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

JANINE DOEGE, 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. A188268

Multnomah County Circuit Court Case No. 20CV33885

APPELLANTS PACIFICORP AND PACIFIC POWER'S OPENING BRIEF AND EXCERPT OF RECORD

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

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I. INTRODUCTION

This appeal concerns the fourth damages trial in the class action proceedings concerning the Labor Day 2020 wildfires. As PacifiCorp demonstrated in its earlier appeals, this case should never have been certified as a class action; the class action trial evidence did not establish that PacifiCorp caused ***all*** of the class members' damages; and both common and statutory law do not allow the class members to recover unlimited noneconomic damages. In addition to those errors—which have pervaded every damages trial to date—the Court should reverse the judgment in ***this*** case for at least three reasons.

First, the trial court mischaracterized the Phase I verdict to the Phase II jury. The numerous Labor Day 2020 fires were caused by many different sources. And the Phase I jury was asked whether PacifiCorp was one of those causes—to which the jury answered yes. But the Phase II jury was told that PacifiCorp was the ***sole*** cause of ***all*** the harm to the class members. On top of that, PacifiCorp was affirmatively prevented from arguing that any plaintiff's harm was caused by anything besides PacifiCorp's conduct, notwithstanding the fact that the Oregon Department of Forestry (ODF) concluded after a years-long investigation that PacifiCorp was not responsible for causing or contributing to the Santiam Canyon fire damage.

Second, the trial court gave a web of confusing and misleading instructions that invited the jury to punish PacifiCorp instead of compensating

plaintiffs and refused PacifiCorp's requests for clarifying instructions telling the jury that PacifiCorp had already been punished. The result was a confusing half-story that inflamed the jury and prejudiced PacifiCorp.

Third, the trial court allowed Plaintiffs to seek tens of millions of dollars in noneconomic damages that were unrecoverable as a matter of law. Noneconomic damages are categorically unavailable under Oregon's wildfire-damages statute, which makes ***doubled*** "economic and property damages" the "exclusive remedies" for wildfire damage. And Oregon common law has never recognized noneconomic damages. But the trial court allowed Plaintiffs to reach far beyond Oregon law to obtain an award over ***ten times*** their economic and property damages for emotional distresses ranging from the loss of trees and pets to the loss of community and views. The jury was given a blank check, and it wrote a large one.

This appeal stems from the fourth Phase II damages trial against PacifiCorp; to date, there have been seven additional damages trials, and there are dozens more scheduled for 2026. It is no surprise that every jury has punished PacifiCorp with tens of millions of dollars in damages because every jury has been given a misleading and confusing view of the Phase I verdict, PacifiCorp's culpability, and the recoverable damages. The same mistakes will occur in future trials if they are not corrected here. The trial court's erroneous decisions should be reversed, any judgments predicated on those decisions

should be vacated, and judgment should be entered for PacifiCorp. At a minimum, the judgments should be reversed and a new trial should be ordered—one that properly instructs jurors and allows PacifiCorp to fully defend itself.

II. STATEMENT OF THE CASE

A. Nature of the Action and Relief Sought

This is a class action for property damage during the Labor Day 2020 wildfires. Phase I adjudicated classwide issues and named class representative liability and damages. Phase II is adjudicating additional class member claims. (ER-580-661; ER-876-889.)

B. Nature of the Judgments

This appeal arises from Phase II, Trial No. 4. (ER-1067-1108; ER-1120-1133.)

Judgments Currently on Appeal			
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	On appeal (A187954)
Phase II, Trial #4	8 (*Doege*)	$46.7 million	Current appeal
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)
Phase II, Trial #9	10 (*Bateman*)	$87.6 million	-
Phase II, Trial #10	8 (*Baker*)	$36.7 million	-
Phase II, Trial #11	10 (--)	$57.2 million	-

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 June 3, 2025. The supplemental judgment was entered on June 17, 2025. Notice of appeal from the judgments was filed on August 1, 2025.

III. QUESTIONS PRESENTED

1. Did the trial court err—particularly in light of the ODF Report exonerating PacifiCorp for fires in the Santiam Canyon—in maintaining certification of the class and finding classwide and individual causation?

2. Did the trial court err in allowing the jury to be misled and confused into believing that PacifiCorp's level of culpability was relevant to their determination of compensatory damages—while refusing to instruct the jury that PacifiCorp had already been punished with punitive damages?

3. Did the trial court err in permitting the noneconomic damages award—which had no apparent limits and was over ten times the amount of Plaintiffs' economic and property losses?

4. Did the trial court err in rejecting PacifiCorp's legal challenges to evidence and recovery of specific types of economic damages—the "ornamental-tree" damages, the "retail-replacement-value" damages, and the double-economic damages?

IV. SUMMARY OF ARGUMENT

A. Instructional, Causation, and Class Certification Errors

The trial court deprived PacifiCorp of its right to assert individual defenses to individual claims by erroneously instructing the jury that PacifiCorp was the sole cause of each class member's harms (including in the Santiam Canyon). In so doing, the trial court fundamentally misunderstood class action law and denied PacifiCorp's constitutional rights to a jury trial and due process—constitutional deprivations that are even more egregious given that class certification was never appropriate, class causation was never established, and ODF exonerated PacifiCorp in the Santiam Canyon.

B. Punitive Damages and Instructional Errors

The trial court compounded its existing errors with instructional and evidentiary rulings that invited the jury to punish PacifiCorp while refusing to instruct the jury that PacifiCorp had already been punished with a punitive

damages multiplier in Phase I. The instructions painted a misleading and confusing picture that invited the jury to take PacifiCorp's level of culpability into account when awarding damages, a clearly erroneous and prejudicial result.

C. Noneconomic Damages Errors

The noneconomic damages awards were unlawful. *First*, noneconomic damages are categorically prohibited. They are barred by Oregon's wildfire-damages statute, and they are unavailable under Oregon common law. *Second*, the wide range of noneconomic damages specifically awarded here—awarding millions for harms such as lost views, burned drawings, and harmed animals—swept beyond any conceivable limits under Oregon law. Even if noneconomic damages are theoretically available in a pure property-loss case, the trial court—throughout Phase II—has refused to impose any meaningful limits on when noneconomic damages are allowed.

D. Economic Damages Errors

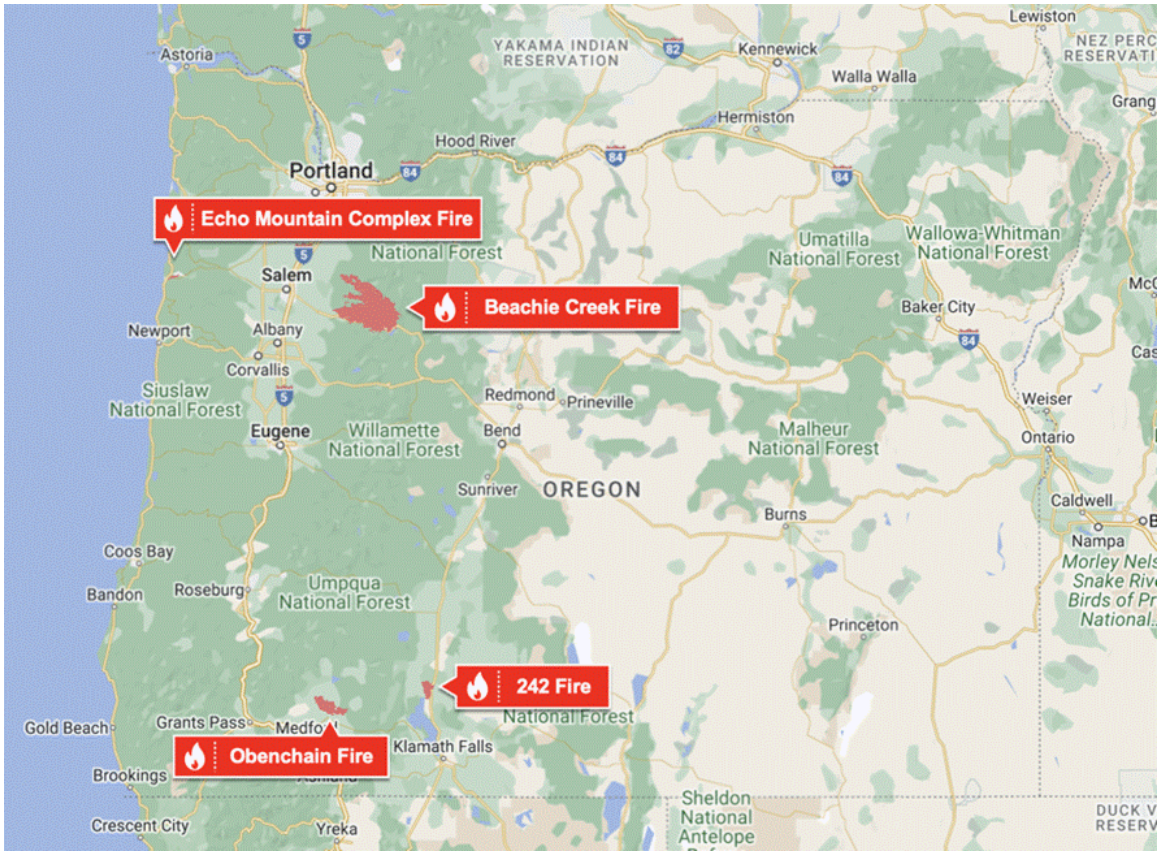
The trial court also permitted Plaintiffs to unlawfully inflate the economic damages awards. *First*, the trial court erroneously permitted "ornamental tree" damages, which were duplicative of property damages, subjective, unquantifiable, and grossly excessive—often approaching the amount of the claimed property values. *Second*, the trial court erroneously permitted "retail replacement value" damages for personal property, which provided plaintiffs an improper windfall. Third, the trial court impermissibly awarded double

economic damages. These damages were duplicative of the punitive damages already awarded, and in any event could be awarded only by the jury.

V. STATEMENT OF FACTS

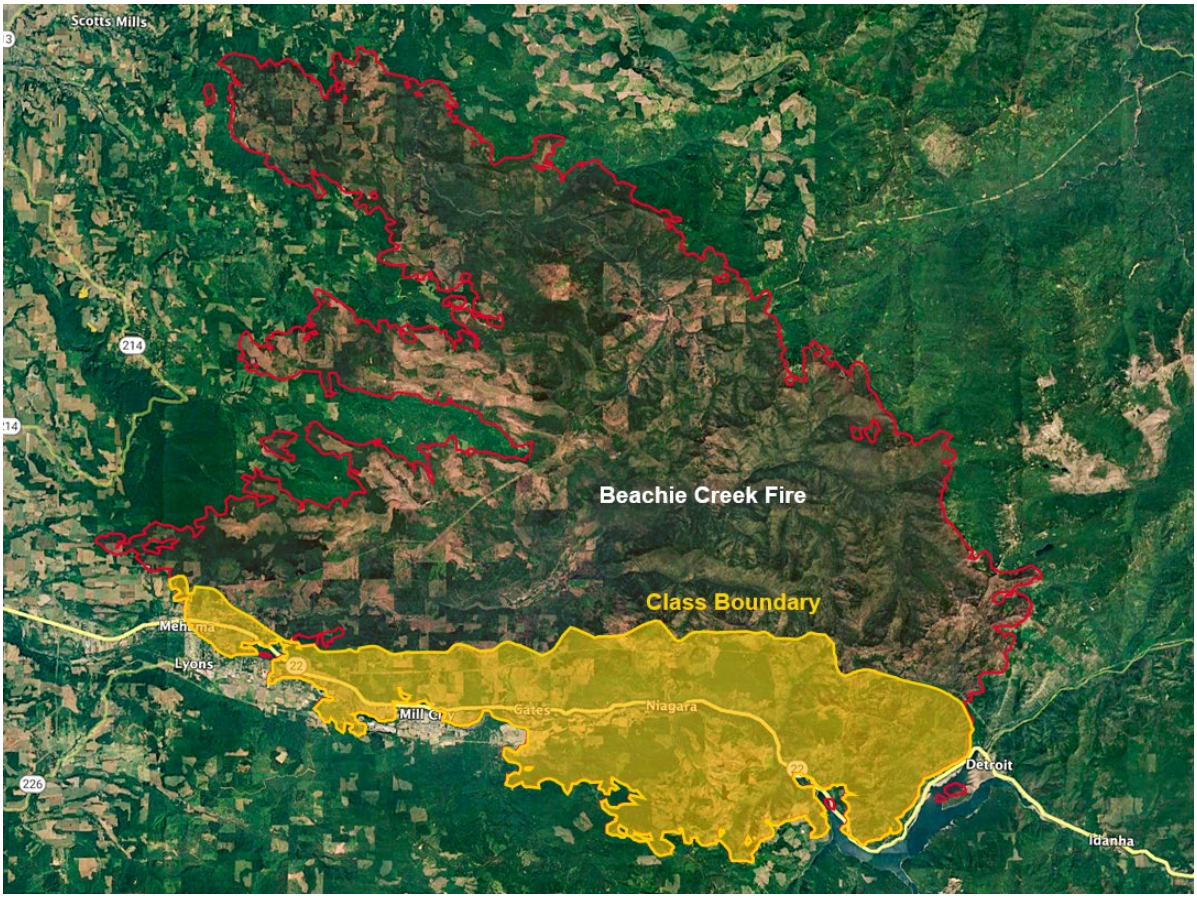
A. Plaintiffs Sue PacifiCorp for Wildfire Damage to Their Property.

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 consisting of thousands of plaintiffs living hundreds of miles apart and affected by different fires with different causes. (TCF-10/27/21-Motion for Issues Class Certification.)



Class certification was particularly problematic for the Santiam Canyon. There, the lightning-caused Beachie Creek Fire—a mega-fire that started in the

Opal Creek Wilderness just north of the canyon—indisputably burned class properties ***before*** any PacifiCorp fire, as ODF confirmed. (ER-121-124; ER-126; ER-127; ER-785-805; 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. (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." (ER-19.)

C. The Trial Court Enters the Phase I Limited Judgment.

The Phase I jury returned a verdict in favor of the individual plaintiffs and the class on five claims. (ER-175-197.) The jury awarded the class representatives $4.38 million in economic damages and $67.5 million in noneconomic damages. (ER-191-194.) The jury also awarded a 25% classwide punitive damages multiplier, and the trial court imposed double economic damages. (ER-198-203; TCF-01/04/2024-Limited Judgment; TCF-05/10/2024-Corrected Limited Judgment.) That limited judgment was flawed—class certification was improper, classwide causation was never established (particularly in the Santiam Canyon), and noneconomic damages were never available.

D. The Trial Court Enters Phase II Limited Judgments.

The trial court proceeded with Phase II. 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-352-354; ER-363-364; ER-493-495, ER-505; ER-679-681, ER-690-91; ER-1040-1042, ER-1051-1052.) The juries have awarded those plaintiffs well over $100 million—with noneconomic damages exposure alone projected to rise to around

$6 billion. (ER-1067-1108; TCF-04/26/2024-Limited Judgment; TCF-06/28/2024-Limited Judgment; TCF-04/18/2025-Limited Judgment.)

E. The Oregon Department of Forestry Absolves PacifiCorp of Responsibility for the Santiam Canyon Fire.

Days before this trial began, ODF released its official fire report confirming that the lightning-caused Beachie Creek Fire—a mega-fire that, fueled by historically high winds, consumed 160,000 acres from Detroit to Lyons—was responsible for the harm throughout the Santiam Canyon, including within the class area. (ER-785-805.) ODF found that: (1) "wildland fire starts caused by down powerlines * * * were suppressed by local residents and/or local municipal fire departments," (2) there was "no evidence of powerline ignitions contributing to the spread of the fire in the Santiam Canyon," and (3) the "most probable explanation" for "other ignitions in areas where no roads or powerlines w[ere] present" was "spot fires from the main Beachie Creek Fire." (ER-800-802) The ODF Report confirmed the lack of classwide causation—particularly in the Santiam Canyon. But the trial court refused to stay the trial and adhered to its decision to preclude any causation evidence—including the ODF Report.[1] (ER-806-815; ER-816-821.)

[1] Unless otherwise noted, all "Tr" citations are to the Phase II, Trial 4 transcript filed in this appeal (03/21/2025-03/31/2025).

F. Phase II, Trial 4 Awards $48 Million to Seven Plaintiffs.

The fourth Phase II trial adjudicated the claims of seven additional class members—including several in the Santiam Canyon. Plaintiffs were awarded gross damages of nearly $48 million—even though their total property damages totaled $2.5 million. (ER-1067-1108.)

Phase II, Trial 4 Limited Judgment					
#	Plaintiff	Noneconomic	Economic	Exemplar Harms	Location
1	Bette Carter Living Trust	$0	$119,960	1. Loss of home 2. Loss of trees 3. Loss of garden sheds	Echo
2	Denise Dake	$11.5 million	$627,860	1. Loss of tame and feral cats 2. Loss of photos, souvenirs, jewelry, and family items. 3. Loss of community and social gatherings 4. Loss of garden and trees	Obenchain
3	Justin Hall	$350,000	$11,851	1. Evacuation-related stress 2. Water damage to floors and broken appliances 3. A week of cleanup to the house and property	Echo
4	Estate of Darrell Huber	$0	$703,251	1. Loss of ornamental trees 2. Loss of old vehicles and boat	Santiam

5	Michele Pfohl	$7 million	$481,876	1. Loss of cat 2. Loss of husband's ashes 3. Loss of community	Santiam
6	John Wagner	$10 million	$344,098	1. Loss of pictures, baseball records 2. Loss of ability to host family gatherings 3. Evacuation stress and inconvenience 4. Loss of views of trees, nature, and wildlife	Santiam
7	Ron Wick	$5 million	$230,886	1. Evacuation and displacement-related stress 2. Loss of mother's and son's ashes 3. Loss of coin and marble collections	Echo
Aggregated Damages Total: $47,982,010 Noneconomic: $33,850,000 Economic: $2,519,782 (2x multiplier added for total of $5,039,564) Punitive: 0.25x multiplier on compensatory damages Insurance Offset against Economic Damages: $1,274,129					

FIRST 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 subject wildfires. (ER-225-240; TCF-12/06/2024-Plaintiffs' Motion for Partial Summary Judgment.) PacifiCorp opposed Plaintiffs' motion. (ER-241-257; TCF-03/01/2025-Defendants' Opposition.) The trial court granted summary judgment "for the reasons stated in Plaintiffs' motion," (ER-287-291), and reincorporated its rulings for all Phase II trials (ER-874-875).

B. Standard of Review

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

SECOND ASSIGNMENT OF ERROR

The trial court erroneously prohibited PacifiCorp from introducing evidence in Phase II that the specific harms alleged 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 or that the "lightning-caused Beachie Creek Fire" was the cause of class members' injuries. (ER-279-280, ER-285.) Plaintiffs filed similar motions that were granted for Phase II, Trial 4. (TCF-03/03/2025-Plaintiffs' Motions in Limine; ER-828-830.)

B. Standard of Review

The trial court's ruling excluding evidence and argument based on the conclusion that the prior jury's findings rendered them legally irrelevant is reviewed for errors of law. *Durette v. Virgil*, 272 Or App 545, 554-55, 356 P3d 639 (2015).

THIRD 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 that the class members suffered. (ER-298-300; ER-464-468; ER-338-350; ER-475-491; ER-994-1003; ER-1012.) The trial court overruled PacifiCorp's objection. (ER-299-300; ER-468; ER-351-367; ER-492-509; ER-678-694; ER-1039-1054.) 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-577.) PacifiCorp renewed and incorporated all its prior exceptions to instructions in this trial. (ER-994-1003; ER-1012.)

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).

FOURTH 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. (*E.g.*, TCF-12/23/2021-Defendants' Opposition; TCF-03/17/2023Motion 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); ER-937-982.) The trial court certified the class and denied all of PacifiCorp's motions to decertify. (ER-1-25; ER-260-261; ER-510-511; ER-567-568.)

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).

FIFTH ASSIGNMENT OF ERROR

The trial court erred when it failed to grant judgment to PacifiCorp on the class claims, given the absence of evidence establishing 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. (*E.g.*, 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-937-982.) The trial court denied all of PacifiCorp's motions. (ER-260-261; ER-510-511; ER-567-568; ER-675-676.)

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").

COMBINED ARGUMENT ON FIRST THROUGH FIFTH ASSIGNMENTS OF ERROR

A. The Trial Court Erroneously Deprived PacifiCorp of Its Right to Challenge Causation as to These Phase II Plaintiffs.

The trial court made three critical choices that effectively prohibited PacifiCorp from raising any defense to causation. The trial court (1) granted summary judgment before all Phase II trials on PacifiCorp's causation-based defenses (ER-287-291; ER-442-445; ER-670; ER-874-875), (2) precluded evidence of other potential causes of class-member harm (ER-277-286; ER-446-455; ER-662-669; ER-822-831), 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 (ER-352-354; ER-363-364; ER-493-495; ER-505; ER-679-681; ER-690-91; ER-1040-1042; ER-1051-1052).

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, for example, 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 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.

The trial court's decision to structure this case as a bifurcated class action cannot deprive PacifiCorp of its right to present bona fide defenses. *See, e.g.*, *Bernard v. First Nat'l Bank of Or.*, 275 Or 145, 159, 550 P2d 1203 (1976) (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"); *Wal-Mart Stores, Inc. v. Dukes*, 564 US 338, 367, 131 S Ct 2541, 180 L Ed 2d 374 (2010) ("[A] class cannot be certified on the premise that [defendant] will not be entitled to litigate its statutory defenses to individual claims."). By preventing PacifiCorp from even mentioning the Beachie Creek Fire, the trial court prevented PacifiCorp

from showing that most or all of the sources of noneconomic damages—including burn damage to homes and trees, smoke and ash damage, loss of views or community, and evacuation-related harms like the stress of seeing fire along the highway—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-1040-1041.) That was error because the Phase I jury found that PacifiCorp was only ***a*** cause of ***some*** injury to class members. (ER-175-197.) 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.

Wagner's circumstances illustrate the fundamental problems with these errors and the prejudice that has flowed from it. Wagner lived on the southwestern edge of the class boundary directly in the path of the Beachie Creek Fire and in an area of the class boundary where no fires attributable to PacifiCorp's power lines were identified. (ER-649-661; ER-107; ER-125; ER-148.) Wagner did not own the property—his son did. (Tr-862:25-863:17.) Wagner's own damages primarily consisted of emotional distress from losing the ability to host family at the home (Tr-472:10-474:15, Tr-909:2-910:10), the loss of personal items such as baseball records, fishing equipment, and books, drawings, and blueprints (Tr-890:4-892:3, 902:9-903:2, 910:24-911:13), stress and inconvenience from evacuating (Tr-892:25-895:25), and lost privacy and views of trees, nature, and wildlife (Tr-888:22-889:10, 897:7-898:9). He also testified about the loss he felt from moving to a suburban area with limited access to nature. (Tr-906:12-19.)

The facts of Wagner's claim were first presented in this Phase II trial. Phase I had nothing to do with Wagner or his property and did not address his (or any class member's) evacuation experience or the loss of having to move to

a suburban area with less access to nature. And, critically, there was no evidence at Phase I of any utility-caused fire or ignition anywhere close to Wagner'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 damaged the property where Wagner resided. There was no evidence at any point in this case that PacifiCorp's conduct caused Wagner to evacuate, caused the damage to his son's property, or caused his loss of personal items or sense of community. Such evidence was essential, given the numerous different fires with numerous different causes burning in the vicinity of Wagner's home. Nevertheless, Wagner received over $10 million without establishing that ***PacifiCorp*** caused his damages. Without such evidence, PacifiCorp cannot be liable to Wagner. And even assuming such evidence existed, Oregon law and due process require that PacifiCorp have an opportunity to dispute the evidence and prove that the Beachie Creek mega-fire caused Wagner's evacuation, the property damage, and any emotional distress. A class action cannot be used to deprive a defendant of that right. *Bernard*, 275 Or at 159; *Wal-Mart*, 564 US at 367.

B. 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 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 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-175-197.) 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" on some portion of a parcel of land. (ER-105-113; 5/9/2023-Tr-3333:18-23, 3338:17-3339:22.)

The Phase I jury never heard evidence of, much less decided, which harms PacifiCorp caused for every class member. Nor could it have done so. Plaintiffs'

evidence of alleged PacifiCorp-caused harm consisted of, quite literally, disconnected dots within a limited area on a map. (ER-125; ER-148.) Whether PacifiCorp's conduct ignited a 50-foot grass fire near Gates, for example, would be irrelevant to whether PacifiCorp was liable to any member of the class miles away, upwind, and in a completely different town. But in advance of Phase II, the trial court effectively decided that jury question 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 court erroneously allowed Plaintiffs to pursue every other category of damages—including evacuation-related stress, loss of privacy and community, and emotional distress from smoke-damaged property—on the basis that the Phase I verdict conclusively established causation as to those 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). Plaintiffs offered evidence during Phase II of a range of injuries beyond "soil burn"—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 damages. (ER-1058-1066.) The result of that structure was a gaping hole between Phase I and Phase II, which the trial court filled with an instruction that resolved that jury question and deprived PacifiCorp of its right to defend itself.

For example, as discussed above, Wagner claimed damages for harm well beyond mere "soil burn," including evacuation-related distress, damage to trees, and loss of community. (*See* discussion *supra* at 20-21.) There was no proof at Phase I—or Phase II—that PacifiCorp caused these injuries, and thus no basis for awarding damages to Wagner for these types of injuries.

"[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 trial court did here to reconcile the Phase I verdict with the goal of limiting the scope of the Phase II trials.

C. The Trial Court Should Not Have Certified the Class and Should Have Decertified the Class After Phase I.

Plaintiffs brought this case as a class action consisting of thousands of people who live hundreds of miles apart, were affected by different fires with different causes, and were subject to distinct location-specific defenses. But Plaintiffs have *never* carried their burden of showing that common proof would resolve the questions of whether (1) PacifiCorp equipment started a particular fire, (2) the fire started because PacifiCorp acted negligently, and (3) the

negligently caused fire spread and caused damage to each class member's property. *See* A183140. Such classwide proof is *the sine qua non* of a class action, and Plaintiffs' complete failure to meet their burden means this case could not proceed as a class action. *See Wal-Mart*, 564 US at 348-50; ORCP 32 B.

This case's unfitness to proceed as a class action has become even more apparent as the parties have built a record that affirmatively ***exonerates*** PacifiCorp of causing any classwide damage. Plaintiffs have never been able to show (by common proof or otherwise) that PacifiCorp's negligence was the cause of classwide damage in the Santiam Canyon. As the evidence shows, and as ODF has concluded, there is "no evidence of powerline ignitions contributing to the spread of the fire in the Santiam Canyon." (ER-800.) Instead, ***lightning*** was responsible for causing the classwide damage in the Santiam Canyon.

ODF's conclusion should have prompted the trial court to at least reconsider its certification decision. For one thing, the Report is indisputably exhaustive. ODF was "statutorily mandated" to investigate the 2020 Labor Day wildfires "for the sole purpose of unbiased fact finding to determine origin, cause, [and] responsible party." *See Investigation and Cost Recovery Process*, available at https://www.oregon.gov/odf/fire/pages/investigations.aspx (last visited Dec. 15, 2025). In preparing its Report, ODF reviewed—among other things—numerous in-person observations from ODF personnel, nearly two

hundred witness interviews, thousands of documents and photographs, and much of the record from these *James* trials. (ER-790; ER-798-799.) And in carrying out its statutory duty, ODF "works hard" to identify and "collect costs from responsible parties" via civil litigation, which helps "alleviate the economic impacts of fire to landowners and taxpayers." *See Investigation and Cost Recovery Process*, *supra*. In fact, "most investigation reports are completed ***with the assumption that litigation is likely to occur***." *Id.* (emphasis added).

Despite that assumption, however, ODF found "no evidence of powerline ignitions contributing to the spread of the fire in the Santiam Canyon." (ER-800.) Instead of recommending litigation against PacifiCorp or holding PacifiCorp responsible, ODF fully exonerated PacifiCorp.

Despite a growing mountain of evidence that classwide adjudication of PacifiCorp's liability is impossible, the trial court has repeatedly refused to grant PacifiCorp's motions to decertify the class. Those denials, like the trial court's initial certification decision, are clearly erroneous. After all, decertification is necessary when the record even "suggests" that issues of liability, causation, and damages must be assessed with "individualized" rather than classwide inquiries. *Pearson v. Philip Morris, Inc.*, 358 Or 88, 114, 361 P3d 3 (2015); *Belknap v. U.S. Bank Nat'l Ass'n*, 235 Or App 658, 667, 234 P3d 1041 (2010) (class certification is not static); ORCP 32 C. And here, the evidence in the record—confirmed by an authoritative report from ODF—not only suggests, but

affirmatively shows, that PacifiCorp is ***not*** liable to all class members, and certainly cannot be proved liable to all of them using common proof, as both ORCP 32 and due process require. Faced with the ODF Report and the myriad examples of individualized issues, the trial court should have ***at least*** decertified the class, granted PacifiCorp's motion for directed verdict on any claims arising out of the Santiam Canyon, and then proceeded to try only the non-Santiam Canyon claims in Phase II trials going forward. But instead of doing that, the trial court adhered to its prior certification order, closing its eyes to a growing mountain of evidence and argument that called for the opposite result.

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

As PacifiCorp explained in the principal appeal (A183140), Plaintiffs failed to prove PacifiCorp caused classwide damage in the Santiam Canyon. So the Phase I classwide liability judgment (and derivative Phase II judgments) must fail.

Plaintiffs' failure to prove a PacifiCorp-caused fire impacted the entire class area is unsurprising and dispositive. As ODF determined, there is "no evidence of powerline ignitions contributing to the spread of the fire in the Santiam Canyon." (ER-800-802.) Instead, the "most probable explanation" was the Beachie Creek Fire. (ER-802.)

Zero witnesses testified that any utility fire damaged the eastern half or western end of the Santiam Canyon. Plaintiffs, recognizing this, ultimately moved to remove the eastern half of the Santiam Canyon from the class map. (ER-148.) But the court denied Plaintiffs' motion. So—by Plaintiffs' own admission—there is no evidence PacifiCorp caused any damages in half the class area. The mere ***possibility*** that a fire ***could*** have spread from PacifiCorp's equipment "is not enough to give rise to an inference" supporting a finding of causation. *State v. Olson*, 296 Or App 687, 692, 439 P3d 551 (2019). This requires decertifying the class and vacating the resulting limited judgments, including here.

SIXTH ASSIGNMENT OF ERROR

The trial court erred by giving the jury irrelevant, misleading, and confusing instructions regarding standards of culpability and the extent of PacifiCorp's liability in Phase I.

A. Preservation

PacifiCorp objected to Plaintiffs' proposed instructions before the first Phase II trials. (TCF-12/20/2023-Defendant's Objections to Plaintiffs' Proposed Jury Instructions; ER-301-304; ER-461-463.) The trial court included Plaintiffs' proposed instructions in instructions in Phase II, Trials 1 and 2, to which PacifiCorp excepted. (TCF-01/22/2024-Defendants' Submission re Draft Jury Instructions; 01/12/2024-Tr-1247:8-21; ER-338-350.) 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-577.) PacifiCorp renewed its objections and exceptions in this trial. (ER-994-1003; ER-1012.)

B. Standard of Review

Whether the trial court properly instructed the jury is a legal question reviewed for errors of law. *State v. Bistrika*, 262 Or App 385, 406, 324 P3d 584 (2014).

SEVENTH ASSIGNMENT OF ERROR

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

A. Preservation

PacifiCorp repeatedly sought to inform the jury that punitive damages had already been awarded against PacifiCorp and clarify the permissible scope of damages. (TCF-12/20/2023-Proposed Neutral Statement; TCF-12/20/2023-Jury Instructions (Special Instruction Nos. 20-21); TCF-01/14/2024-Proposed Jury Instructions (Special Instruction Nos. 16, 22); TCF-02/06/2024-Motion No. 5; TCF-02/15/2024-Proposed Jury Instructions; ER-305-307; ER-318-325; ER-471-473.) 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* ER-293-294; ER-295-297; ER-461-468; ER-471-473.) 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-577.) PacifiCorp objected to the trial court's refusal to give the instructions. (ER-317-331; ER-338-350; ER-475-491; ER-994-1003.)

B. Standard of Review

The trial court's refusal to give a jury instruction regarding the Phase I jury's award of punitive damages is reviewed for legal error. *Yeatts v. Polygon Nw. Co.*, 313 Or App 220, 229, 496 P3d 1060 (2021).

COMBINED ARGUMENT ON SIXTH THROUGH SEVENTH ASSIGNMENTS OF ERROR

The scope of damages in this trial should have been limited to compensating Plaintiffs. But the trial court made two instructional errors that confused and misled the jury—and had nothing to do with the jury's narrow task of awarding compensation. *First*, it instructed jurors in detail about PacifiCorp's liability in Phase I—repeatedly emphasizing that PacifiCorp was grossly negligent and highly culpable in causing the fires. Those issues had no bearing on Plaintiffs' compensatory damages in Phase II—and only invited the jury to punish PacifiCorp rather than merely compensate Plaintiffs. *Second*, the trial court rejected PacifiCorp's request for accurate instructions that would have provided a complete summary of Phase I and mitigated the harm arising from the other instructions. The court failed to instruct jurors that PacifiCorp had

already been punished in Phase I, and it failed to tell jurors that *only* economic and noneconomic injuries were at issue in this trial. These errors were prejudicial and pernicious—inviting the jury to punish PacifiCorp and award tens of millions of dollars in improper damages.

A. The Trial Court Erred by Instructing Jurors about Standards of Culpability and PacifiCorp's Liability in Phase I.

Irrelevant jury instructions "risk[ ] confusing or misleading the jury by suggesting to it that the [instruction] bears on the jury's deliberation." *Leonard v. Moran Foods, Inc.*, 269 Or App 112, 131, 343 P3d 693 (2015). Here, the trial court confused jurors by instructing them about PacifiCorp's liability in Phase I and defining various standards of culpability (e.g., "negligence," "recklessness," and "gross negligence"). Those instructions were irrelevant to the jury's sole task—determining Plaintiffs' compensatory damages—and encouraged jurors to punish PacifiCorp.

A jury instruction invites error when it encourages the jury to award damages based on improper or irrelevant considerations. *Honeywell v. Sterling Furniture Co.*, 310 Or 206, 211-12, 797 P2d 1019 (1990). *Holger v. Irish*, 316 Or 402, 851 P2d 1122 (1993), is illustrative. In *Holger*, the trial judge committed reversible error by instructing jurors about a plaintiff's settlement with a non-party—a fact with no bearing on the scope of damages in that case. *Id*. at 415. True, the plaintiff had settled the prior case. But prejudice—not accuracy—is

the standard for irrelevant jury instructions. And there, because information about the settlement "could have * * * encouraged" jurors to "conclude that plaintiff had [already] been compensated fully for the claimed injury," it distracted "from the appropriate line of analysis" and required reversal. *Id.*

Although the jury here should have considered only the scope of Plaintiffs' injuries when awarding damages, the trial court distracted jurors by instructing them about PacifiCorp's culpability. For example, the trial court devoted an entire page of instructions to explaining that PacifiCorp's "conduct was willful" and "reckless as to the entire class," and that PacifiCorp's "gross negligence was the cause of harm to the entire class." (ER-1040-1041.) It also instructed jurors on the legal definition of those standards of culpability. (ER-1050-1051.) Those instructions encouraged an award based on improper considerations and should be reversed.

First, the instructions were irrelevant. The exact contours of ***how*** PacifiCorp "caused" the wildfires had no bearing on the scope of Plaintiffs' damages in this proceeding. Nor was the degree of PacifiCorp's culpability relevant to compensatory damages.

Second, the instructions distracted jurors "from the appropriate line of analysis" in this trial—determining Plaintiffs' compensatory damages. *Holger*, 316 Or at 415. A "number of jurors" in the Phase II trials have already "expressed confusion when [a] slide was shown [defining] recklessness, gross

negligence, et cetera." (Tr-20:3-11.) And there is no wonder why. After all, jurors assume they are given instructions for a reason. *Leonard*, 269 Or App at 131. And here, "compensatory damages" for noneconomic harms "***already*** contain [a] punitive element"—making standards of culpability appear especially relevant, even though they are not. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 US 408, 426, 123 S Ct 1513, 155 L Ed 2d 585 (2003) (emphasis added).

Plaintiffs' closing argument—made over PacifiCorp's objections, but consistent with Plaintiffs' closings in the previous Phase II trials—underscored the misleading and confusing picture painted by the trial court's instructions by further encouraging jurors to punish PacifiCorp.

> Judge Alexander is giving you the law here in these instructions and then you're the ones that apply that to the facts and decide what justice is. * * * So when a major corporation in Oregon is found to have acted negligently, willfully, grossly negligent, recklessly, committed trespass, nuisance and cause harm, * * * they must be held fully accountable by the citizens of this state.

(Tr-1182:23-1183:7; *see also* 01/22/2024-Tr:1531:6-1532:17.)

The trial court never articulated, much less justified, why jurors should be instructed about the exact contours of PacifiCorp's liability in Phase I—issues that were completely irrelevant to the jury's verdict. Outlining and emphasizing the level of PacifiCorp's culpability "could have" distracted jurors and

"encouraged" them to punish PacifiCorp rather than compensating Plaintiffs. *Holger*, 316 Or at 415.

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

The trial court compounded the instructional errors above by failing to instruct the jury (1) that PacifiCorp had already been punished with punitive damages and (2) that it was limited to compensating Plaintiffs (rather than punishing PacifiCorp).

"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 the requested instructions.

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, that prejudice was palpable: the jury was openly invited to punish PacifiCorp. 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. And by refusing to "tell the jury that" its irrelevant instructions were "inapplicable" to Plaintiffs' scope of damages, the trial court increased the risk of jury "confusion" and committed reversible error. *See Leonard*, 269 Or App at 131.

PacifiCorp was entitled to jury instructions that were clear, accurate, and avoided confusion and attempts to mislead the jury with irrelevant considerations. The trial court should have told the jury PacifiCorp had already been punished for the acts the jury instructions described. And it should have also told the jury that it was to consider compensating Plaintiffs only when awarding damages. Because jurors received no such guidance, they were left to assume they should do ***something*** with their instructions about PacifiCorp's heightened culpability in Phase I. Plaintiffs validated those assumptions by telling the jury ***exactly*** what to do: hold PacifiCorp "accountable." That reversible—and preventable—error was only exacerbated by the errors discussed below—especially allowing Plaintiffs to claim unlimited noneconomic damages through emotional distress testimony designed to maximize jurors' sympathy and willingness to punish PacifiCorp.

EIGHTH 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-378-441; ER-512-566.) The trial court denied all motions. (ER-260-261; ER-510-511; ER-567-568.) PacifiCorp filed motions for directed verdict—incorporating its previously-decided arguments in Phase I trial and Phase II, Trials 1 and 2, regarding the unavailability of noneconomic damages. (ER-937-982.) Those motions were deemed denied. ORCP 63 B, D(1).

B. Standard of Review

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

NINTH ASSIGNMENT OF ERROR

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

A. Preservation

In Phase I, the trial court rejected PacifiCorp's directed verdict motion on noneconomic damages, 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-7994-7999, 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-338-350; ER-475-491.) 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-577.) PacifiCorp renewed and incorporated all of its prior exceptions to instructions in this trial. (ER-994-1003.)

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).

TENTH ASSIGNMENT OF ERROR

The trial court erred when it denied PacifiCorp's request for jury instructions explaining 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; ER-307-308.) PacifiCorp expressly noted its objections to the instructions given and not given in all Phase II trials. (ER-338-350; ER-475-491; ER-994-1003.)

B. Standard of Review

The court reviews the refusal to give a requested jury instruction for errors of law. *Yeatts*, 313 Or App at 229.

ELEVENTH 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-262-276.) 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-577.)

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 EIGHTH THROUGH ELEVENTH ASSIGNMENTS OF ERROR

No case or principle supports the award of tens of millions of dollars in noneconomic damages for the property damage here. *First*, the class was not

entitled to any noneconomic damages—which were barred by the wildfire-damages statute and unavailable under the common law. *Second*, the specific noneconomic damages here—which include noneconomic damages for everything from lost views to injured animals—were unbounded and violate Oregon law.

A. The Trial Court Erred by Permitting Recovery of Any Noneconomic Damages for the Property Claims Here.

The limited judgment awarded $34 million in noneconomic damages for alleged emotional harms resulting from property damage caused by unintentional wildfires—over ***ten times*** the value of the economic damages awarded. As PacifiCorp has argued in the principal appeal (A183140), these noneconomic damages are unprecedented and unlawful—and they should be vacated in their entirety for two independent reasons.

First, Oregon's wildfire-damages statute bars the claims for noneconomic damages. The 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) (permitting "twice the amount of economic and property damages" for gross negligence and recklessness). Because Plaintiffs' claims in this case arise solely from wildfire damage to property, the wildfire-damages statute mandates that the "exclusive remedies" for such damages are

"economic and property damages" (and no more than "twice" the amount of such damages—even assuming that PacifiCorp was grossly negligent or reckless).

Second, Oregon common law does not permit noneconomic damages for property damages caused by unintentional wildfire damages—and every Oregon court to consider the issue has rejected such damages. *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., LLC*, 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.) (same). As PacifiCorp has explained in earlier appeals, the noneconomic damages in this case—threatening to impose billions of dollars for emotional harm from unintentional property damage—lack any foundation in Oregon precedent, conflict with Oregon noneconomic damages law, and threaten significant mischiefs and runaway consequences in Oregon law if left uncorrected.

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 with proper evidentiary exclusions and proper jury instructions.

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, the trial court nevertheless instructed jurors to consider "inconvenience and interference with the plaintiffs' normal and usual activities" anyway. (Tr-1179:17-23.) Plaintiffs were permitted to testify about the inconvenience and interference from the fires—including from being displaced, being forced to clean up or repair fire damage, and other ongoing interference in their daily lives. (*See, e.g.*, Tr-397:15-400:25, 546:8-549:1 (Dake) (multiple moves, trouble sleeping); Tr-781:13-782:7 (Hall) (temporary lack of electricity and running water).) And Plaintiffs were repeatedly allowed to cite inconvenience and interference as bases for noneconomic damages—including at the close of trial. (*See, e.g.*, Tr-1213:5-19 (Dake); Tr-1225:4-1227:11 (Pfohl).) Because these noneconomic damages were impermissible, *Meyer*, 60 Or App at 80 n.6, the trial court's decisions here—permitting the jury to consider such damages, allowing

evidence on such damages, and refusing to instruct the jury that such damages were prohibited—require granting 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."). But here, Plaintiffs were allowed to focus on harm to animals to support their sweeping noneconomic damages awards. Plaintiffs sought noneconomic damages based on the loss of animals. (*See, e.g.*, Tr-1210:11-23 (Pfohl's cat).) Plaintiffs even sought noneconomic damages based on animals they did not own—such as feral cats (Tr-568-570, 592-593 (Dake)), or wild deer, elk, and turkey (Tr-1191:11-18 (Wagner).) No Plaintiff was entitled to noneconomic damages for emotional distress resulting from the loss of an animal—including animals they did not own. Because the trial court

impermissibly allowed jurors to consider and award noneconomic damages for harm to animals, PacifiCorp is entitled to a new trial.

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. *See, e.g.*, *Lockett*, 182 Or App at 382-83; *see also, e.g.*, ORS 477.089(1), (4) ("economic and property damages" are the "exclusive remedies for damages * * * to property caused by a wildfire"). Here, however, Plaintiffs focused extensively on emotional distress associated with the loss of property—making repeated references to the sentimental value of everything from vacation souvenirs to fishing equipment. (*See*, *e.g.*, Tr-578:3-581:22 (Dake) (pictures, baby clothes, travel souvenirs, including rugs, beads, and shawls, and jewelry); Tr-890:4-892:3, 902:3-20 (Wagner) (pictures, school records, books, fishing equipment, books, drawings, posters); Tr-840:21-822:6 (Wick) (coin and marble collections); Tr-1117:2-1119:24 (Pfohl) (picture of her mother, engagement ring, marble bust).) Noneconomic damages were unavailable for the subjective and varied harms arising from the personal and real property damage alleged here—and PacifiCorp is entitled to a new trial.

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 the noneconomic damages award was predicated on the loss

of identity from the alleged property damages. Plaintiffs repeatedly testified about "identity" harms from losing their property—and their lawyers repeatedly drove that point home to the jury. (*See, e.g.*, Tr-543 (house and property were "part of [Dake's] identity"); Tr-1220:17-122-12.) Plaintiffs also repeatedly asserted "community" harms—and "one of [the] greatest losses" alleged here was "the loss of * * * community." (Tr-462:10-11, 542:1-22 (Dake) (sense of community); *see also, e.g.*, Tr-348:2-8 (Pfohl) ("she hasn't been able to rebuild the community she had," which "can't be replaced").) Because these "identity" and "community" harms were impermissible, the trial court erred by permitting the jury to consider and award damages for such harms—entitling PacifiCorp to a new trial.

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—absent any physical injury. *See Philibert v. Kluser*, 360 Or 698, 703-04 385 P3d 1038 (2016); *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. (*See, e.g.*, Tr-563:17-572:21 (Dake); Tr-892:25-895:25 (Wagner); Tr-1104:6-1105:6 (Pfohl).) None of these asserted harms of stress or fear from evacuating should

have been heard by the jury or formed a basis for recovery. PacifiCorp is entitled to a new trial.

6. *Loss of Aesthetic Value of Land and Recreation.* Oregon law does not permit recovery of noneconomic damages arising out of harm to the aesthetic or recreational value of real property. To start, 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). Wagner, for example, testified to injuries resulting from the loss of recreational features of the property (e.g., a fishing hole) as well as the aesthetic value of the property (e.g., trees and animals). But Wagner did not own the property—his son did—and the trial court erred by permitting recreational and aesthetic damages untethered from "ownership of the land." *Kline*, 207 Or at 181.

Moreover, ownership aside, there is no right to noneconomic damages for aesthetic and recreational property-based harms. *Philibert*, 360 Or at 708; *see also Moody v. Oregon Cmty. Credit Union*, 371 Or 772, 785, 542 P3d 24 (2023). Permitting recovery for such damages would risk the type of "unlimited claims or damages" that Oregon courts have taken pains to prevent—and Plaintiffs provide no justification for newly recognizing such damages now. Several Plaintiffs testified to recreational and aesthetic damages arising from property—in violation of Oregon law. (*See, e.g.*, Tr-395:23-396:20 (Dake) (burned trees); Tr-888:20-889:10 (Wagner) (burned trees and lost wildlife).) Those

noneconomic damages were unavailable under Oregon law—and they should have been excluded from the jury's consideration and award of noneconomic damages.

TWELFTH ASSIGNMENT OF ERROR

The trial court erred by failing to exclude inadmissible expert testimony regarding "ornamental tree" economic damages, resulting in duplicative and unauthorized damages.

A. Preservation

PacifiCorp opposed "ornamental tree" damages and moved to exclude testimony on such damages, but the trial court overruled the objection. (TCF-03/26/2024-Defendants' Bench Memorandum In Support of Exclusion of Plaintiffs' Expert; Tr-620-31.)

B. Standard of Review

The trial court's admission of expert testimony as relevant is reviewed for legal error. *State v. Akins*, 373 Or 476, 482, 568 P3d 174 (2025).

ARGUMENT ON TWELFTH ASSIGNMENT OF ERROR

The trial court erred by allowing Plaintiffs Dake, Huber, and Pfohl to double count the value of lost ornamental (i.e., non-timber) trees in addition to the loss of value to real property—which necessarily already factored in the lost trees. These damages were barred by statute and supported only by inadmissible expert testimony.

Plaintiffs presented two experts on economic damages who gave overlapping evidence Plaintiffs treated as distinct. *First*, Charles Lamunyan provided two different measures of Plaintiffs' property damages: the diminution in fair market value after the fire, or alternatively, the cost to restore the property to its former condition. (Tr-643:1-644:6.) *Second*, David Braun testified regarding the cost to replace the ornamental trees on the property. (*See* Tr-692:5-694:13.) Plaintiffs requested Braun's estimated damages ***in addition to*** Lamunyan's. (Tr-1204:11-1205:7 (urging the jury to award additional damages for ornamental tree damage).)

Plaintiffs' approach is irreconcilable with ORS 477.089, which provides the "exclusive remedies" for wildfire property damages. It authorizes recovery of "economic and property damage," defined as "***the sum of***":

> (A) The lesser of the difference in the fair market value of property immediately before and immediately after a wildfire or the cost of restoring property to the condition the property was in immediately before a wildfire; ***and***
>
> (B) Any ***other*** objectively verifiable monetary losses.

ORS 477.089(1)(a) (emphases added). The statute accordingly provides a two-step calculation for damages with subsection (A) and subsection (B) covering distinct categories. Since damages are the "sum" of both categories and subsection (B) is limited to "other" losses, subsection (B) necessarily excludes

damages already subsumed in subsection (A). *See Groshong v. Mut. of Enumclaw Ins. Co.*, 329 Or 303, 312, 985 P2d 1284 (1999) (defining "other" as "distinct from the one or those first mentioned").

The trial court, however, let Plaintiffs add ornamental tree damages into subsection (B) when those losses were necessarily accounted for in subsection (A). It is blackletter law that "[s]tanding timber is a part and parcel of the real property and is considered of itself as real property until severed from the soil." *Hink v. Bowlsby*, 199 Or 238, 243, 260 P2d 1091 (1953). And here, subsection (A) covers all losses to real property: a property's "fair market value" must be ascertained by "an individual who has been certified as a state certified appraiser under ORS 674.310." *See* ORS 477.089(1)(b), (d). In turn, ORS 674.310 governs "real estate appraisals." ORS 674.310(1)(a). Moreover, the legislature borrowed subsection (A)'s framework—taking the lesser value of the property's diminution in value or the cost of restoration—from eminent domain caselaw, which has long valued condemned real estate that way. *See Tunison v. Multnomah Cnty.*, 251 Or 602, 604, 445 P2d 498 (1968). Accordingly, any tree-based damages belonged exclusively under subsection (A) as part of the calculation of "the lesser of" the property's diminution in fair market value or the cost of restoration.

Braun conceded he was not testifying as a certified appraiser, as required under subsection (A). (Tr-727:1-7.) In fact, he emphasized his damages

calculations were separate from Lamunyan's fair-market-value testimony, which reflected "what people are willing to pay for a similar, equivalent, or adjusted value property." (Tr-742:7:743:1.) The result was that Plaintiffs asked the jury for *both* "the lesser of" damages to real property under subsection (A) ***and*** ornamental tree damages under subsection (B) even though trees are part of real property. *See Tunison*, 251 Or at 604. Plaintiffs' approach is equivalent to valuing a house first, then adding "ornamental" windows, doors, or other fixtures to that amount as though those items would be purchased separate from the house itself—a form of double-counting clearly barred by ORS 477.089, law, and appraisal practice.

The results speak for themselves. Plaintiffs' experts told the jury that Dake, Huber, and Pfohl's non-timber trees were worth nearly as much as the damages to their ***entire real property***:

Ornamental Tree Damages		
Plaintiff	**Subsection (A) Damages (Lamunyan)[2]**	**Subsection (B) Damages (Braun)[3]**
Huber	$142,022	$136,456
Dake	$260,000	$179,074
Pfohl	$155,855	$95,386

[2] ER-891
[3] ER-890.

And during closing arguments, Plaintiffs expressly told the jury that damages for trees qualify as "other objectively verifiable monetary losses" under subsection (B) and urged the jury to award separate damages for them. (Tr-1204:11-14].) Failure to exclude Braun's testimony—the sole basis for Plaintiffs' ornamental tree damages—was error. *Phomvongsa by Phomvongsa v. Phounsaveth*, 72 Or App 518, 521, 696 P2d 567 (1985).

THIRTEENTH ASSIGNMENT OF ERROR

The trial court erred by awarding "retail-replacement value" damages.

A. Preservation

PacifiCorp consistently argued that "retail replacement value" is not a proper measure of damages for personal property and that evidence of retail replacement value should not be permitted. (TCF-05/16/2023-Directed Verdict Motion; TCF-08/11/2023-JNOV Motion; TCF-12/13/2023-Motion in Limine No. 14.) The trial court denied all attempts to exclude retail replacement value evidence. (ER-260-261; ER-268-269; 01/12/2024-Tr-1266:9-1267:6.) In CMO No. 10, the trial court stated that, for future Phase II trials, motions in limine "must be limited" to new evidentiary issues and directed the parties to use the same jury instructions for future Phase II trials. (ER-577.)

B. Standard of Review

The proper measure of damages is a question of law. *Smith v. Pallay*, 130 Or 282, 288, 279 P 279 (1929); *see also Stewart v. Albertson's, Inc.*, 308 Or App 464, 485, 481 P3d 978 (2021).

ARGUMENT ON THIRTEENTH ASSIGNMENT OF ERROR

The trial court committed reversible error by permitting Plaintiffs to seek "retail replacement value" economic damages. Under ORS 477.089, the "exclusive remedies for damages or injury to property caused by a wildfire" are "economic and property damage(s)." ORS 477.089(1), (4). And "where property is destroyed, the measure of damages is generally the market value of the property." *Portland Gen. Elec. Co. v. Taber*, 146 Or App 735, 739, 934 P2d 538 (1997); *Barber v. Motor Inv. Co.*, 136 Or 361, 366, 298 P 216 (1931) (same). Market value accounts for personal property's used condition by allowing recovery of only the difference between the property's value immediately before and immediately after it was damaged. *Mock v. Terry*, 251 Or 511, 512, 446 P2d 514 (1968). Without that limitation, many claimants would recover an unjust windfall. For example, a plaintiff with used tools and equipment—valued at no more than a few hundred dollars—could recover thousands of dollars to purchase new replacements.

Despite this well-established rule, the trial court permitted Plaintiffs to pursue ***retail*** replacement value for their personal property losses. Retail value,

unlike market value, does ***not*** account for the personal property's used condition. To prevent an unjust windfall, courts have permitted the recovery of retail value only when a plaintiff can "prove that [retail value] would have been realized if defendant had not damaged his property." *See Mock*, 251 Or at 513. For example, although a new vehicle will typically lose value as soon as it is purchased, in an action to recover for a stolen vehicle, a dealership will typically be able to recover the full retail amount of the stolen property by proving that but for the theft of the car, the dealership would have received the car's full retail value. *See Krause v. Eugene Dodge, Inc.*, 265 Or 486, 511, 509 P2d 1199 (1973). "[I]n the absence of such proof, such items of damage are not recoverable." *Mock*, 251 Or at 513.

Neither Plaintiffs nor their experts ever tried to explain how or why any class member would have received full retail value but for the fires. Yet the trial court allowed Plaintiffs to pursue retail replacement damages anyway. As a result, Plaintiffs were able to recover damages that far exceeded what their personal property was actually worth.

FOURTEENTH 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; 10/13/2023-Tr-1376:25-1378:22), and it expressly renewed its prior objections here (Tr-1331:20-1332:12).

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).

FIFTEENTH 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 double damages under ORS 477.089 because it was a question for the jury (TCF-09/11/2023-Defendants' Opposition; 10/13/2023-Tr-1376:25-1378:22), and it expressly renewed its prior objections here (Tr-1331:20-1332:12).

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 FOURTEENTH AND FIFTEENTH ASSIGNMENTS OF ERROR

The trial court erred in awarding double damages under ORS 477.089 because (1) that determination should have been left to the jury and (2) the damages duplicated, and therefore were mutually exclusive with, the punitive damages.

A. 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). As PacifiCorp has explained (A187954), 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." The key word is "recoverable," which indicates that the statute provides only a ***potential recovery*** of double damages (not a guaranteed one) that must be ***granted by the jury*** (not the trial court). *See Bixler v. First Nat'l Bank of Or.*, 49 Or App 195, 201, 619 P2d 895 (1980) (damages "withdrawn from jury" when "not recoverable").

"[O]ther related statutes" use unmistakably mandatory language when they task the court to award such damages. *Oakleigh-McClure Neighbors v. City of Eugene*, 269 Or App 176, 183, 344 P3d 503 (2015); *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). "[W]hen the legislature wants to" assign that function to the court, "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—and the trial court usurped the jury's function by doubling damages itself.

B. The Double Damages Were Duplicative.

The award of double damages under ORS 477.089 erroneously allowed Plaintiffs to double dip on penal, non-compensatory damages for the same injury—as PacifiCorp has explained (A187954). When a statute imposes multiplied 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]"). And a plaintiff cannot receive "duplicative" remedies for the same wrong—instead, the plaintiff must elect his choice of remedy. *State ex rel. Washington Cnty. v. Betschart*, 72 Or App 692, 700, 697 P2d 206 (1985).

Here, Plaintiffs' punitive damages and double damages were double punishment. The wildfire-damages 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. But Plaintiffs already received a 25% punitive damages multiplier of their 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. The trial court erred by imposing double damages that were duplicative of the punishment already imposed by the Phase I jury.

VI. CONCLUSION

For the above reasons, the limited judgment should be reversed.

DATED: January 6, 2026

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CERTIFICATE OF COMPLIANCE

The court granted a motion to exceed the length limit for this opening brief. The order granting that motion was dated December 23, 2025, and permits an additional 1,500 words. I certify that the brief complies with the Order, which word count is 11,406 words.

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

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CERTIFICATE OF FILING AND SERVICE

I certify that on January 6, 2026, I filed the original of this **APPELLANTS PACIFICORP AND PACIFIC POWER'S OPENING BRIEF AND EXCERPT OF RECORD** with the Appellate Court Administrator by the Court of Appeals' eFiling system.

I further certify that on January 6, 2026, I caused true copies of this **APPELLANTS PACIFICORP AND PACIFIC POWER'S OPENING BRIEF AND EXCERPT OF RECORD** to be served on the following parties listed via e-service on the Oregon Court of Appeals website and via email.

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Cody Berne
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I further certify that on January 6, 2026, I caused true copies of this **APPELLANTS PACIFICORP AND PACIFIC POWER'S OPENING BRIEF AND EXCERPT OF RECORD** to be served on the following persons at the following addresses via U.S. First Class Mail and via email.

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