defendants' Opposition).) The trial court granted summary judgment "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-236-240.) The trial court reincorporated and applied its rulings to all Phase II trials. (ER-746.)

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).

FOURTH 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

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. (TCF-12/13/2023 (Plaintiffs' Motion in Limine).) PacifiCorp opposed Plaintiffs' motion. (TCF-12/20/2023 (Defendants' Opposition).) The trial court erroneously held that the Phase I verdict 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-228-229; ER-234.) PacifiCorp also moved after each Phase II trial for a new trial based on this error. (ER-403-466; ER-532-586.) The trial court has denied each of PacifiCorp's motions. (ER-530-531; ER-532-588; ER-782.)

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 v. Virgil*, 272 Or App 545, 554-55, 356 P3d 639 (2015).

FIFTH ASSIGNMENT OF ERROR

The trial court erroneously instructed the Phase II juries that PacifiCorp was the cause of all injuries asserted by the class members.

A. Preservation

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-348-350; ER-472-474; ER-363-375; ER-485-501) The trial court overruled PacifiCorp's objection. (ER-349-350; ER-474; ER-377-78; ER-503-504; ER-789-790.) In CMO No. 10, the trial court directed the parties to use "the same neutral statement, jury instructions and verdict form that were used in Phase II, Trial 2." (ER-597.) PacifiCorp renewed and incorporated all of its prior exceptions to instructions in this trial. (ER-763-771.)

B. Standard of Review

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 FIRST THROUGH FIFTH ASSIGNMENTS OF ERROR

A. The Trial Court Should Not Have Certified the Class and Should Have De-Certified the Class After Phase I.

The limited judgment here is flawed because it is predicated on a class action that should never have been certified. Class actions must satisfy the

requirements of ORCP 32. Those requirements demand elements such as commonality and predominance—ensuring that the litigation involves a unified and homogeneous class rather than a divergent and heterogeneous motley of plaintiffs. *See Pearson v. Philip Morris, Inc.*, 358 Or 88, 111, 361 P3d 3 (2015). The trial court's decision to certify a class consisting of thousands of people living hundreds of miles apart, affected by different fires with different causes, and subject to location-specific defenses, contravened established class-action rules. The trial court certified the class based on Plaintiffs' promise that they could answer the 14 certified issues on a classwide basis—without any need for a "property-by-property analysis." *James v. PacifiCorp*, 323 Or App 764, 776, 524 P3d 506 (2023). But that promise was false—particularly as to the Santiam Canyon, where the lightning-caused Beachie Creek Fire (*not* a PacifiCorp fire) indisputably caused class harms. (*See, e.g.*, ER-114-117; *see also, e.g.*, ER-814-834.) In the Santiam Canyon alone, Plaintiffs introduced testimony about several different spot fires—many of which were extinguished before they could spread—each with a different cause, in addition to the unique circumstances that triggered the Echo Mountain, South Obenchain, and 242 Fires. (*See, e.g.*, ER-118.)

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 property? How did each of those fires

start? Did those fires actually spread and damage class member property? In the Santiam Canyon, where the nearby Beachie Creek Fire indisputably burned the same area and where ODF concluded that every fire supposedly caused by PacifiCorp equipment was extinguished and did not spread, did any PacifiCorp fires (rather than the Beachie Creek Fire) actually harm each class member? PacifiCorp's principal appeal (A183140) explains why the trial court's decision to certify and maintain the class was wrong. Each trial has reinforced those arguments. There is no way to determine whether PacifiCorp's alleged negligence was a cause of each class member's damages—including in the Santiam Canyon—without an individual inquiry focused on the circumstances of a person's property and experience.

B. Plaintiffs Failed to Prove Classwide Causation in the Santiam Canyon.

As PacifiCorp argued in the principal appeal (A183140), Plaintiffs never established that PacifiCorp caused harm to the entire class. This lack of classwide causation means that the Phase I classwide liability judgment (and the derivative Phase II individual damages judgments) must fail. Plaintiffs produced no evidence that the entire area within the class map was even affected—much less destroyed—by a PacifiCorp-caused fire. Not only were there dozens of spot fires, each with its own unique cause and pattern of spread, but the entire Santiam Canyon was burned by the lightning-caused Beachie Creek Fire *before* any

PacifiCorp-caused fire damaged any property. ODF confirmed as much in a report that exonerated PacifiCorp for harms within the Santiam Canyon. (ER-814-834.) Plaintiffs did not introduce evidence of a single fire in the entire eastern half of the Santiam Canyon that was started by PacifiCorp equipment. Plaintiffs were so concerned with this failure of proof that they asked the trial court to remove the eastern half of the canyon from the class after they had presented their case. (ER-121). The trial court's decision to maintain the existing class only underscores its defects. The lack of evidence establishing classwide causation requires decertifying the class and vacating the limited judgments predicated on the classwide judgment, including the judgment at issue in this appeal.

C. The Trial Court Erroneously Deprived PacifiCorp of Challenging Causation as to These Phase II Plaintiffs.

This trial highlighted the problems with the trial court's class certification ruling, Plaintiffs' failure to prove classwide causation, and the bifurcated case structure. In the Santiam Canyon specifically, the Phase I trial did not establish that every single class member suffered all claimed damages as a result of a utility ignition. For example, the only way to determine whether a plaintiff evacuated because of an isolated utility fire or the massive Beachie Creek Fire was to allow PacifiCorp to present its defense that the Beachie Creek Fire caused

those harms and allow the jury to decide. The trial court denied PacifiCorp that opportunity.

Rooney's circumstances illustrate that fundamental problem and the errors that flow from it. Rooney lived on the northwestern edge of the class boundary (Tr-615:16-19), directly in the path of the Beachie Creek Fire. At trial, she claimed noneconomic damages based on evacuation-related distress as well as distress and inconvenience related smoke damage and spot fires in her yard. (ER-614-627; ER-747-762.) She received a "Level 3, go now" evacuation order. (Tr-617:3-8.) When she left, she encountered "hundreds" of cars that were also evacuating on Highway 22, which led to her feeling "trapped." (Tr-619:18-620:18.) By her own admission, Rooney "didn't know where the fire was coming from." (*Id.*) Rooney never saw any flames while she was evacuating, and there was no evidence introduced regarding the cause of the spot fires or smoke damage. (Tr-633:25-634:2.) The next day, Rooney returned to her house, which survived the fires. (Tr-621:19-622:5.)

The facts of Rooney's claim were first presented in this Phase II trial. Phase I had nothing to do with Rooney or her property and did not address her evacuation experience or the smoke damage to her property. There was no evidence of any utility-caused fire or ignition anywhere close to Rooney's property, no evidence of the direction or rate of spread of any such fire, and no evidence of any harm that such fire allegedly caused.

The Phase II trial evidence did not remedy these shortcomings. Plaintiffs never offered any evidence of which fire (the Beachie Creek Fire or some other fire) triggered the evacuation warning Rooney received. Nor did they offer any evidence of which fire caused the "hundreds" of other cars to evacuate along Highway 22. There was no evidence at any point in this case that PacifiCorp's conduct caused Rooney to evacuate, caused the spot fires at her home, or had anything to do with the smoke damage to her property. Such evidence was essential given the numerous different fires with numerous different causes burning in the vicinity of Rooney's home. But Rooney received over $1 million without ever establishing that PacifiCorp caused her damages.

Plaintiff Michele's claim suffered from similar gaps. Michele also lived in the Santiam Canyon and evacuated after seeing a plume of ash ignite trees near his property. (Tr-667:14-25.) He and his wife saw flames near the road as they left their property. In addition to his evacuation experience, Michele identified as a source of emotional distress the fire-damaged trees across from his property (on federal land), which impacted his view. (Tr-680:5-681:13.)

Again, it is undisputed that the Beachie Creek Fire consumed the entire class area—including Michele's property. Yet Plaintiffs did not offer any evidence—in either Phase I or this trial—that a PacifiCorp-caused ignition or fire was the source of the ash that ignited trees near Michele's property, was the source of the flames that Michele drove past, or burned the trees on the federal

property that affected Michele's view from his house. Nevertheless, he was awarded over $3 million.

Without such evidence, PacifiCorp cannot be liable to Rooney or Michele. And if such evidence existed, PacifiCorp had a right to contest it. In any other circumstance, a defendant in PacifiCorp's position would have been able to challenge Plaintiffs' claims that PacifiCorp caused their damages through evidence and defenses. Both Oregon law and due process required giving PacifiCorp that opportunity to present a bona fide defense to liability by demonstrating to the jury that the Beachie Creek mega-fire prompted Rooney's and Michele's evacuation and was the cause of their emotional distress in connection with that experience. A class action cannot be used to deprive a defendant of that right. *Bernard v. First Nat'l Bank of Or.*, 275 Or 145, 159, 550 P2d 1203 (1976); *Wal-Mart Stores, Inc. v. Dukes*, 564 US 338, 367, 131 S Ct 2541, 180 L Ed 2d 374 (2011).

The trial court made three critical choices that effectively prohibited PacifiCorp from raising any defense to causation: The trial court (1) granted summary judgment on PacifiCorp's causation-based defenses, (2) precluded evidence of other potential causes of class member harm, and (3) instructed the jury that the Phase I verdict had already determined that PacifiCorp was ***the*** cause of all fire-related injuries the class members suffered.

All three decisions were erroneous. As to the summary judgment decision, the trial court conclusively determined that PacifiCorp's defenses failed as a matter of law—even though it should have viewed the evidence "in the light most favorable" ***to PacifiCorp*** as the nonmoving party. *See Twigg v. Admiral Ins. Co.*, 373 Or 445, 474, 568 P3d 156 (2025). That decision was clearly wrong. The only fact that the jury determined at Phase I was that PacifiCorp was a cause of some soil-burn damage within the class area. But there were multiple fires encompassed within the class area with different causes and different directions of spread. There was no basis on which the trial court could conclude ***as a matter of law*** before trial that PacifiCorp caused all smoke damage, caused all evacuations of everyone in the Santiam Canyon, or caused the reduction in views to every class member.

The trial court's ruling precluding PacifiCorp from presenting any evidence of the Beachie Creek Fire was also wrong. The trial court's decision to structure this case as a bifurcated class action cannot deprive PacifiCorp of a right to present its defenses. *See, e.g.*, *Bernard*, 275 Or at 159–60 (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"); *Cimino v. Raymark Indus., Inc.*, 151 F3d 297, 312 n30 (5th Cir 1998) ("[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."); *Carrera v. Bayer Corp.*, 727 F3d 300, 307 (3d Cir 2013) ("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."). By preventing PacifiCorp from even mentioning the Beachie Creek Fire, the trial court prevented PacifiCorp from showing that most or all of the noneconomic damages—including burn damage to homes and trees, 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 by the Beachie Creek Fire. 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-19.)

The trial court's third error effectively eliminated causation as an issue that PacifiCorp could contest at any point in Phase II. Having granted summary judgment and precluded evidence before trial, the trial court further closed the door on PacifiCorp by instructing the jury that the Phase I verdict had already determined that PacifiCorp was ***the*** cause of all fire-related injuries the class

members suffered. (ER-789-790.) That was error because the Phase I jury only found that PacifiCorp was ***a*** cause of ***some*** injury to class members. (ER-152-174.) 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 classwide harm presented to the Phase I jury was an expert's testimony regarding "soil burn"—that some portion of the soil within the parcel was affected by an unidentified fire. 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. By altering and expanding the scope of the Phase I jury's verdict, the trial court's instruction was error.

D. The Trial Court Erred by Usurping the Jury's Role and Deciding the Scope of PacifiCorp's Liability Itself.

Not only was PacifiCorp denied its right to present individualized defenses, but the trial court allowed Plaintiffs to secure damages for injuries that PacifiCorp did not cause and that Plaintiffs never proved that PacifiCorp caused. It did so by effectively amending the scope of the Phase I verdict to conclusively determine liability for damages that were never proven in Phase I. Doing so was legal error, and denied PacifiCorp's its rights to a jury trial under Article I, section 17, of the Oregon Constitution, and to due process under the Fourteenth Amendment.

The trial court's class certification order explicitly left certain issues to be resolved during the Phase II proceedings, including PacifiCorp's ability to test the "specific causation of each class member's damages." (ER-21.) The Phase I verdict was expressly limited to a single question—whether PacifiCorp was "a cause of harm to the entire class within the boundaries of the [class] fire areas." (ER-154; ER-156; ER-162; ER-165.) During Phase I, the only purported evidence of such "harm" to non-named class members (such as Plaintiffs here) was an expert's determination that certain properties within the class boundaries suffered "low soil burn" severity on some portion of a parcel of land. (ER-105-113; 5/9/23 Tr-333:18-23, 3338:17-3339:22.)

The Phase I jury did not hear evidence of, and did not decide, which harms PacifiCorp caused for every non-class member, nor could it. But in advance of Phase II, the trial court effectively decided that jury question for itself. Although the court correctly recognized that certain categories of damages such as bodily injuries fell outside of the scope of the Phase I verdict, the problem was that the court nonetheless allowed Plaintiffs to pursue other categories of damages—including smoke and ash damage, evacuation-related injuries, and emotional distress—on the basis that the Phase I verdict conclusively established causation as to every category of damages. That was error.

Damages cannot be awarded unless there is a finding of liability. *See, e.g.*, *Bell v. Burson*, 402 US 535, 542, 91 S Ct 1586, 29 L Ed 2d 90 (1971). And

Article I, section 17 guarantees "a procedural right to have a jury rather than a judge decide the facts in certain kinds of civil cases." *Horton v. Or. Health & Sci. Univ.*, 359 Or 168, 226, 376 P3d 998 (2016). As discussed above, the Phase I verdict was confined to identifying PacifiCorp as "a cause" of some "soil burn" on certain (but not all) parcels of land within the class boundaries. Nevertheless, during the Phase II trial, Plaintiffs offered evidence of a range of other injuries—including smoke damage, harm to community or a sense of privacy, emotional distress, and evacuation-related stress. The Phase II jury never decided which of those harms were caused by PacifiCorp and which were not. The only question that the Phase II jury answered was the amount of noneconomic damages. (ER-805-813.) The result of that structure was a gaping hole between Phase I and Phase II, which the trial court filled with an instruction to the jury that took away defenses from PacifiCorp.

Rooney and Michele are both perfect examples of that problem: Both claimed damages for harm beyond mere "soil burn." Rooney sought compensation for evacuation-related distress, damage to certain trees on her property, and smoke damage. (ER-614-627.) And Michele sought emotional distress damages for the negative impact on the view from his property. (Tr-661:18-25, 673:18-682:15.) There was no proof at Phase I that PacifiCorp caused these injuries, and thus no basis for awarding damages to Plaintiffs for these types of injuries at Phase II.

"[A] judge cannot * * * usurp the functions of a jury, or substitute his verdict or judgment for theirs." *Fiore v. Ladd*, 29 Or 528, 533, 46 P 144 (1896). But that is what the court did here to reconcile the Phase I verdict with the goal of limiting the scope of the Phase II trials. Although the evidence, instructions, and verdict form at Phase I said nothing about smoke and ash, harm to community or privacy, emotional distress, or evacuation-related injuries, the court concluded that such injuries were within the scope of the Phase I verdict. Because the Phase I verdict did not establish that PacifiCorp was liable for the specific damages claimed in the Phase II trial, PacifiCorp is entitled to judgment or at least a new trial.

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

During Phase I and the first two Phase II trials, PacifiCorp made numerous motions regarding entitlement to noneconomic damages. (*See, e.g.* TCF-05/16/2023 Directed Verdict Motion); TCF-08/11/2023 (Defendants' Post-Trial Motions); TCF-01/14/2024 (Directed Verdict Motion); TCF-03/01/2024 (Directed Verdict Motion); ER-403-466; ER-532-586.). The trial court denied all motions. (ER-209-210; ER-530-531; ER-587-588.) PacifiCorp filed motions for directed verdict— incorporating its previously-decided arguments in Phase I

trial and Phase II, Trials I and 2, regarding the unavailability of noneconomic damages. (ER-738-745; ER-772-779.) The trial court denied those motions. (ER-782.)

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

In Phase I, the trial court rejected PacifiCorp's directed verdict motion on noneconomic damages and overruled PacifiCorp's objections to the use of uniform civil jury instructions on noneconomic damages and rejected PacifiCorp's argument that noneconomic damages are improper in the absence of physical injury. (06/05/2023 Tr-7994-99, 8046-49.) PacifiCorp expressly noted its objections to the instructions given and not given in Phase I and Phase II, Trial Nos. 1 and 2. (TCF-06/06/2023 (ORCP 59 H Notations); ER-363-375; ER-485-501.) In CMO No. 10, the trial court directed the parties to use "the same neutral statement, jury instructions and verdict form that were used in

Phase II, Trial 2." (ER-597.) PacifiCorp renewed and incorporated all of its prior exceptions to instructions in this trial. (ER-763-771.)

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).

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 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).) PacifiCorp expressly noted its objections to the instructions given and not given in all Phase II trials. (ER-363-375; ER-485-501; ER-763-771.)

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 (2021).

NINTH ASSIGNMENT OF ERROR

The trial court erred when it denied PacifiCorp's motions in limine to preclude evidence and argument on unrecoverable noneconomic damages.

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-211-225.) In CMO No. 10, the trial court stated that, for future Phase II trials, "Motions *in limine* must be limited to specific evidentiary issues not previously raised and resolved by the Court's prior rulings on Omnibus Motions *in Limine* for Phase I and Phase II, Trials 1 and 2." (ER-597.)

B. Standard of Review

The trial court's ruling denying a motion in limine on relevance grounds is reviewed for errors of law. *Durette*, 272 Or App at 555.

COMBINED ARGUMENT ON SIXTH THROUGH NINTH ASSIGNMENTS OF ERROR

No case or principle supports the award of $32 million in noneconomic damages for the property damage here. First, the class was not entitled to any noneconomic damages—which were unavailable under common law and barred by the wildfire-damages statute. Second, the specific noneconomic damages

here—which include noneconomic damages for financial inconvenience, lost aesthetics, and injured animals—were unbounded and violate Oregon law.

A. The Noneconomic Damages Awards Were Unlawful.

The limited judgment here awarded $32 million in noneconomic damages to seven individual plaintiffs for alleged emotional harms they suffered as a result of harm to their property from unintentional wildfires. Those noneconomic damages awards should be vacated in their entirety because Oregon law does not permit noneconomic damages for such claims.

1. Oregon Common Law Does Not Permit Noneconomic Damages for Property Loss.

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. *See, e.g.*, *Philibert v. Kluser*, 360 Or 698, 703-04, 385 P3d 1038 (2016). In cases involving unintentional property damage, noneconomic damages are not available. *See, e.g.*, *Meyer v. 4-D Insulation Co., Inc.*, 60 Or App 70-80, 652 P2d 852 (1982) (rejecting such damages); *Bailey v. Polygon Nw. Co.,* No. 3:22-cv-00292, 2022 WL 17184309, at *7 (D Or Aug. 23, 2022) (You, M.J.) (same), *report and recommendation adopted in relevant part*, 2022 WL 17178268 (D Or Nov. 23, 2022) (Hernandez, D.J.). Because this case did not involve any physical injury, any evidence of intentional misconduct, or the invasion of any special legally protected interest, noneconomic damages

should not have been recoverable. Yet Phase II juries—including the Phase II, Trial 3 jury here—continue to mete out noneconomic damages, which average 12 times the total amount of economic damages and threaten to impose $6 billion in liability. 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*, 60 Or App at 72. The judgments should be reversed as to such damages. At a minimum, the verdicts should be reversed and a new trial should be ordered—imposing at least some limits on the noneconomic damages cases.

2. Oregon's Wildfire Damages Statute Bars the Claims for Noneconomic Damages.

The noneconomic damages awards are also barred by statute. Oregon's wildfire-damages statute provides that "economic and property damages" are the "exclusive remedies for damages or injur[ies] to property caused by a wildfire." ORS 477.089(2)(a)-(b) & (4). The wildfire-damages statute—passed in response to the runaway wildfire damages from the 2007 Moonlight Fire in California—was designed to bring stability and limitations to wildfire damages. By "better defin[ing] the legal exposure for wildfire damages," the statute prevents "undue windfalls" for "creative lawyers" and ensures that "Oregon's

landowners" will not "face legal claims of such massive scale that they are forced to choose between gambling the company and settling for outrageous sums." (TCF-10/27/22 (Chase Decl., Ex. 3 at 2, Ex. 5 at 2).) Because Plaintiffs' claims in this case arise solely from wildfire damage to property, and because the wildfire-damages statute states that the exclusive remedies for such damages are economic, the noneconomic damages awards here must be vacated. And Plaintiffs' noneconomic damages—amounting to 12 times their economic damages and alone exposing PacifiCorp to $6 billion in liability exposure for noneconomic damages alone—brings all the mischiefs that ORS 477.089 was designed to prevent.

B. The Trial Court Erroneously Permitted Plaintiffs to Recover Noneconomic Damages from Every Source of Emotional Distress.

The trial court compounded its erroneous decision to permit any noneconomic damages by failing to put any meaningful limits on the noneconomic damages awarded by the jury. It permitted the jury to consider and award several categories of noneconomic damages that are prohibited by Oregon law. Because these categories of noneconomic damages should have been out of bounds—never put before the jury, and never put in the award—PacifiCorp is entitled to judgment, or at least a new trial.

1. ***Inconvenience or Discomfort.*** Oregon law does not allow noneconomic damages for "inconvenience, annoyance, and discomfort"

resulting from fires because such harms are "adequately compensated" through economic damages. *Meyer*, 60 Or App at 80 n 6. Here, PacifiCorp stipulated to an amount of economic damages for every Plaintiff. And yet, the trial court instructed jurors to consider "inconvenience and interference with the plaintiffs' normal and usual activities" *anyway.* (Tr-854:20-22.) And based on the testimony that was permitted regarding inconvenience and discomfort, there was a lot for jurors to consider. Rooney, for example, "was displaced for a number of weeks while her house was being cleaned of the smoke and ash damage." (Tr-782:13-21.) Dillingham and Coates offered testimony about having to spend a night in the parking lot while evacuating the fires. (Tr-798:2-6.) And Sims discussed his discomfort from having to give away his horses because he "no longer had a place to keep them." (Tr-876:12-13.)

Those noneconomic damages were impermissible under Oregon law, and it is not difficult to understand why. Any number of negligence cases involving property loss—including car or bike accidents—result in some measure of inconvenience and interference with normal daily life. But allowing noneconomic damages for inconvenience or interference with daily activities that do not result from a physical injury is unprecedented. The trial court's instruction permitting the jury to award those damages, and refusal to instruct the jury that such damages were not recoverable, requires a new trial.

2. ***Harm to Animals.*** The trial court upended settled Oregon law precluding noneconomic damages caused by the death or injury of pets or animals. *See Lockett v. Hill*, 182 Or App 377, 51 P3d 5 (2002). In denying noneconomic damages where the defendant's dogs mauled and killed the plaintiffs' cat in their presence, *Lockett* explained "[n]o Oregon court has recognized" a legally protected interest for harm to pets or animals stemming from negligence. *Id.* at 382-83; *see also* Restatement (Third) of Torts*: Physical and Emotional Harm* § 47 cmt m (2012) ("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.").

Here, by contrast, Plaintiffs were allowed to make harm to animals a centerpiece at trial. The Dillinghams explained "Pedro the Donkey" (who perished) was a "herd protector" that was also "part of the[ir] family." (Tr-471:9-12.) Similarly, Coates discussed the destruction of her koi pond and testified she had trouble sleeping because Angelica, her cat, perished in the fire because she scurried under a trailer. (Tr-444:24-25, 450:18-24.) No Plaintiff was entitled to noneconomic damages for emotional distress resulting from the loss of an animal. Because the trial court allowed Plaintiffs to recover those impermissible damages over PacifiCorp's objections, a new trial is warranted.

3. ***Injury to Real and Personal Property.*** There is no precedent in Oregon law for awarding emotional or mental distress damages that are caused by the loss or damage to real or personal property. In addition, under ORS 477.089, the "exclusive remedies for damages or injur[ies] to property caused by a wildfire" are "economic and property damage(s)"—i.e., objectively verifiable harms. ORS 477.089(1), (4). Here, however, Plaintiffs focused extensively on emotional distress associated with the loss of property, conceded sentimental value is purely subjective, and made repeated references to the unquantifiable value of everything from tools to homes. Sims, for example, explained his "tool box" had "sentimental value." (Tr-365:12-16.) And Ross made repeated references to the loss of his "dream" home—which gained heightened sentimental value after his wife passed away years later and from reasons completely unrelated to the fire. (Tr-820:18-21.)

4. ***Loss of Community and Identity.*** "No Oregon court has recognized that a person's interest in a sense of identity is legally protectible." *Lockett*, 182 Or App at 382. But sense of identity was another central theme in this trial. Plaintiffs elicited expert testimony to establish "a concern for loss of identity when somebody loses a home"—which would have informed the scope of noneconomic damages for *everyone* except Rooney. (Tr-706:22-25.) Sims' story is illustrative. He had "a lot of identity wrapped up in his horse ranching," and his barn "was kind of his special place to be with his horses." (Tr-771:20-

25.) And Plaintiffs—who used this trial for noneconomic damages as an opportunity to have jurors *punish* PacifiCorp—pounced on that loss of identity: "the worst part" was that Sims, "a strong and proud cowboy," "contemplated taking his own life because of what was done to him." (Tr-876:12-18.) "It's one thing to burn a person's house, it's another thing to burn their spirit." (*Id.*)

5. ***Fear or Stress of Evacuating.*** No Oregon case has ever held that a party is entitled to noneconomic damages for stress arising from witnessing or evacuating from a fire or similar event. *See Philibert*, 360 Or at 703-04; *see also Lowe v. Philip Morris USA*, 344 Or 403, 410–11, 183 P3d 181 (2008) (plaintiff must allege and prove actual loss or harm to make out a claim for negligence; threat of future physical harm not sufficient). Yet much of Plaintiffs' testimony focused on their experiences without regard to actual physical injury. Rooney explained the fear of the fire "was terrifying," and lamented the stress of "find[ing] a way out" without knowing whether flames were "around the corner." (Tr-618:19-22.) Denton described his evacuation as "frightening," citing "concer[n] for [his] safety" while the fire was "burning down the hill towards [him]." (Tr-540:1-12.) And Michele took it a step further, discussing fear of *his wife* evacuating—doubly impermissible because neither personal fear of evacuating is recoverable, nor fear of harm *to others*. None of these examples should have been heard by the jury or formed a basis for recovery.

6. ***Loss of Aesthetic Value of Land and Recreation.*** The trial court ignored the "elementary" rule that a plaintiff must prove "ownership of the land" before claiming damages. *Kline v. Elkins*, 207 Or 179, 181, 294 P2d 1118 (1956). The trial court's interpretation of recoverable noneconomic damages to include loss of aesthetic or recreational value resulted in improper trial testimony and a faulty jury verdict. Denton, for example, lamented his view of "BLM land" became a view of "matchsticks" instead of trees. (Tr-326:2-4.) Rooney discussed the loss of her cherished "privacy" from "100-year old trees," "across" from which "were more trees." (Tr-335:24-25.) And Sims explained he now has views of "dead trees" instead of a "forest." (Tr-546:24-547.) Those noneconomic damages were unavailable under Oregon law, and PacifiCorp was entitled to both evidentiary and instructional limitations on them.

TENTH ASSIGNMENT OF ERROR

The trial court erred when it refused to instruct the jury regarding the existing award of punitive damages but permitted instructions on evidence of PacifiCorp's culpability.

A. Preservation

PacifiCorp repeatedly moved in limine and proposed jury instructions that would have informed the jury that punitive damages had already been awarded against PacifiCorp. (TCF-12/20/2023 (Defendants' Proposed Neutral Statement); Tr-01/05/2024-50:18-51:5; TCF 01/14/2024 (Proposed Jury

Instructions); TCF-02/06/2024 (Motion No. 5); TCF-02/15/2024 (Proposed Jury Instructions); Tr-03/01/2024-1253:20-1255:20). Based on its ruling on Plaintiffs' motion in limine, the trial court declined to instruct the jury that punitive damages were awarded in Phase I. (See Tr-01/05/2024-75:21-77:24; Tr-03/01/2024-1253:20-1255:20.) In CMO No. 10, the trial court directed the parties to use "the same neutral statement, jury instructions and verdict form that were used in Phase II, Trial 2." (ER-597.) PacifiCorp objected to the trial court's refusal to give the instruction. (ER-352-355; ER 356-362; ER-363-375; ER-485-501; ER-763-771.)

B. Standard of Review

The trial court's refusal to issue a jury instruction regarding the Phase I jury's award of punitive damages is reviewed for legal error. *Yeatts*, 313 Or App at 229.

ELEVENTH ASSIGNMENT OF ERROR

The trial court erred by awarding double economic damages as a matter of law without presenting that issue to the jury.

A. Preservation

PacifiCorp opposed entry of limited judgment regarding double damages under ORS 477.089 because it was a question for the jury (TCF-09/11/2023 (Defendants' Opposition)), and expressly renewed its prior objections here (Tr-935:10-24). (*See also* ER-202-206.)

B. Standard of Review

The trial court's interpretation of ORS 477.089 is reviewed for legal error. *Simington Gardens, LLC v. Rock Ridge Farms, LLC*, 308 Or App 661, 665, 481 P3d 396 (2021).

TWELFTH ASSIGNMENT OF ERROR

The trial court erred by awarding double economic damages in addition to punitive damages.

A. Preservation

PacifiCorp opposed entry of limited judgment regarding an award of double damages under ORS 477.089 because Plaintiffs were required to elect between punitive and double damages (TCF-09/11/2023 (Defendant's Opposition)), and expressly renewed its prior objections here (Tr-935:10-24). (*See also* ER-202-206.)

B. Standard of Review

The trial court's construction of ORS 477.089 in awarding double damages is reviewed for legal error. *Simington Gardens*, 308 Or App at 665.

COMBINED ARGUMENT ON TENTH THROUGH TWELFTH ASSIGNMENTS OF ERROR

The trial court committed three errors related to punitive damages and statutory multipliers that require correction. First, the court erred by refusing to instruct the jury of the existing punitive damages award even though the jury was told the factual findings about PacifiCorp's conduct on which the punitive

award rested. Second, the court improperly granted double damages under ORS 477.089 when that determination should have been left to the jury. Third, the court erred by allowing Plaintiffs to recover double damages under ORS 477.089 *on top of* punitive damages because these are duplicative, and therefore mutually exclusive, penal remedies.

A. The Trial Court Erred by Refusing to Instruct the Jury on the Prior Award of Punitive Damages.

The trial court told the jury that PacifiCorp acted with gross negligence, recklessness, and willfulness—and it permitted Plaintiffs to inflame the jury by asking them to hold PacifiCorp "accountable." But it refused to instruct the jury that PacifiCorp had already been punished with punitive damages and that the jury should limit itself to providing compensation for Plaintiffs (rather than additional punishment for PacifiCorp). PacifiCorp was entitled to a jury instruction that a prior jury awarded punitive damages—and that this jury's role was limited to compensating Plaintiffs. "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." *Yeatts*, 313 Or App at 229. Here, neither the existence of the punitive damages award nor the compensatory role of the jury were disputed—and the trial court erred in failing to provide that instruction.

That error requires reversal. "[A]n error in failing to give an instruction is prejudicial if it 'probably created an erroneous impression of the law in the minds of the jury and if that erroneous impression may have affected the outcome of the case.'" *Id.* at 233. Here, the prejudice was palpable. The jury was invited to punish PacifiCorp. The trial court instructed that PacifiCorp had engaged in "gross negligence," "recklessness," and "willful" misconduct against the class. (ER-789; ER-799-800.) And Plaintiffs told the jury it must hold PacifiCorp "accountable" for its gross misconduct and intentional "refus[al] to accept responsibility." (Tr-848:9-19; Tr-912:24-25 ("[T]his is absolutely about accountability.")) But the trial court—despite the plain risk of prejudice—refused to tell the jury that PacifiCorp had already been punished with a punitive-damages multiplier that applied to any damages the jury awarded. (*See* ER-788-804.) PacifiCorp was entitled to negate Plaintiffs' attempt to inflame the jury by telling the jury that PacifiCorp had already been punished for the acts the jury instructions described—especially since "compensatory damages" for noneconomic harms like "emotional distress * * * already contain [a] punitive element." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 US 408, 426, 123 S Ct 1513, 155 L Ed 2d 585 (2003).

B. The Trial Court Improperly Usurped the Jury's Role by Awarding Double Damages.

The trial court granted Plaintiffs' post-trial motion for double economic damages under ORS 477.089(2). But that was error—determining whether to double damages was the province of the jury, not the trial court. ORS 477.089 provides that "in a civil action for property damage caused by a wildfire, the recoverable damages are * * * [t]wice the amount of economic and property damages, if the wildfire occurred as the result of recklessness, gross negligence, willfulness or malice." ORS 477.089(2)(b). The key word is "recoverable," which indicates that the statute provides only a *potential* recovery of double damages, not a guaranteed one. Accordingly, the statute defines the type of damages that are legally capable of being recovered—meaning the type of damages a plaintiff may seek from a jury. *See Bixler v. First Nat'l Bank of Or.*, 49 Or App 195, 201, 619 P2d 895 (1980) (when damages are "not recoverable," they must be "withdrawn from the jury"). By its terms, ORS 477.089 neither uses mandatory language nor instructs the court to award double damages in the event a plaintiff prevails. In the absence of countervailing language, "recoverable damages" means legally permissible damages that a jury finds as a matter of fact. After all, "[a]scertainment of damages generally is a question of fact" for the jury. *Brasch v. Quan*, 162 Or App 472, 476, 986 P2d 1183 (1999).

"[O]ther related statutes" are replete with examples of damages provisions mandating double or treble damages. *Oakleigh-McClure Neighbors v. City of Eugene*, 269 Or App 176, 183, 344 P3d 503 (2015). Statutes use unmistakably mandatory language when they require the court to award such damages. *See, e.g.*, ORS 105.810(1) (plaintiff "shall be given" treble damages); ORS 30.876(1) ("the court shall award" treble damages); ORS 659.785(2) ("[t]he court shall award" treble damages). By contrast, ORS 477.089 provides no such command. "[W]hen the legislature wants to" assign that function to the court rather than the jury, "it knows how to do so." *Ettinger v. Denny Chancler Equip. Co.*, 139 Or App 103, 110, 910 P2d 420 (1996). But the legislature did not do so here. The time for Plaintiffs to seek double damages was not in a post-trial motion before the court—but at trial itself before the jury.

C. The Double Damages Were Duplicative.

The award of double damages under ORS 477.089 was independently erroneous because it allowed Plaintiffs to improperly double dip on penal, non-compensatory damages for the same injury. When a statute imposes double or treble damages for "willful" acts, the excess damages "are punitive in character." *McHargue v. Calchina*, 78 Or 326, 332, 153 P 99 (1915) (non-compensatory damages are "penalt[ies]"). A plaintiff cannot receive "duplicative" remedies for the same wrong and must, instead, elect his choice of remedy. *State ex rel. Washington Cnty. v. Betschart*, 72 Or App 692, 700, 697 P2d 206 (1985).

Plaintiffs' punitive damages and double damages were duplicative. Both are penal; the statute authorizes double damages only for wildfire injuries resulting from "recklessness, gross negligence, willfulness or malice," ORS 477.089(2)(b), and thus intends to punish. Plaintiffs already received a 0.25 punitive-damages multiplier of their damages, including economic damages, and now seek to combine that with a doubling of their economic damages. These remedies are duplicative—awarded for the same injury and for the same penal purpose—and cannot both be recovered.

In addition, allowing Plaintiffs to reap the benefit of both punishments violates Article VII, section 3, of the Oregon Constitution, which provides that "no fact tried by a jury shall be otherwise re-examined in any court of this state." In an earlier trial, Plaintiffs made their case for punitive damages, and the jury opted to impose a modest 0.25 multiplier based on their assessment of PacifiCorp's conduct (and despite Plaintiffs' request for much higher). Under Article VII, "[a] jury's allocation of fault is a fact" that cannot be reexamined. *Tyrrell v. Marine Propulsion Servs., Inc.*, 178 Or App 392, 395, 37 P3d 1027 (2001). But now Plaintiffs turn to the *trial court* to impose double damages as additional punishment for the same conduct and same injury on top of the punishment the jury found appropriate. The effect is to overturn the jury's assessment of fault when it imposed a mere 0.25 punitive multiplier—which is a factual determination not subject to reexamination.

VI. CONCLUSION

The flawed limited judgment must be reversed.

DATED: December 11, 2025

STOEL RIVES LLP

s/ Brad S. Daniels

Per A. Ramfjord, OSB No. 934024
per.ramfjord@stoel.com
Brad S. Daniels, OSB No. 025178
brad.daniels@stoel.com
Reilley D. Keating, OSB No. 073762
reilley.keating@stoel.com
Telephone: (503) 224-3380

Alison L. Plessman, *pro hac vice*
aplessman@hueston.com
Rajan S. Trehan, *pro hac vice*
rajan.trehan@hueston.com
Stephanie W. Xiao, *pro hac vice*
sxiao@hueston.com
Khoa D. Nguyen, *pro hac vice*
knguyen@hueston.com
HUESTON HENNIGAN LLP
523 West 6th Street, Suite 400
Los Angeles, CA 90014
Telephone: (213) 788-4340

Douglas J. Dixon, *pro hac vice*
ddixon@hueston.com
Craig A. Fligor, *pro hac vice*
cfligor@hueston.com
HUESTON HENNIGAN LLP
620 Newport Center Drive, Suite 1300
Newport Beach, CA 92660
Telephone: (949) 229-6840

Blaine H. Evanson, *pro hac vice*
bevanson@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
3161 Michelson Drive
Irvine, California, 92612
Telephone: (949) 451-3800

Attorneys for Defendants-Appellants
PacifiCorp and Pacific Power

CERTIFICATE OF COMPLIANCE

I certify that the brief complies with the word-count limitation in ORAP 5.05, which word count 10,000.

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.

s/ Brad S. Daniels
BRAD S. DANIELS, Bar No. 025178
brad.daniels@stoel.com

Attorneys for Defendants-Appellants

CERTIFICATE OF FILING AND SERVICE

I certify that on December 11, 2025, I filed the original of this **APPELLANTS PACIFICORP AND PACIFIC POWER'S OPENING BRIEF** with the Appellate Court Administrator by the Court of Appeals' eFiling system.

I further certify that on December 11, 2025, I caused true copies of this **APPELLANTS PACIFICORP AND PACIFIC POWER'S OPENING BRIEF** to be served on the following parties listed via e-service on the Oregon Court of Appeals website and via email.

Keith A. Ketterling
Timothy S. DeJong
Cody Berne
Carsen Nies
STOLL STOLL BERNE LOKTING & SHLACHTER P.C.
209 SW Oak Street, Suite 500
Portland, Oregon 97204

Matthew J. Preusch
KELLER ROHRBACK L.L.P.
1129 State Street, Suite 8
Santa Barbara, California 93101

Nadia Dahab
SUGERMAN DAHAB
101 SW Main Street, Ste. 910
Portland, Oregon 97204

Derek C. Johnson
Marilyn A. Heiken
JOHNSON JOHNSON LUCAS & MIDDLETON, PC
975 Oak Street, Suite 1050
Eugene, Oregon 97401

Alexander Tievsky
EDELSON PC
350 North LaSalle Street, 14th Floor
Chicago, Illinois 60654

Attorneys for Plaintiffs-Respondents

I further certify that on December 11, 2025, I caused true copies of this **APPELLANTS PACIFICORP AND PACIFIC POWER'S OPENING BRIEF** to be served on the following persons at the following addresses via U.S. Mail and via email.

John M Coletti
PAULSON COLETTI
385 1st St., Suite 217
Lake Oswego, Oregon 97034

William Keith Dozier
WM. KEITH DOZIER LLC
385 1st St., Suite 217
Lake Oswego, Oregon 97034

Daniel Mensher
KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, Washington 98101

Yoona Park
Sarah R. Osborn
KELLER ROHRBACK L.L.P.
805 SW Broadway, Suite 2750
Portland, Oregon 97205

Nicholas A. Kahl
NICK KAHL, LLC
209 SW Oak St., Suite 400
Portland, Oregon 97204

Attorneys for Plaintiffs-Respondents

Marcus Hull
Senior Assistant Attorney General
OREGON DEPARTMENT OF JUSTICE
400 Justice Building
1162 Court St., NE
Salem, Oregon 97301-4096

Attorney for Creditor-Respondent

s/ Brad S. Daniels
BRAD S. DANIELS, Bar No. 025178
brad.daniels@stoel.com

Attorneys for Defendants-Appellants