IN THE SUPREME COURT OF THE STATE OF OREGON

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

Petitioners on Review,

and

MARY KATHLEEN BECHERER, *et al.*,

Plaintiffs,

and

OREGON DEPARTMENT OF JUSTICE,

Creditor,

v.

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

Respondents on Review.

SC No. S072933

CA No. A183140

Multnomah County Circuit Court Case No. 20CV33885

RESPONDENTS' ANSWERING BRIEF

Review of the Decision of the Court of Appeals
on Appeal from the Limited Judgments of the
Multnomah County Circuit Court
The Honorable Steffan Alexander

Date of Court of Appeals Decision: April 8, 2026
Author of Decision: JOYCE, J.
Concurring in Opinion: ORTEGA, P.J.; HELLMAN, J.
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September 2026

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Page

INDEX OF CONTENTS

INTRODUCTION 1

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW 7

STATEMENT OF FACTS AND PROCEDURAL HISTORY 8

I. PacifiCorp And Its Wildfire Mitigation Program. 8

II. Labor Day 2020.....9

III. Plaintiffs' Complaint And Class Certification. 11

A. The 242, South Obenchain, And Echo Mountain Complex Fire Areas. 12

B. The Santiam Canyon Fire Area. 13

IV. The Phase I Trial. 18

A. Plaintiffs' Santiam Canyon Evidence. 18

B. Plaintiffs' Shifting Theories And Attempts To Address Their Failure Of Common Proof. 24

V. Plaintiffs' Requested Jury Instruction. 25

VI. The Trial Court Verdicts And PacifiCorp's Appeals.....28

VII. The Court Of Appeals Reverses The Trial Court. 29

SUMMARY OF ARGUMENT 30

ARGUMENT 31

I. The Trial Court Erred In Instructing The Jury That It Could "Assume That The Evidence At The Trial Applies To All Class Members." 31

A. The Instruction Was Legally Erroneous. 32

1. Material Variations Within The Fire Areas.....33

2. Material Variations Across Fire Areas. 45

3. The Instruction Violated Due Process. 47

B. None Of Plaintiffs' Defenses Of The Instruction Have Merit. 48

1. The Trial Court's Decision To Certify The Class Does Not Validate The Instruction. 49

2. The California Pattern Instruction Has Never Been Used In A Wildfire Class Action And Was Not Appropriate Here. 50

3. Plaintiffs' Remaining Arguments Should Be Rejected. 53

II. The Improper Instruction Prejudiced PacifiCorp. 57

A. An Instruction Is Prejudicial If There Is "Some Likelihood" The Jury Reached An Erroneous Result. 58

B. There Is Some Likelihood That The Trial Court's Erroneous Instruction Caused The Jury To Reach An Erroneous Result. 60

C. Plaintiffs' Prejudice Arguments Do Not Withstand Scrutiny. 62

CONCLUSION 65

INDEX OF AUTHORITIES

Page(s)

Cases

Amchem Prods., Inc. v. Windsor,
521 US 591, 117 S Ct 2231, 138 L Ed 2d 689 (1997) 52

Bernard v. First Nat'l Bank,
275 Or 145, 550 P2d 1203 (1976) 5, 49, 55

Bjorndal v. Weitman,
344 Or 470, 184 P3d 1115 (2008) 59

Bradford v. Union Pac. R.R. Co.,
2007 WL 2893650 (WD Ark Sept 28, 2007) 52

In re Bridgestone/Firestone, Inc.,
288 F3d 1012 (7th Cir 2002) 46

Brooks v. Bergholm,
256 Or 1, 470 P2d 154 (1970) 32

Castano v. Am. Tobacco Co.,
84 F3d 734 (5th Cir 1996) 46

Clippinger v. State Farm Auto. Ins. Co.,
173 F4th 817 (6th Cir 2026) 56, 7

Comcast Corp. v. Behrend,
569 US 27, 133 S Ct 1426, 185 L Ed 2d 515 (2013) 50

Downing v. San Diego Gas & Elec. Co.,
2010 WL 4233033 (Cal Ct App Oct 27, 2010) 44

Duran v. U.S. Bank Nat'l Ass'n,
59 Cal 4th 1, 325 P3d 916 (2014) 47

Elan v. Tate,
294 Or App 76, 430 P3d 179 (2018) 59, 61

In re Fibreboard Corp.,
893 F2d 706 (5th Cir 1990) 53

Haas v. Estate of Carter,
316 Or App 75, 502 P3d 1144 (2021) 17, 35

Hadley v. Extreme Techs., Inc.,
272 Or App 49, 355 P3d 132 (2015) 63

Hurt v. Midrex Div. of Midland Ross Corp.,
276 Or 925, 556 P2d 1337 (1976) 51

James v. PacifiCorp,
348 Or App 347, 590 P3d 618 (2026) .....*passim*

Joshi v. Providence Health Sys.,
342 Or 152, 149 P3d 1164 (2006) 35

Kizer v. Tristar Risk Mgmt.,
13 Cal App 5th 830, 221 Cal Rptr 3d 207 (2017) 51

Lindsey v. Normet,
405 US 56, 92 S Ct 862, 31 L Ed 2d 36 (1972) 2

Off. of Gen. Treasurer ex rel. Emps. Ret. Sys. v. Boeing Co.,
182 F4th 422 (4th Cir 2026) 57

Pearson v. Philip Morris, Inc.,
358 Or 88, 361 P3d 3 (2015) 3, 49, 52, 54

Perkin v. San Diego Gas & Elec. Co.,
225 Cal App 4th 492, 170 Cal Rptr 3d 335 (2014) 52

Purdy v. Deere & Co.,
311 Or App 244, 492 P3d 99 (2021) 8, 60, 61, 65

Purdy v. Deere & Co.,
355 Or 204, 324 P3d 455 (2014) *8,* 31, 32, 50, 57, 58, 60, 61, 64, 65

Saldana v. City of Camden,
252 NJ Super 188, 599 A2d 582 (App Div 1991) 52

Sherertz v. Brownstein Rask,
288 Or App 719, 407 P3d 914 (2017) 59

Shoup v. Wal-Mart Stores, Inc.,
335 Or 164, 61 P3d 928 (2003) 58

State v. Berry,
293 Or App 717, 429 P3d 1011 (2018) 60

State v. Hayward,
327 Or 397, 963 P2d 667 (1998) 7, 32

State v. Keegan,
349 Or App 1, 591 P3d 714 (2026) 64

State v. Knepper,
62 Or App 623, 661 P2d 560 (1983) 32

State v. Pine,
336 Or 194, 82 P3d 130 (2003) 59

State v. Wiltse,
373 Or 1, 559 P3d 380 (2024) 41

Strawn v. Farmers Ins. Co.,
350 Or 336, 258 P3d 1199 (2011) 7, 33, 46, 49, 53, 56, 65

Tyson Foods, Inc. v. Bouaphakeo,
577 US 442, 136 S Ct 1036, 194 L Ed 2d 124 (2016) 52

In re Urethane Antitrust Litig.,
768 F3d 1245 (10th Cir 2014) 50

Wal-Mart Stores, Inc. v. Dukes,
564 US 338, 131 S Ct 2541, 180 L Ed 2d 374 (2011) 47, 50

Wallach v. Allstate Ins. Co.,
344 Or 314, 180 P3d 19 (2008) 8, 31, 58, 59, 60, 64

Williams v. Portland Gen. Elec. Co.,
195 Or 597, 247 P2d 494 (1952) 32

Statutes

ORS 1.735(1) 49, 50

Other Authorities

CACI No. 115 ..... 26, 50, 51

Edison Int'l & S. Cal. Edison Co., Current Report (Form 8-K) (Jan 22, 2021). 56

Fed R Civ P 23(b)(3) 52

Fire Victim Trust, *Latest Progress*,
https://www.firevictimtrust.com 55

Kupfner v. Xcel Energy, Inc., No 2022CV30195 (Colo Dist Ct, Boulder Cnty) (settlement announced Sept 24, 2025) 55

Letter from Reuben A. Ginsburg, Chair, Jury Instructions Comm., State Bar of Cal. Litig. Section, to Judicial Council of Cal. 1-2 (Mar 3, 2011) 51

ORCP 32 49

Press Release, PacifiCorp, *PacifiCorp Announces Settlement of All Federal Claims for Damages from 2020 Labor Day Wildfires and 2022 McKinney Fire* (Feb 20, 2026) 55

Press Release, S. Cal. Edison, *SCE Resolves All Insurance Subrogation Claims for the Thomas and Koenigstein Fires and Montecito Mudslides* (Sept 23, 2020) 55

User Guide, in Judicial Council of California Civil Jury Instructions (2026 ed) 50, 51

Xcel Energy Inc., Current Report (Form 8-K) (Sept 24, 2025) 55

Xcel Energy Inc., Quarterly Report (Form 10-Q) (Q3 2025)..... 55

INTRODUCTION

The trial court had no basis in Oregon law to give an instruction allowing the jury in this case to "assume that the evidence at the trial applies to all class members." No court has given that jury instruction in any case remotely resembling this one. The Court of Appeals was correct to reverse.

This case arises from four fire areas—arbitrarily identified based on the 17 major wildfires and hundreds of smaller fires—that burned in Oregon during a once-in-a-lifetime windstorm and unprecedented dry conditions on Labor Day 2020. Those fires had many different causes, including the lightning-caused Beachie Creek megafire, which devastated the Santiam Canyon and surrounding areas. Yet Plaintiffs asked the trial court to try this case as a single class action, claiming that PacifiCorp caused *all* fire-related damages to *every* piece of real and personal property—and a panoply of noneconomic damages purportedly flowing from that loss of property—within four geographic boundaries covering a combined 91,000 total acres (i.e., an area roughly three times the size of Eugene) and in areas separated by as many as 200 miles (i.e., from the edges of Lincoln County to the edges of Klamath County).

After improperly certifying all these claims in a single class action, the trial court erroneously told jurors that they could "assume that the evidence at the trial applies to all class members." That instruction violated Oregon law. It ignored critical differences between and within the fire areas. It excused

Plaintiffs from their burden to prove each and every claim. And it prejudiced PacifiCorp's due process right "to present every available defense." *Lindsey v. Normet*, 405 US 56, 66, 92 S Ct 862, 31 L Ed 2d 36 (1972).

No court *anywhere* has *ever* tried as a single class action a case involving multiple wildfires with distinct causes and legal theories. Courts and litigants have long understood that individual issues predominate in such cases, demanding a parcel-by-parcel analysis of which fires burned which properties. Plaintiffs have not cited a single wildfire case that was certified as a class action or that gave the jury instruction at issue here, much less a wildfire case as complex and dispersed as this one.

Instructing the jury in a case such as this to "assume that the evidence at the trial applies to all class members" was as erroneous as it was unprecedented. This case involves four separate fire boundaries, many separate fires within those areas, a lightning-caused megafire (the Beachie Creek Fire) that indisputably burned through one of the areas (the Santiam Canyon), different theories applicable to different areas, and even different causation standards. Allowing the jury to assume away material differences *between* and *within* the fire areas—particularly in the Santiam Canyon—was improper. The Santiam Canyon did not involve a single point of ignition that spread to a defined area. And it was undisputed (and confirmed by the Oregon Department of Forestry) that the pre-

existing, lightning-caused Beachie Creek Fire burned the Santiam Canyon. (ER-848-50.)

Plaintiffs nonetheless argued that PacifiCorp damaged the entire 70-plus-square-mile canyon because (1) its equipment allegedly started a handful of spot fires at various scattered locations; (2) some witnesses claimed to observe some powerline activity (sparks or a downed line) at specific locations; (3) some firefighters were purportedly "diverted" from stopping the Beachie Creek Fire's spread due to PacifiCorp-caused spot fires; and (4) PacifiCorp allegedly failed to preserve some of its equipment when restoring power in a small section of the canyon.

Plaintiffs' divergent theories and evidence in the Santiam Canyon highlighted the fundamental problem with their single-class approach: There was no common evidence demonstrating that "proof as to one [property owner would] be proof as to all." *Pearson v. Philip Morris, Inc.*, 358 Or 88, 111, 361 P3d 3 (2015). Establishing a claim in the eastern and northwestern portions of the Santiam Canyon—where PacifiCorp did not even have any powerlines—required dramatically different evidence than establishing a claim near Gates in the center of the Santiam Canyon, where PacifiCorp had powerlines. And telling the jury to assume evidence regarding a spot fire near Mill City applies to class members in the northeastern portion of the Santiam Canyon, which was engulfed

by the Beachie Creek Fire before any utility fire could have reached it, was reversible error.

The Court of Appeals unanimously and correctly concluded that "given the particular class that the trial court certified in this case and the evidence and theories at trial, the trial court erred" in giving this instruction. *James v. PacifiCorp*, 348 Or App 347, 355, 590 P3d 618 (2026), *rev allowed*, 375 Or 395 (2026). The trial court effectively told the jury to fill in Plaintiffs' evidentiary gap with an "assumption," relieving Plaintiffs of their burden on a critical element of their claims. Although the instruction might be proper in an ordinary class action, the Court of Appeals held that it could not be given "in view of" the "unique and complex circumstances" of this case, especially with "how this case developed" through trial. *Id.* at 374, 377, 380.

The prejudice to PacifiCorp was clear. Plaintiffs' closing argument repeatedly invoked the instruction, telling the jury to ignore gaping evidentiary holes as to portions of the class and simply assume the proof offered applied throughout the class. There was *at the very least* "some likelihood" that the jury "misunderst[ood] its task based on the instruction," including because it was "amplified by plaintiffs' counsel's closing argument." *Id.* at 377-78.

Plaintiffs' principal attack on the Court of Appeals is that so long as class certification was proper, the instruction was proper *per se*. The Court of Appeals

correctly rejected that argument: Whether or not class certification was proper, a jury instruction must correctly state the law, be supported by the evidence, and neither confuse nor mislead. Having obtained certification of this enormous, disparate, and complex class, Plaintiffs bore the burden to present a workable trial plan that did not "deprive the defendan[t] of valuable procedural and substantive rights." *Bernard v. First Nat'l Bank*, 275 Or 145, 153-54, 550 P2d 1203 (1976). Telling jurors to assume evidence as to one class member was evidence as to all allowed Plaintiffs to circumvent that burden.

Plaintiffs' additional attempts to minimize the instruction's prejudice also fail. Plaintiffs' closing argument emphasized that jurors "can assume that the evidence that came in applies to the class members as a whole," (Tr-8495:14-20; *see also* Tr-8348:13-21)[1], and *invited* jurors to assume that evidence as to some plaintiffs applied to other plaintiffs across the various fire areas—whether those plaintiffs were dozens of miles across the Santiam Canyon or hundreds of miles away in a different part of Oregon. Ignoring their own words to the jury, Plaintiffs focus their briefing on the verdict form's purported requirement of separate answers for the four fire areas. But the verdict form did not remove the risk that the jury would assume evidence from one fire applied to absent class

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

members in other fire areas, or that plaintiff-specific evidence within one fire area applied throughout the fire area. Nor did it remove the risk that jurors would do exactly what Plaintiffs repeatedly told them to do—assume *all* evidence applied classwide.

* * *

PacifiCorp recognizes the tragic property loss Oregonians suffered from the Labor Day 2020 fires. PacifiCorp has paid more than $2.2 billion in settlements to property owners outside this class action. It agrees that Plaintiffs' and class members' claims should be adjudicated as efficiently and justly as possible. But these proceedings were neither efficient nor just. The trial court committed fundamental errors by inappropriately combining a massive number of highly disparate claims into a single class action, allowing Plaintiffs to recover hundreds of millions of dollars in noneconomic damages that were barred by law, and instructing the jury to assume the evidence applied classwide despite—among other things—Plaintiffs' counsel's concession at trial that they could not prove the claims of class members in the entire eastern half of the Santiam Canyon. Plaintiffs identify no jurisdiction that has approached wildfire litigation this way. Unbounded class actions coupled with unlimited noneconomic damages and relaxed standards of proof are a recipe for legal errors, due process violations, and multi-year delays. Outside of the class-action process, thousands

of wildfire plaintiffs in Oregon and elsewhere have received compensation far more quickly and efficiently than the class members in this case. The Court should affirm.

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

1. Whether, given the trial court record in this case and the "material variation [between] the members of the class," *Strawn v. Farmers Ins. Co.*, 350 Or 336, 359, 258 P3d 1199 (2011), the trial court's instruction allowing the jury to "assume that the evidence at the trial applies to all class members" was a complete and accurate statement of the applicable law.

Proposed Rule of Law: No. Under well-established law, a jury instruction must completely and accurately state the law applicable to the case and must be supported by the evidence. In class actions, as in any case, a jury instruction must not confuse, mislead, or comment on the evidence, especially in a manner that improperly shifts the burden of proof. *See State v. Hayward*, 327 Or 397, 411, 963 P2d 667 (1998). The trial court erroneously told the jury that it could "assume" evidence about one class member applied to every class member, despite PacifiCorp's evidence showing material differences *between and within* the four geographically disparate fire areas. *James*, 348 Or App at 371-77.

2. Whether there was "some likelihood that the jury reached a legally erroneous result" when the trial court erroneously instructed the jury to assume

that the evidence applied classwide notwithstanding material differences between class members, and where the erroneous instruction was "amplified by plaintiffs' counsel's closing argument to the jury." *Purdy v. Deere & Co.*, 311 Or App 244, 259, 492 P3d 99 (2021) (*Purdy II*).

Proposed Rule of Law: Yes. Courts "presume" prejudice when, as here, the erroneous instruction "*permits* the jury to reach a legally erroneous result." *Wallach v. Allstate Ins. Co.*, 344 Or 314, 326, 329, 180 P3d 19 (2008). Here, Plaintiffs' counsel repeatedly *encouraged* the jury to reach such a result by emphasizing during closing that the instructions allowed them to "assume that the evidence that came in applies to the class members as a whole." *James*, 348 Or App at 377-78. Separate votes for each fire area did nothing to address the material variation among class members *within* the same fire area. Undisputed trial evidence shows that not all class members within the Santiam Canyon Fire area, for example, were harmed by PacifiCorp. Thus, neither the wording of the verdict form nor the jury's votes on it remove "some likelihood" that at least some jurors erroneously decided the claims by evidence not common to the class. *See Purdy v. Deere & Co.*, 355 Or 204, 232, 324 P3d 455 (2014) (*Purdy I*).

STATEMENT OF FACTS AND PROCEDURAL HISTORY

I. PacifiCorp And Its Wildfire Mitigation Program.

In early 2018, PacifiCorp became the first utility company in Oregon to conduct a fire risk study to develop a wildfire mitigation program. (Tr-5518:16-

18; Tr-7025:2-6.) PacifiCorp identified its highest risk areas based on historical fire activity and countless other datapoints, deployed technologically advanced weather stations on its electrical system, and developed a protocol for conducting public safety power shutoffs in 14 of the highest fire-risk areas. (Tr-7053-54; Tr-7354:13-7355:4; ER-198-99, 242-51; DTX-8585.)

PacifiCorp's wildfire mitigation program supplemented the company's baseline safety practices, including its vegetation management and equipment maintenance programs and its emergency de-energization practices. (Tr-5299:20-22; Tr-5262:15-5263:19; Tr-4999:15-22; Tr-5035:18-5036:1; Tr-7022:3-7024:1.) Those programs were designed to respond to specific local conditions, which varied greatly across PacifiCorp's 13.4-million-acre service territory in Oregon. (Tr-4983:25-4984:7; Tr-7348:6-21; ER-201.) Because power shutoffs can affect hospitals, vulnerable customers, and emergency communications, PacifiCorp's power shutoff practices were "granular," based on a variety of local factors. (Tr-5403:20-5404:2; Tr-7259:1-22; Tr-7390:13-7392:6; *see* ER-243.)

II. Labor Day 2020.

On Labor Day 2020, a once-in-a-lifetime windstorm combined with exceptionally dry conditions to start numerous fires and dramatically increase the size of existing fires across Oregon. (ER-838-39, 841-42.) The storm fueled 17 significant wildfires (including five "megafires" exceeding 100,000 acres)

and hundreds of smaller fires, all separated by hundreds of miles. *See* Brief of Pacific Northwest Investor-Owned Utilities as *Amicus Curiae* at App-51, *James v. PacifiCorp*, CA No. A183140 (Or App 2025).

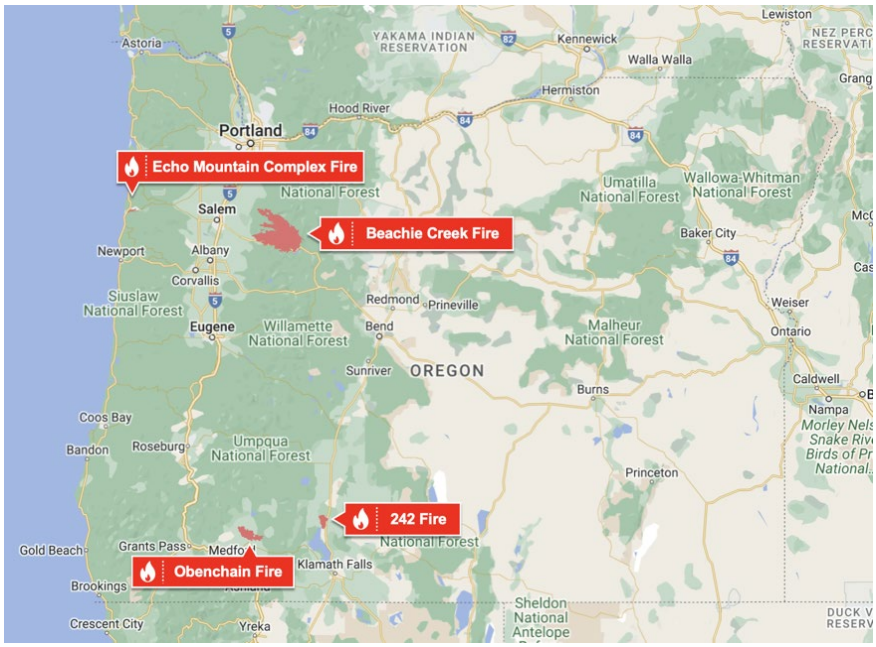
PacifiCorp's response to the storm was consistent with other utilities. None of the other 41 electric utilities in the state turned off all power to their entire service territories, nor did state regulators[2] or anyone else ask or direct them to preemptively de-energize the entire state. Thus, while one electric utility (Portland General Electric) initiated a shutoff in one location (a portion of Mt. Hood), it was pre-planned and occurred before the call with state officials. (Tr-423:17-23; Tr-5581:25-5582:12; Tr-5592:12-5593:3; Tr-7395:6-20; Tr-7397:10-16.) Like other utilities, PacifiCorp de-energized its lines in specific

[2] Plaintiffs claim that "As the east winds began to blow on Labor Day, the fire risk became so dire that around 8:00 p.m., the Governor's chief of staff and the Oregon Department of Forestry's top firefighter convened a call with PacifiCorp and other utilities to implore them to shut off the power." (Op. Br. 7.) This is not true. At trial, Doug Grafe, the Oregon Department of Forestry's top firefighter, was specifically asked: "You weren't calling for public safety power shutoffs" during the call, and his response was "I don't have that authority, so I wasn't calling for them." (Tr-652:22-25.) The Governor's Chief of Staff, Nik Blosser, also denied there was any such request. "Q: There was no explicit request for the utilities to deenergize on the September 7th phone call, correct? A: Correct." (Tr-685:6-9.) And finally, Kristen Sheeran, the Governor's climate and energy policy advisor who attended the call, also denied that any such request was made. "Q: And just to be really clear, at no time on the call did anyone from the Governor's Office or the PUC or Doug Grafe request, demand, direct any of the utilities to implement a [shutoff], right? A: No. Q: That never happened? A: That never happened." (Tr-5358:5-11.)

locations in response to local conditions, worked with local officials and first responders, and reacted to the unprecedented event, including through on-the-ground decisions by hundreds of employees and staff. (Tr-6045-50; Tr-6573:6-9; Tr-7538:1-4; DTX-8553.)

III. Plaintiffs' Complaint And Class Certification.

On September 30, 2020, Plaintiffs filed their class action complaint against PacifiCorp, including claims for negligence, private and public nuisance, and trespass. (ER-1-30.) Plaintiffs initially sought an undisclosed amount of damages on behalf of the entire class, (*see* ER-29), though they now claim over $1.6 billion (ER-168). Plaintiffs then sought to certify an issues class—defined as all "owners or residents" of private property or owners of personal property on public lands located within the "boundary of the maximum extent of burn" for the "Echo Mountain" Complex, "South Obenchain," "242," or "Santiam Canyon" fires that "experienced fire activity during those fires." (TCF-10/27/2021 (Plaintiffs' Motion for Issues Class Certification); *see also* ER-53-54.) Class actions require common issues with common facts, but the class that Plaintiffs proposed was anything but cohesive. It involved multiple fire areas, separated by hundreds of miles, caused by more than a dozen spot fires and damaging thousands of individual properties. (*See* ER-64, 66, 105-06, 272-74; *see also* TCF-03/17/2023 (Defendants' Motion to Decertify) at 5.)



A. The 242, South Obenchain, And Echo Mountain Complex Fire Areas.

Plaintiffs advanced different negligence theories targeting different wildfire-management practices in different territories. The 242 Fire ignited relatively early on the evening of September 7, while winds were increasing. Plaintiffs' theory for the 242 Fire focused on PacifiCorp's vegetation management program in that region, and asserted that PacifiCorp failed to cut down a vulnerable tree that snapped in the storm and contacted powerlines. (Tr-8266:1-25.)

For the South Obenchain Fire, which ignited the next day on September 8, Plaintiffs contended that a dead tree broke and contacted PacifiCorp's powerlines. (Tr-350:16-18.) Plaintiffs did not specify their negligence theory for the South Obenchain Fire; they cited the location of the tree within

PacifiCorp's right of way, and also noted that PacifiCorp's lines at the alleged ignition point remained energized. (Tr-1907:21-1912:2.)

Plaintiffs' Echo Mountain Complex Fire story was different yet again. That fire area involved two ignitions that did not merge: one at a particular address on the top of Echo Mountain (the Echo Mountain Fire) and another on Maple Drive (the Kimberling Fire). (Tr-1640:24-1641:3.) Plaintiffs' theory as to each was that a branch blew into PacifiCorp's powerlines, created an arc, and started the fire. (Tr-1574:25-1575:19; Tr-2188:22-2189:13; Tr-2582:14-25.) Unlike the two Southern Oregon fire theories, which relied on an identified tree that PacifiCorp allegedly should have removed, the Echo Mountain Complex Fire theories relied on branches from undefined locations contacting powerlines—a distinct liability and causation story.

B. The Santiam Canyon Fire Area.

In the Santiam Canyon, Plaintiffs could not identify a single liability or causation theory for wildfire damage. The Santiam Canyon included the majority of the class and was by far the largest fire area—20 miles long and 70-plus-square-miles (approximately 33,880 football fields)—yet only a portion of it was serviced by PacifiCorp. (*See* ER-66, 177, 185 (45,660 acres burned); ER-42, 844-45, 850.)

Plaintiffs' case was further complicated because the pre-existing, lightning-caused Beachie Creek Fire burned the entire canyon. On August 16,

2020, lightning struck in a remote area of federal land, the Opal Creek Wilderness, northeast of Highway 22. (Tr-644:20-646:11; Tr-3874:5-16; Tr-5077:16-21; Tr-5156:21-25; ER-837-38, 842; *see also* ER-42.) The Beachie Creek Fire smoldered for three weeks, and on the night of September 7, winds exceeding 50 miles per hour made it explode from less than 500 acres to more than 190,000 acres, creating a megafire that the Oregon Department of Forestry later concluded was responsible for the property destruction in the canyon. (ER-838-39, 841, 850.)

The Beachie Creek Fire raced east to west down the canyon, triggering ember-caused spot fires throughout the night. By 11:30 p.m., it had reached Gates and Mill City—two towns in the center of the canyon. (ER-188-91; Tr-5182:17-23; Tr-5229:18-5230:2; Tr-4769:1-4772:9; DTX-6842, DTX-8537.) By 4:00 a.m. on September 8, it had engulfed the entire canyon. (Tr-3909:8-3910:9; Tr-5190:11-5191:10.) Given the undisputed evidence and destructive path of the Beachie Creek Fire, determining whether an individual parcel or piece of real or personal property within the canyon was damaged by the Beachie Creek Fire or by any utility-caused ignition raised serious problems for Plaintiffs.

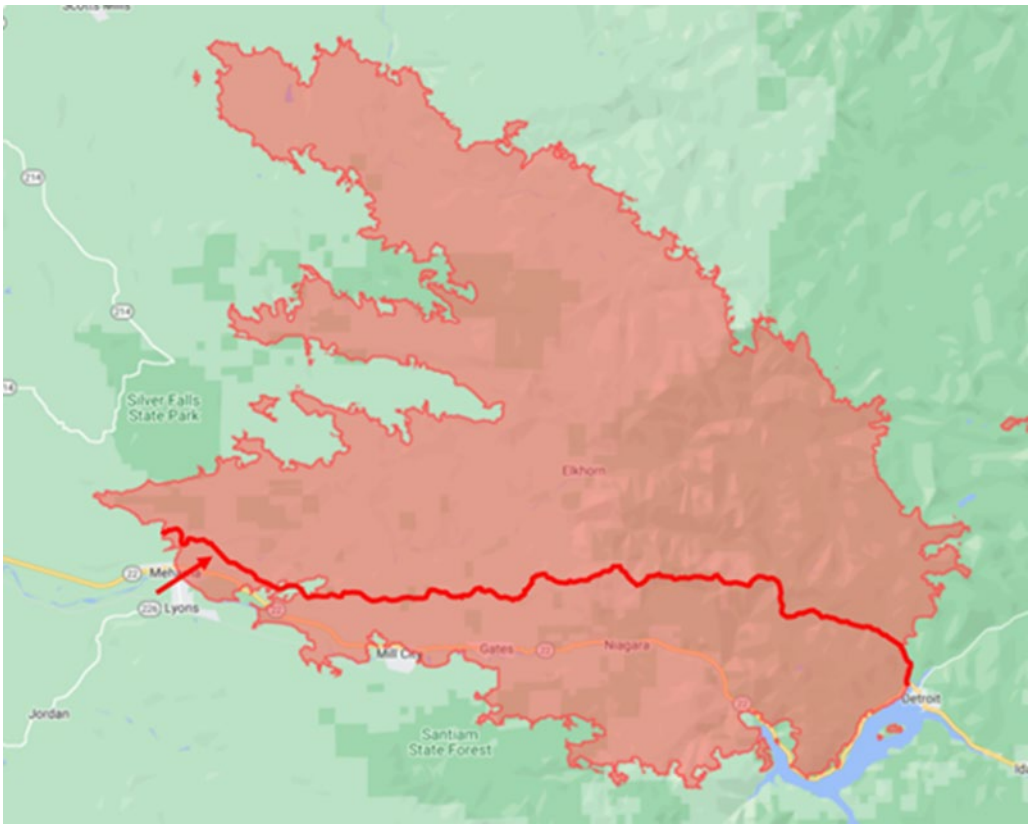
Because the pre-existing Beachie Creek Fire burned in the same area, Plaintiffs could not simply identify a power-equipment ignition (or even a

combination of ignitions) and look to the outer bounds of the total area burned to argue that PacifiCorp was responsible for destroying more than 1,250 parcels throughout the entire canyon. Identifying a property that suffered burn or smoke damage would not reveal whether or when it was damaged by the Beachie Creek Fire.

Plaintiffs' case was further complicated because PacifiCorp only had equipment in one part of the canyon, and in that area, some of its lines were de-energized at 10:31 p.m. on September 7, and remained off for the rest of the night. (Tr-6085:9-12; Tr-6047:21-24; DTX-8553.) Many of the burned areas were devoid of PacifiCorp powerlines and miles away from PacifiCorp's service territory. (ER-848-50; Tr-2438:11-20; Tr-8376:9-25.)

At the class certification stage, Plaintiffs tried to circumvent these issues through a series of factual shortcuts and flawed legal theories.

First, Plaintiffs' counsel simply drew an artificial red line through the total area burned by the pre-existing Beachie Creek Fire and defined the (more populous) area south of that line (but still within the Beachie Creek Fire boundary) as the "Santiam Canyon Fire." (ER-50, 54; TCF-03/17/23 (Defendants' Motion to Decertify) at 7.)



Second, Plaintiffs claimed they would introduce a fire-spread expert—Nicole Brewer—who could testify that PacifiCorp was responsible for *all* property damage below their red dividing line. (TCF-02/16/2022 (Plaintiffs' Supplemental Brief) at 4-5, 8.) Brewer's report discussed various alleged powerline-caused fires in the Santiam Canyon, beginning at approximately 8:30 p.m. on the night of Labor Day. (ER-35-50.) Plaintiffs then vaguely promised Brewer's testimony would tie those ignitions together into "one conflagration" that damaged all of the properties and justified their classwide liability and causation theory. (TCF-02/16/2022 (Plaintiffs' Supplemental Brief) at 8.) In essence, Plaintiffs claimed that (1) classwide evidence would show that scattered

powerline ignitions—some of which may have been extinguished or burned less than 50 square feet—somehow caused *all* the damage within the more-than-70-square-mile class boundary *before* the Beachie Creek Fire arrived in the same area; and (2) individualized, location-specific inquiries were unnecessary to make that determination. This was because supposedly "common evidence" (Brewer's testimony) would show that a single PacifiCorp-caused "conflagration" spread to all "the properties included in the class" area. (TCF-02/16/2022 (Plaintiffs' Supplemental Brief) at 3, 8.)

Third, Plaintiffs argued that the "substantial factor" causation standard could show that those ignitions were a material element or substantial factor in causing harm to every class member, citing *Haas v. Estate of Carter*, 316 Or App 75, 83, 502 P3d 1144 (2021), *aff'd*, 370 Or 742 (2023). Plaintiffs dismissed the Beachie Creek Fire by arguing "even that potential other cause—a single, lightning ignited wildfire—is common to all class members." (TCF-02/16/2022 (Plaintiffs' Supplemental Brief) at 9.)

Unlike in the other fire areas, Plaintiffs did not specify a theory of negligence for the Santiam Canyon, such as a tree falling on a particular line. Given the various ignition sources and the lack of evidence as to their cause, Plaintiffs could not possibly show that a single fire destroyed all the class properties, or that such a fire was caused by any specific tree that PacifiCorp

should have identified and removed, or by hazardous infrastructure. Instead, Plaintiffs argued PacifiCorp should have shut off the power to the canyon after the first powerline ignition was identified that evening (Tr-7442:3-7443:15) and otherwise criticized PacifiCorp's response to the storm.

Based on Plaintiffs' representations, including that a decision "to grant class certification is not a fixed ruling" (02/17/2023-Tr-212:22-24), the trial court granted Plaintiffs' motion (ER-53-77).

IV. The Phase I Trial.

Plaintiffs assert that "the trial played out as the trial court had predicted." (Op. Br. 12.) Nothing could be further from the truth.

A. Plaintiffs' Santiam Canyon Evidence.

The differences between Plaintiffs' promised proof and their trial evidence were starkest in the Santiam Canyon. Nicole Brewer, the expert Plaintiffs highlighted at class certification, did *not* testify about *any* of the fires at issue in the Santiam Canyon, nor did Plaintiffs offer any other expert to support their "one conflagration" theory, or their assertion that alleged PacifiCorp-caused fires spread and burned the entire canyon before the Beachie Creek Fire arrived. Instead, Plaintiffs offered testimony from a few experts—who never established PacifiCorp's fault.

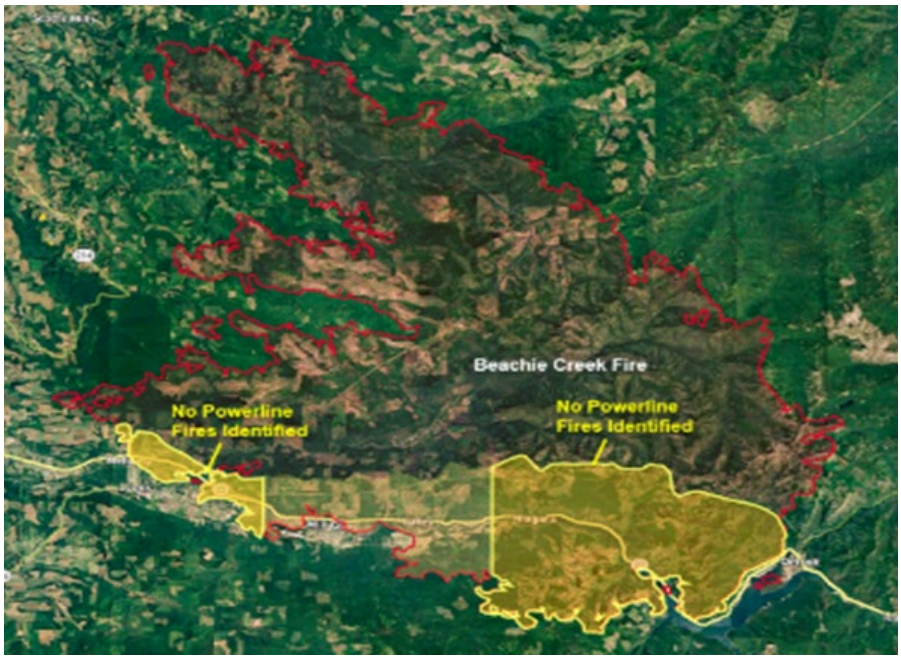
Pelton testified about isolated locations of spot fires and powerline activity in the Santiam Canyon. (Tr-4441:11-4443:4.) But he expressly disclaimed any

opinion on fire spread, (Tr-4452:16-4453:8), and did not identify any powerline activity, fire, or damage in vast swaths of the Santiam Canyon, (*e.g.*, Tr-4528:7-25; Tr-4530:5-4532:5). Bailey sought to exclude the lightning-caused Beachie Creek Fire as a potential source of harm in the canyon. But his testimony actually confirmed that the Beachie Creek Fire had entered the class boundary before PacifiCorp's equipment allegedly ignited many of the spot fires cited by Pelton (and before they could have burned through the canyon). (*E.g.*, ER-188-91; Tr-3944:5-3947:4; Tr-4400:13-19.)

Pelton relied on 911 calls or other evidence of utility lines that had been affected by the windstorm to opine that PacifiCorp's equipment started a handful of different fires in a narrow sliver in the middle of the 20-mile-long canyon. (Tr-4400:9-12; Tr-4401:18-4402:10; ER-192.) Plaintiffs presented a demonstrative graphic showing all events identified by Pelton (only some of which were attributed to PacifiCorp and only some of which were actual fire ignitions). (ER-192.)

Pelton was not a fire progression expert, and he had not analyzed whether any fire spread at all. (Tr-4452:16-4453:8.) Rather than multiple ignitions constituting or contributing to a single conflagration, Pelton simply identified every possible report of some activity (including utility line activity with no fire reported and small grass fires), all in the middle three miles of the 20-mile-long class area. (ER-192; Tr-7483:1-9.)

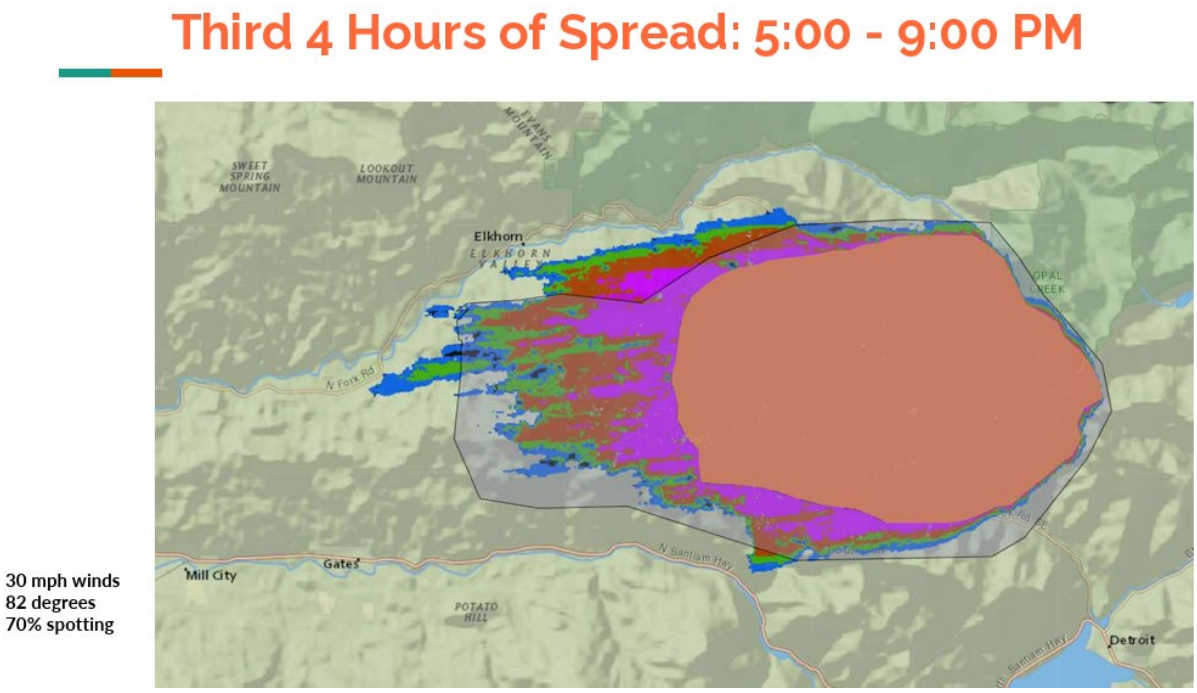
Critically, Pelton did not identify *any* alleged utility fire in the *entire eastern ten miles* or *western seven miles* of the canyon. (ER-192; Tr-7483:6-9.)



Pelton never explained what happened *after* any of the spot fires he identified were started, much less where or how far they burned, whether they were extinguished, or whether they affected any class member's property. Nor did he explain how electrical fires started in the middle of the canyon could have spread ten miles *upwind*, in the face of 50 mph east-to-west winds. (*See* ER-192, 256.)

Plaintiffs then called Bailey to testify that the Beachie Creek Fire had not entered the Santiam Canyon before the ignitions allegedly caused by PacifiCorp. But Bailey's testimony contradicted that theory. Rather than point to actual satellite data, Bailey "modeled" the progression of the pre-existing, lightning-caused Beachie Creek Fire as it moved from the wilderness north and east of the Santiam Canyon into the canyon itself. Bailey's model showed that the Beachie Creek Fire had already entered the canyon and consumed class member property

by 8:00 p.m. on Labor Day, indicated by the blue boundary below, and continued advancing down the canyon in the ensuing hours:



(ER-190-91.)

Plaintiffs also offered the expert testimony of Mark Buckley. But Buckley's analysis was limited to determining which tax parcels within the four class areas included "at least some property" that experienced at least "low" "soil burn severity" according to a U.S. Forest Service map, regardless of which fire burned it *or* how much. (*See, e.g.*, ER-177-78; Tr-3333:24-3334:8; Tr-3338:17-3339:2.) Contrary to Plaintiffs' assertions, Buckley did *not* "identify the class properties that the Santiam Canyon Fire harmed." (Op. Br. 22.) He did not opine on the *cause* of any "soil burn" to those parcels—he only concluded whether the

property suffered some burn damage, not whether it was burned by the Beachie Creek Fire, a utility fire, or some other cause. (Tr-3366:20-25.)

Plaintiffs now dispute PacifiCorp's characterization of Bailey's model showing that the Beachie Creek Fire was in the Santiam Canyon before or near the time of any PacifiCorp-caused ignitions. (Op. Br. 38 n 6.) But the image from Bailey's model indisputably shows the Beachie Creek Fire in the class boundary before any PacifiCorp-related fires. And although some of the canyon includes public lands, the class includes owners of property on public lands—and this territory falls within the class. (TCF-10/27/2021 (Plaintiffs' Motion for Issues Class Certification); *see also* ER-54, 66, 185, 278.)

Even putting those points aside, Bailey himself acknowledged that his modeling showed that "as of 11:00," the Beachie Creek Fire was "just north of Highway 22 in the Santiam Canyon right where it narrows above Gates or east of Gates," and then at midnight "it's south of Highway 22 east of Gates as well," already having "jumped the river and the road." (Tr-3944-46; *see* ER-191.) As a result, (1) whatever the precise hour of arrival, it is indisputable that the Beachie Creek Fire burned rapidly through the Santiam Canyon that night, reaching different parcels at different times; and (2) Plaintiffs abandoned their "one conflagration" theory that PacifiCorp caused all fire damage before the Beachie Creek Fire's arrival. *See James*, 348 Or App at 354-55. Those two facts

alone mean the causal question—which fire destroyed which parcel, and when—varied from property to property across more than 70 square-miles and could not be answered by assumption.

B. Plaintiffs' Shifting Theories And Attempts To Address Their Failure Of Common Proof.

Faced with a glaring gap between the promised proof and the actual evidence, Plaintiffs made several attempts to salvage their case. Plaintiffs began by shifting to a "resource diversion" theory, claiming that PacifiCorp's utility lines had caused the evacuation of wildland firefighters that left the entire canyon "defenseless" from the Beachie Creek Fire. (*E.g.*, TCF-10/11/2023 (Plaintiffs' Opposition to JNOV Motion) at 7; *see also* ER-277.) Under this theory (which was never mentioned at the class certification stage), Plaintiffs claimed that PacifiCorp was still responsible even if the Beachie Creek Fire was the sole cause of damage to a property in the canyon. *Id.*

Plaintiffs also attempted to redefine the class. They initially proposed a verdict form that asked the jury to redraw the class boundary to conform to the proof at trial. (Tr-8105:23-8107:5; Tr-8131:19-8132:3.) When that argument failed, Plaintiffs moved to eliminate the entire eastern half of the canyon from the class (where there was no evidence of PacifiCorp even servicing customers, much less any PacifiCorp-caused ignitions). (Tr-8145:16-25; ER-259-60.) Plaintiffs presented a map that simply "Xed out" that part of the canyon:

(ER-256, 259.) The trial court rejected that request, too, and left the "Xed out" portion of the class in the case. (Tr-8156; ER-263.)

Put simply, lacking common proof of liability and causation, Plaintiffs attempted to address the fundamental flaws in their case by changing both their causation theories and the scope and nature of the certified class.

V. Plaintiffs' Requested Jury Instruction.

Plaintiffs then asked the trial court to cure their failure of proof with the jury instruction at issue in this appeal. The instruction told jurors they could assume that evidence applied classwide—despite critical differences between and within the fire areas that prohibited that stark assumption—and Plaintiffs' counsel made this instruction a central theme of closing arguments in order to paper over their lack of classwide proof.

Near the end of trial, Plaintiffs asked the trial court to instruct the jurors that they "may assume that the evidence at the trial applies to all class members." (ER-278-79.) The language was adapted from CACI No. 115, a California pattern instruction written to explain the mechanics of an ordinary class action. (TCF-06/07/2023 (Defendants' Submission Re Draft Jury Instructions and Draft Verdict Forms).) PacifiCorp objected, noting that "[w]hatever the manner of proof, whether it's common or individualized, [Plaintiffs] still have their burden of proving their case as to the entire class and each of its members." *James*, 348 Or App at 364. And although such instructions may be proper in some circumstances, PacifiCorp made clear they may not be given where—as here—there are material differences between class members on the issues of causation and liability. (*See id.*; Tr-8007:11-8008:6.) The trial court nonetheless gave the improper jury instruction over PacifiCorp's objection. (ER-278-79.)

The instruction titled "Class Questions Defined" is the subject of this appeal. That instruction told the jury:

> "Only some questions on the verdict form are common to all class members. Those questions are called the class questions. * * * In answering the class questions, you must determine the answer as to the class. Because the case is a class action, you can answer the class questions based on evidence that applies to the class as a whole. There is no requirement that individual class members appear in court to prove their case. *You may assume that the evidence at the trial applies to all class members.*"

(ER-278-79 (emphasis added).) The court also gave a companion instruction, "Class Defined," which described a single class spanning all four fire areas. (ER-278.) Read together, the two instructions told the jury that (1) there was only one class, (2) the evidence at trial could be assumed to apply to all of its members, and (3) the class questions could be answered "based on evidence that applies to the class as a whole."

Plaintiffs then relied heavily on the instruction in closing argument. *James*, 348 Or App at 367-68, 377-78. Plaintiffs told jurors that they "can assume that the evidence that came in applies to the class members as a whole," specifically noting that "there's no better example if you're thinking about who was harmed by the fires" than different plaintiffs who were allegedly harmed in different parts of the Santiam Canyon, as well as plaintiffs harmed by Echo Mountain. *Id.* at 368.

Plaintiffs also encouraged the jury to find PacifiCorp liable for all the damage within the Santiam Canyon, so long as evidence established that utility-caused activity was "*a* cause" of harm to *any* individuals in any part of the Santiam Canyon:

> "For the Santiam Canyon, the question is simply, were they a cause of the harm that night; not the cause, not the only cause, but a cause of the harm. Of course they were a cause of the harm. They admit they started fires in the Santiam Canyon. They admit they caused harm in the Santiam Canyon."

Id.

Plaintiffs' counsel then returned to the instruction in rebuttal, telling jurors that they "can assume that the evidence that came in applies to the class members as a whole" because the court had instructed that "you don't need to hear from each and every class member." (Tr-8495:14-19.) Plaintiffs thus used the instruction for exactly the inference it authorized: that the jury could use evidence about some class members to reach a verdict for all of them. (*Id.*)

VI. The Trial Court Verdicts And PacifiCorp's Appeals.

The jurors followed the erroneous instruction and returned a split liability verdict in favor of both the individual class representatives and the entire class. (ER-290-312.) The vote on liability in the Santiam Canyon was 9-3. (ER-291-92.) The Phase I limited judgment incorporated the jury's verdict on classwide liability and became the foundation for Phase II—jury trials to adjudicate individual economic and noneconomic damages for thousands of additional class members. (*See* ER-356, 464-65, 500-01.) More than 170 damages trials were scheduled to follow the Phase I verdict, and nineteen Phase II trials have been completed (most Phase II trials have now been stayed).

At the same time that this class action has been embroiled in litigation, other non-class members with wildfire property damage have received timely and effective relief. Outside of this class action, as explained below, PacifiCorp has paid *over $2.2 billion* in claims and settled *thousands of cases*—including

around *90 percent* of claims outside of the Beachie Creek/Santiam Canyon fire area.

PacifiCorp has appealed each limited judgment entered to date—with several independent appeals pending before the Court of Appeals. In the appeal at issue here (from the limited judgments following the Phase I trial and the first two Phase II trials) (ER-351, 541, 625, 707), PacifiCorp assigned error to over a dozen legal rulings that pervade the entire litigation and fall into three categories. The trial court violated established class-action rules—allowing this case to proceed as a class action despite Plaintiffs' inability to present common proof that PacifiCorp caused all of the class members' damages. The court also violated established remedial rules—awarding hundreds of millions in noneconomic damages that are prohibited by the common law and barred by statute. And the court violated established tort-law principles—failing to require Plaintiffs to prove causation and papering over that failure with erroneous instructions (including an additional instruction that told Phase II jurors that PacifiCorp was the sole cause of Plaintiffs' injuries). (*See* ER-464-65, 500-01.)

VII. The Court Of Appeals Reverses The Trial Court.

The Court of Appeals reversed the judgment and ordered a new trial based on the instructional error, unanimously concluding that the trial court's instruction that the Phase I jury "may assume that the evidence at the trial applies to all class members" was prejudicial error based on the "unique and complex

circumstances" of this case. *James*, 348 Or App at 368-78. The court grounded that holding in settled law: the class device "leaves the parties' legal rights and duties intact," yet the instruction relieved Plaintiffs of their burden. *Id.* The court separately concluded that the evidence was legally sufficient to withstand a directed verdict—a distinct question, governed by a different standard, that asks only what a properly instructed jury could have found. *Id.* at 380. Although the instructional error was one of nearly a dozen dispositive issues, the court declined to address most of PacifiCorp's remaining assignments of error. *Id.* at 379-80.

SUMMARY OF ARGUMENT

The Court of Appeals' unanimous holding properly applies Oregon law to a clear record and should be affirmed.

I. The instruction telling jurors they may "assume" that evidence applies classwide was erroneous. A jury instruction must accurately state the law, leave factual determinations to the jury, fit the certified class, and reflect the evidence and theories at trial. This rule is not relaxed in a class action; if anything, it is more important that a class action jury be properly instructed. Here, the instruction at issue violated these principles because there were significant differences within the class—within and between the fire areas—that prohibited jurors from "assuming" that evidence applied classwide, at least given "the class that was certified, the evidence at trial, and plaintiffs' theories of

causation." *James*, 348 Or App at 380. Plaintiffs' counterarguments ignore these facts, confuse class-certification law, rely on a California pattern jury instruction that no California court has ever used in a case like this, and otherwise muddle and confuse the issues. Plaintiffs cannot cure the fundamental problems with the jury instruction. It excused Plaintiffs' burden to prove every claim; it lacked any foundation in Oregon law; and it violated PacifiCorp's due process right to defend itself against every claim.

II. The instructional error was prejudicial. Reversal is required because there is at least "some likelihood that the jury reached a legally erroneous result," *Purdy I*, 355 Or at 232, and prejudice follows when an instruction "permits" that result, *Wallach*, 344 Or at 329. Neither the class questions nor the verdict form cured the error. The jury was told to interpret the class questions "according to these instructions," and the form's 80 questions asked repeatedly whether PacifiCorp was liable to "the entire class." Counsel then amplified the error at closing, and the jury voted identically on causation as to the class representatives and as to "the entire class."

ARGUMENT

I. The Trial Court Erred In Instructing The Jury That It Could "Assume That The Evidence At The Trial Applies To All Class Members."

The trial court structured the proceedings as a trial by assumption—violating fundamental tenets of Oregon instructional law and federal due

process. Jury instructions must "correctly state the law" and be "supported by evidence." *Purdy I*, 355 Or at 227. It is reversible error to give an instruction that is "confusing or misleading," *Williams v. Portland Gen. Elec. Co.*, 195 Or 597, 610, 247 P2d 494 (1952), untethered to (and unsupported by) the evidence, *State v. Knepper*, 62 Or App 623, 627, 661 P2d 560 (1983), or that "comment[s] on the evidence" or relieves a party of its burden of proof, *Hayward*, 327 Or at 410-11; *Brooks v. Bergholm*, 256 Or 1, 8-9, 470 P2d 154 (1970) (same). In this case, Plaintiffs faced major evidentiary gaps and offered evidence that could not apply uniformly to all class members. By telling jurors they "may assume that the evidence at the trial applies to all class members"—regardless of how individualized the evidence was—the trial court improperly and confusingly opined on the evidence, relieved Plaintiffs of their burden of proof, and deprived PacifiCorp of its right to present individual defenses. The Court of Appeals correctly and unanimously reversed.

A. The Instruction Was Legally Erroneous.

This wildfire class is unprecedented. It involved different fires with different causes affecting thousands of class members separated by hundreds of miles—fissures demanding a rigorous, parcel-by-parcel analysis to determine what caused each plaintiff's individual property damage. Plaintiffs secured a broad instruction telling jurors *all* evidence applies to *all* class members.

That instruction was erroneous—and Plaintiffs have failed to cite a single case giving an instruction in a case like this. A common-inference instruction is legally erroneous if there is "material variation" among class members—meaning the evidence does not apply to class members "to the same degree and in the same way." *Strawn*, 350 Or at 358-59. Here, the evidence—involving thousands of class members affected by dozens of fires throughout Oregon—was not "uniform and without material variation." *James*, 348 Or App at 373. The trial court's decision to tell jurors they could "assume" that evidence applied classwide was thus "erroneous in view of the class that was certified, the evidence at trial, and plaintiffs' theories of causation." *Id.* at 380.

1. Material Variations Within The Fire Areas.

As illustrated by the glaring evidentiary deficiencies and divisions within the Santiam Canyon, jurors could not simply "assume" evidence as to one plaintiff was evidence as to all plaintiffs within a given fire area.

a. Material Variations Within The Santiam Canyon.

Plaintiffs had no unified theory to show class members in the Santiam Canyon were affected "to the same degree and in the same way." *Strawn*, 350 Or at 359. PacifiCorp did not even service much of the fire area; the lightning-caused Beachie Creek Fire engulfed the same area; and Plaintiffs were forced to rely on location-specific spot fires or downed utility lines with their own location-specific theories of liability, like failing to de-energize powerlines or

not trimming trees. Plaintiffs' splintered case thus turned on different theories and different bodies of proof: spot fires for some, firefighter diversion for the rest; a tree here, and a powerline there. The trial court erred by issuing a common-inference instruction under these circumstances.

No unified causation theory. Plaintiffs "did not have a single, unified theory of causation as to how plaintiffs within the Santiam Canyon Fire boundary were harmed by PacifiCorp." *James*, 348 Or App at 354. Instead, Plaintiffs claimed class members were harmed "*either*" by "one of any number of PacifiCorp-caused fires," *or* "for *some* of the plaintiffs in the Santiam Canyon," by the lightning-caused Beachie Creek Fire, because *other* "fires in the Santiam Canyon caused by PacifiCorp's power equipment caused firefighters who were stationed in the Santiam Canyon to evacuate the Santiam Canyon, leaving it 'defenseless.'" *Id.* at 354-55 (emphasis added).

But those are two entirely different theories, resting on two different bodies of proof, and bearing on the claims of two different groups of class members. Evidence as to one Santiam Canyon member could not establish liability for every other Santiam Canyon member.

One theory—which required proving PacifiCorp started individual fires within the Santiam Canyon and showing that such spot fires burned *all* parcels in the fire area—turned on where each ignition started, whether it was

suppressed, and whether it in fact reached a given parcel. The other turned on where the firefighters were, why and when they moved, what resources were diverted, where they otherwise would have been deployed, whether they could have stopped the Beachie Creek Fire (which grew by more than 100,000 acres in one night), and whether that hypothetical intervention would have spared the particular property of any specific class member.

Evidence regarding one theory was not "common" to the other. Proof that PacifiCorp's equipment ignited a roadside grass fire at a particular location does not tend to show that the crews staged at an entirely *different* location in this more-than-70-square-mile fire area could have prevented the Beachie Creek Fire's spread to any specific property. And proof about where firefighting resources were positioned and when they withdrew does not tend to show that any particular ignition reached any specific property.

Plaintiffs' proposed causation standard for the Santiam Canyon underscores this lack of uniformity. Instead of proving "but-for" causation—the default rule governing "the majority of cases," *Joshi v. Providence Health Sys.*, 342 Or 152, 162, 149 P3d 1164 (2006)—the trial court allowed Plaintiffs (over PacifiCorp's objection) to use a substantial-factor standard, which is designed for the narrow situation in which multiple "causes concur to cause an event, and either, *operating alone*, would have been sufficient to cause the identical result,"

Haas, 370 Or at 751 (emphasis added). Evidence regarding multiple distinct causes—by definition—cannot apply "in the same way" to all class members.

Plaintiffs' different theories of PacifiCorp's alleged wrongdoing further compounded these material variations. Instead of presenting a unified theory capable of yielding common answers, Plaintiffs claimed PacifiCorp breached duties ranging from vegetation management policies to failing to de-energize powerlines.

But de-energization turned on real-time, granular decisions accounting for the needs of first responders, hospitals, and evacuation routes in a particular area (Tr-5399:20-5401:5; Tr-7259:1-22; Tr-7390:13-7392:6), and vegetation management turned on whether particular trees near particular lines in particular locations had been adequately trimmed, (Tr-4983:25-4984:7; Tr-7348:6-21). Neither theory is relevant to an owner in the portions of the canyon PacifiCorp did not serve, where there was no line to shut off or adjacent vegetation to trim. (Tr-2428:24-2429:12; Tr-2438:11-20; Tr-7482:24-7483:23.) And whether vegetation-management could have prevented a particular tree from falling on a powerline and causing one spot fire in one area of the map says nothing about the owner of a parcel whose home was burned by a downed conductor in a windstorm or by the Beachie Creek Fire. Because these theories rested on different evidence and different measures of reasonableness—but were included

in a single class—evidence supporting one theory could not be assumed to support another.

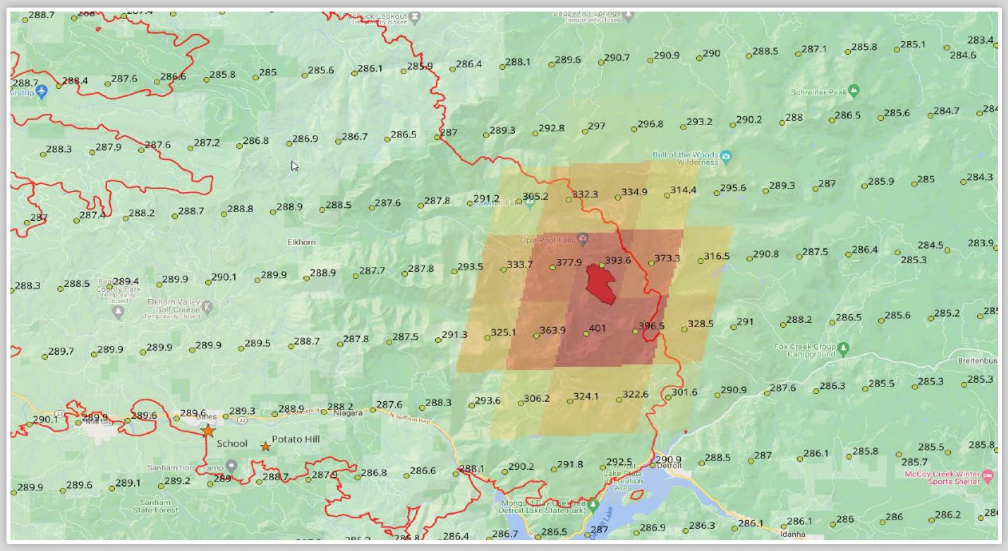
Plaintiffs argue liability did not turn on these location-specific issues, but on global issues like PacifiCorp's resource allocation to wildfire prevention, or its corporate policies about de-energization. (Op. Br. 36.) That makes no sense. Even if evidence of a corporate policy applied to the entire class, PacifiCorp could not be liable to a *specific* class member unless its breach actually and foreseeably caused *that* class member's injury—an inquiry requiring parcel-specific information. By telling the jury that *all* evidence applied to *all* class members, the trial court ensured jurors would not credit PacifiCorp's location-specific defenses. The result was that "aspects of causation were not proven through use of common evidence." *James*, 348 Or App at 380.

The lightning-caused Beachie Creek Fire. The Beachie Creek Fire's timing and spread also fatally undermined Plaintiffs' evidence and assertion that proof as to one class member would be proof as to all. As the Court of Appeals emphasized, "the Santiam Canyon is over 70 square miles," and "the Beachie Creek Fire"—which PacifiCorp did not cause—"undisputedly burned through the Santiam Canyon." *James*, 348 Or App at 372. In fact, the Beachie Creek Fire was *already* burning parcels inside the Santiam Canyon boundary before the first fire Plaintiffs attributed to PacifiCorp even started.

Plaintiffs' fire-progression expert modeled the Beachie Creek Fire inside the northeastern portion of the class boundary, consuming class properties, by 8:00 p.m. on September 7. (ER-188-91; Tr-3896:23-3898:13.) That was thirty-seven minutes before the 8:37 p.m. Gates Bridge East ignition on September 7 that Plaintiffs' own expert identified as the *earliest* attributable to PacifiCorp. (Tr-4400:13-23.) Additionally, Plaintiffs' expert admitted the Beachie Creek Fire had reached the eastern and western portions of the canyon by 1:00 a.m., and that by 4:00 a.m. on September 8, it had engulfed the canyon entirely, including the towns of Gates and Mill City. (Tr-3910:1-9; *see also* Tr-5104:6-12; Tr-5147:24-5148:12; Tr-5182:16-23; Tr-5190:11-5191:10; Tr-5192:20-25.)

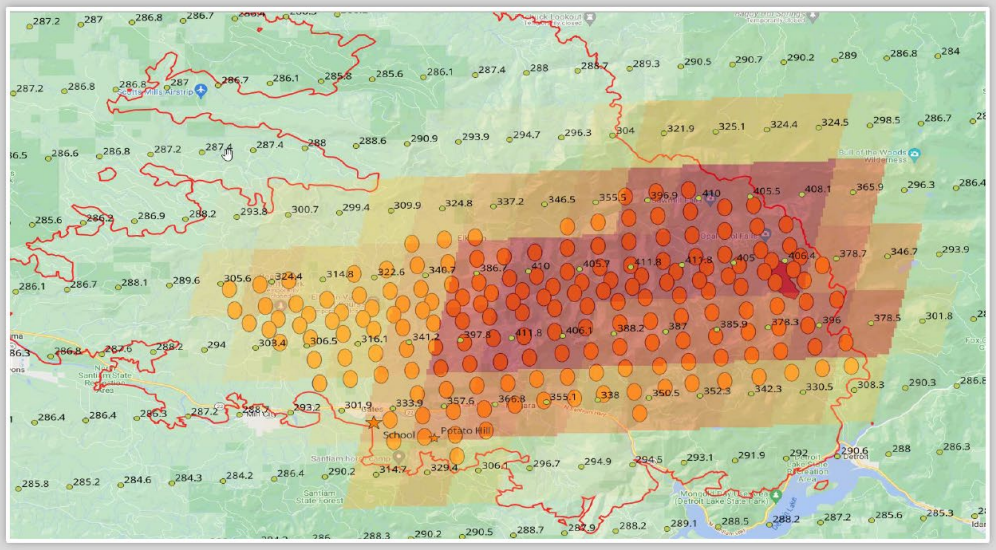
PacifiCorp's real-time data and measurements—which jurors were entitled "to credit," *James*, 348 Or App at 372—showed how quickly and comprehensively the Beachie Creek Fire moved through the canyon. A fixed geostationary satellite (GOES) picked up the fire's spread as the wind increased, and by 11:26 p.m., two different satellites confirmed that the Beachie Creek Fire had spread from its origin point north of Detroit Lake to class property to the north and south of Highway 22 and below the dividing "red line" of Plaintiffs' class boundary:

GOES Imagery 7:01 PM September 7th



13

GOES and MODIS Imagery 11:26 PM September 7th



15

(Tr-4814:7-21; Tr-4751:23-4752:14; Tr-5147:16-5148:21; DTX-8526, 8528, 8532, 8537.) Radar data confirmed that development, showing the heat plume of the Beachie Creek Fire between 10:25 p.m. and 11:37 p.m., and its spread from east to west through the canyon. (Tr-4803:1-4805:22.)

Further complicating the picture, PacifiCorp's powerlines only served a portion of the canyon, and even within those portions, the power was off for much of the night. At 10:31 p.m. on September 7, the powerlines in the eastern portion of Gates (in the center of the canyon) were de-energized, and by 12:09 a.m. on September 8, the entire town had been de-energized. (Tr-1346-47; Tr-6085:5-12; Tr-6044-50; DTX-8553.) Powerlines in Mill City to the west were also de-energized for two critical hours during the night. (Tr-1351; Tr-6044-50; DTX-8553.)

This evidence divided the class by timing and geography. Because the Beachie Creek Fire reached different parcels within the canyon at different hours, and because PacifiCorp's powerlines only existed (and were active) in a portion of the canyon and part of the time, *there was no aggregable evidence capable of explaining all property damage in the canyon*.

That meant PacifiCorp's alternative-causation argument had to be decided property-by-property. And it meant that whether a diversion of firefighting resources could have mattered to a given owner—as Plaintiffs contended—turned on where that owner's property sat in the over-70-square-mile canyon *and* when it suffered any fire or smoke damage. Without any way to separately treat these uniquely affected class members, the issues were not "uniform" across the Santiam Canyon fire area, which meant the evidence could *not* apply

in the same way to all class members "without material variation." *James*, 348 Or App at 372-73. It was error to instruct jurors to assume the evidence was common to all class members under these circumstances. *State v. Wiltse*, 373 Or 1, 12, 559 P3d 380 (2024).

Plaintiffs' distinct spot-fire claims. Plaintiffs' spot-fire theory of PacifiCorp's liability only exacerbated these variations. Having abandoned their "one-conflagration" theory on which the class was certified, Plaintiffs were left having to claim that a *dozen*-plus individual spot fires or downed powerlines in various areas somehow harmed each and every one of the properties within the over-70-square-mile class area—all without a single expert opinion on "the spread or the direction of spread or the rate of spread of any one spot fire in this case." (Tr-4452:22-4454:8.) As the Court of Appeals correctly observed, "much of the evidence" introduced during Phase I "related to particular issues concerning particular wildfires—and for the Santiam Canyon, to particular ignitions at particular locations." *James*, 348 Or App at 372. Because of these material variations, "the jury could not * * * simply 'assume' that that evidence applied 'to all class members.'" *Id*. Thus, for example, it was "not apparent" how evidence about the fire at "832 North Santiam Highway"—"which Plaintiffs emphasized to the jury in connection with th[is] very instruction"—could be assumed to apply to "a different plaintiff, whose property was destroyed

miles away, in a different part of the Santiam Canyon, due to a different fire caused by a different ignition." *Id.*

The Court of Appeals was right. Isolated spot fires could not simply have been "assumed" to damage properties throughout the Santiam Canyon—or to establish PacifiCorp's classwide fault. There was no evidence that any spot fires allegedly caused by PacifiCorp utility equipment spread throughout the canyon.

There were geographic problems with Plaintiffs' theory—many spot fires never spread, were put out where they started, or were miles from PacifiCorp powerlines. (ER-848-50; Tr-2438:6-19; Tr-8376:9-25; Tr-8378-81.) And there were timing problems—many spot fires were reported after PacifiCorp powered off its lines, or after the Beachie Creek Fire entered the canyon. (ER-848-50; Tr-6085:9-12; Tr-8385:5-8386:17.) Accordingly, causation and liability—and which fire burned each parcel throughout the miles and miles of the Santiam Canyon—turned on granular, individualized inquiries that prohibited jurors from assuming evidence as to one parcel applied to all properties in the Santiam Canyon (let alone to properties in the other fire areas). Plaintiffs acknowledged they lacked canyon-wide proof when they (unsuccessfully) moved to excise the *entire* eastern half of the fire area at the close of evidence, *James*, 348 Or App at 365-66—a concession that they lacked common proof as to class members who, by their own account, "resided there." (Op. Br. 24 n 5.)

The limited coverage of PacifiCorp's powerlines within the canyon. Plaintiffs' ability to present common proof was further undermined by the fact that PacifiCorp did not provide electric service to a significant portion of the canyon—including the *upwind* eastern end of the canyon Plaintiffs tried to "X out," and the northwestern area where named plaintiff Jeanyne James lived. (Tr-3649:8-3650:8; Tr-8376:9-25.)

Evidence that might have been relevant to class members elsewhere in the Santiam Canyon (e.g., directly near a PacifiCorp powerline ignition point) could not possibly apply "in the same way" to these property owners who lived several miles away from any PacifiCorp equipment—especially when the wind was blowing the opposite direction. (*See* ER-192, 256; Tr-4845:25-4846:21; Tr-8376:9-25; Tr-8319:13-17.) But again, because both were present in the same class *without* distinction, there were material variations precluding the "assume" instruction.

Plaintiffs' contention that spoliation "permitted the jury to infer—classwide—that the evidence PacifiCorp destroyed would have shown additional ignitions and wider spread" proves PacifiCorp's point. (Op. Br. 39.) The only unpreserved evidence Plaintiffs identified was near Gates—roughly in the center of the canyon. (Tr-4468:4-4469:18.) It was irrelevant to portions of the class area where PacifiCorp had no powerlines, let alone the upwind eastern half of

the canyon Plaintiffs tried to cross out. The only way jurors could have found spoliation relevant for the whole canyon would be by relying on the trial court's incorrect instruction and assuming spoliation evidence near Gates applied equally to the class—including those who lived far away, with no PacifiCorp powerlines nearby. Accepting Plaintiffs' spoliation theory thus requires imagining additional powerline ignitions in the center of the canyon that might have spread upwind, and backwards in time, to a portion of the canyon in which Plaintiffs themselves admitted they could not prove liability.

b. Material Variations Across Fire Areas.

The divergences within the fire areas were not limited to the Santiam Canyon. There were numerous individualized issues in each of the four fire areas, and in none of the areas was it permissible to instruct the jury they could assume all the evidence applied to every class member.

Other jurisdictions recognize that wildfires are not susceptible to classwide assumptions because they require jurors to untangle a mess of individualized, parcel-specific questions to determine a defendant's liability to each and every plaintiff in the area. *See, e.g.*, *Downing v. San Diego Gas & Elec. Co.*, 2010 WL 4233033, at *16, *19 (Cal Ct App Oct 27, 2010). Wildfires require analyzing a "complex interplay of intervening and superseding causes," and all class members must "prove specific forms of damage to their particular properties, and that such damage was caused by the negligence alleged"—

textbook examples of "individualized proof" that defy "commonality of facts." *Id.* Tellingly, Plaintiffs cite no authority to the contrary.

Here, each of the wildfires defied a categorical assumption that evidence applied uniformly within the fire areas. The fire areas engulfed large territories with hundreds of plaintiffs: (1) the 242 Fire burned approximately 13,829 acres, (2) the Echo Mountain Complex Fire—itself comprising *two separate* fires—burned approximately 1,890 acres, (3) the South Obenchain Fire burned approximately 29,531 acres, and (4) the Santiam Canyon Fire—*also* comprising several separate fires—burned approximately 45,660 acres. *James*, 348 Or App at 356. Within every fire area, class members differed in terms of the types of damages claimed (ranging from total destruction to smoke damages, as well as a panoply of indirect noneconomic harms stemming from property loss, evacuation, and displacement); the chain of causation that allegedly led to those damages; and whether other causes intervened, superseded, or contributed to the alleged damages. The limited plaintiff-specific evidence—providing some evidence of some harms within some of the fire areas—could not be "assumed" to apply to all plaintiffs within the fire area.

2. Material Variations Across Fire Areas.

The trial court's certification of a single class involving four unrelated fire areas also resulted in unavoidable material variations *across* the four fire areas. Evidence that *one* of the two Echo Mountain Complex Fire ignitions destroyed

a plaintiff's property in that fire area could not be "assumed" to apply to "plaintiffs over a hundred miles away whose property was destroyed by a different wildfire entirely." *James*, 348 Or App at 372. Neither could evidence that PacifiCorp burned a property in the 242 Fire area be assumed to apply to a house that burned in the Santiam Canyon. Nor could evidence that PacifiCorp forced firefighters to evacuate the Santiam Canyon bear on "PacifiCorp's liability to plaintiffs in * * * the South Obenchain Fire boundary." *Id.*

These material variations were exacerbated by the fact that the class involved *different standards* for proving causation. For three of the fire areas, Plaintiffs had to prove but-for causation. *James*, 348 Or App at 371. But for the Santiam Canyon fire area, Plaintiffs merely "had to prove that PacifiCorp's tortious conduct 'was a substantial factor in causing the harm to the plaintiffs.'" *Id.* The application of different standards of causation necessarily prevents evidence from affecting class members "to the same degree and in the same way." *Strawn*, 350 Or at 358-59. And their inclusion in a single class only highlights the certification error below: "No class action is proper unless all litigants are governed by the same legal rules. Otherwise the class cannot satisfy * * * commonality and superiority." *In re Bridgestone/Firestone, Inc.*, 288 F3d 1012, 1015 (7th Cir 2002); *Castano v. Am. Tobacco Co.*, 84 F3d 734, 741 (5th

Cir 1996) ("[V]ariations" in applicable law "may swamp any common issues and defeat predominance.").

The "assume" instruction told jurors they could assume *any* evidence was common to the over 2,000 property owners—even though there were four unconnected fire areas with admittedly unrelated factual causation theories, and even though class members' claims were governed by different legal standards for causation. That was error. And it requires reversal because "the jury could have understood the instruction, 'you may assume that the evidence at the trial applies to all class members,' to mean that evidence demonstrating that plaintiffs were harmed in one wildfire due to PacifiCorp could be 'assumed' to be applicable to plaintiffs who were harmed in a different wildfire entirely." *James*, 348 Or App at 375. "[A]fter all, the jury was instructed that every class member was a part of one, big, single class." *Id.*

3. The Instruction Violated Due Process.

The instruction not only violated Oregon law—it also violated PacifiCorp's due process right to assert its defense to each of the class members' claims. Federal due process requires that each plaintiff prove their claim, and that a defendant be permitted to defend itself against every claim. *See, e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 564 US 338, 366-67, 131 S Ct 2541, 180 L Ed 2d 374 (2011) (due process protects "right to raise any affirmative defenses"—and prohibits "Trial by Formula"); *Duran v. U.S. Bank Nat'l Ass'n*, 59 Cal 4th 1, 29,

35, 325 P3d 916 (2014) (right to litigate "defenses to individual claims" "derive[s] from * * * principles of due process").

PacifiCorp offered trial evidence contesting Plaintiffs' liability theories for specific properties and supporting individual defenses, which applied to different Plaintiffs differently. PacifiCorp repeatedly pointed out Plaintiffs' failures of proof as to the class as a whole. By instructing the jury that it could assume all the evidence applied to every class member, the trial court altered the substantive law—relieving Plaintiffs of an evidentiary burden they would have in an individual case. This change in the substantive law, which denied PacifiCorp the ability to raise individualized defenses as to class members, violated PacifiCorp's due process rights.

B. None Of Plaintiffs' Defenses Of The Instruction Have Merit.

Plaintiffs argue that the instruction was proper because (1) class certification *per se* authorized the instruction, (2) California has a similar pattern instruction, and (3) the Court of Appeals misunderstood the standard of review. Those arguments lack merit and cannot justify the trial court's unprecedented instruction.

1. The Trial Court's Decision To Certify The Class Does Not Validate The Instruction.

Plaintiffs' primary argument is that a class certification order *necessarily* permits a jury to "assume" the classwide effect of evidence *at trial*, no matter what the actual trial record reveals. That is wrong.

Class certification is a procedural mechanism that predicts which claims, theories, and issues will be amenable to classwide adjudication, whereas jury instructions tell jurors the substantive law to apply in resolving the claims and evidence presented at trial. *See Strawn*, 350 Or at 354, 358; *Pearson*, 358 Or at 114; *see also* ORCP 32. Predicting how a case is likely to be litigated says nothing about whether an instruction given at the close of trial is correct, is supported by evidence, or reflects what Plaintiffs proved by common evidence.

The line between procedural, predictive class certification and substantive, post-trial jury instructions is well established—and the procedural mechanism of class certification cannot "abridge, enlarge or modify the substantive rights of any litigant." ORS 1.735(1). Those underlying rights include the right to assert all available defenses, and the right to have the jury decide contested issues of fact. *Bernard*, 275 Or at 159. Thus, the mere fact of certification does not establish that a jury instruction respects substantive rights.

Plaintiffs cite *no* cases where a comparable instruction was sustained in a similar class action, and they are wrong that the instruction accurately stated the

"effect" of class certification. The trial court's *procedural* determination to aggregate claims in a class action cannot modify the *substantive* law. *See* ORS 1.735(1); *Bernard*, 275 Or at 159-60; *Dukes*, 564 US at 366-67. Plaintiffs were required to prove their claims, and PacifiCorp was entitled to contest every claim.

Jury instructions must actually "fit" Plaintiffs' theories and evidence. *In re Urethane Antitrust Litig.*, 768 F3d 1245, 1259 (10th Cir 2014); *see Comcast Corp. v. Behrend*, 569 US 27, 34-35, 133 S Ct 1426, 185 L Ed 2d 515 (2013); *Purdy I*, 355 Or at 227. Because Plaintiffs' promised classwide proof never materialized, the instruction did not "fit" the trial record.

2. The California Pattern Instruction Has Never Been Used In A Wildfire Class Action And Was Not Appropriate Here.

Plaintiffs also defend the "assumption" instruction by pointing to a California pattern jury instruction, CACI No. 115. That instruction has never been given in a California wildfire class action, and it certainly was not appropriate here.

Plaintiffs cite no California trial court decision giving CACI No. 115 in any case remotely similar to this one, nor has any California appellate court concluded that the instruction is a correct statement of law in such a case. On the contrary, CACI's "user guide" explicitly states that "these instructions"—including CACI No. 115—"were drafted for the common type of case," and that

the instructions are not appropriate as written where "unique or complex circumstances prevail." User Guide, in Judicial Council of California Civil Jury Instructions 2 (2026 ed), https://tinyurl.com/4jb8uw2j (accessed Sept 17, 2026). When CACI No. 115 was initially drafted, commenters objected that the language was "overbroad" because, in many class actions, "[p]articular evidence may or may not apply to all class members and it very likely will not be true that all of the evidence will apply to all class members." Letter from Reuben A. Ginsburg, Chair, Jury Instructions Comm., State Bar of Cal. Litig. Section, to Judicial Council of Cal. 1-2 (Mar 3, 2011), https://tinyurl.com/4nsscbrn. The instruction's drafters responded by clarifying that CACI No. 115 should be given only in the "common" type of class action case and not when any "unique *or* complex circumstances" are present.

As for what counts as a "common" type of class action, California and Oregon courts "routinely have found suitable for class treatment a claim alleging a[] [defendant] consistently applied a uniform policy" or practice that harmed all class members in the same way. *Kizer v. Tristar Risk Mgmt.*, 13 Cal App 5th 830, 842, 221 Cal Rptr 3d 207 (2017); *see, e.g.*, *Hurt v. Midrex Div. of Midland Ross Corp.*, 276 Or 925, 930, 556 P2d 1337 (1976) (a single course of conduct by one defendant producing uniform property damage across a cohesive group is "a case typical * * * for a class action"). Theories and issues that require

"members of a proposed class * * * to present evidence that varies from member to member," by contrast, are "aggregation-defeating." *Tyson Foods, Inc. v. Bouaphakeo*, 577 US 442, 453, 136 S Ct 1036, 194 L Ed 2d 124 (2016) (citation omitted); *see also Pearson*, 358 Or at 111 ("Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." (citation omitted)).

As for what counts as "unique" or "complex," mass-tort litigation is "ordinarily not appropriate for a class action"—let alone a common evidence instruction—"because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways." Fed R Civ P 23(b)(3) advisory committee's note to 1966 amendment; *see Amchem Prods., Inc. v. Windsor*, 521 US 591, 625, 117 S Ct 2231, 138 L Ed 2d 689 (1997). Mass-tort litigation involving wildfire damages claims is even less appropriate for class treatment and common evidence instructions given that the origin of each fire, its causal contribution to each parcel, the competing liability theories, and the resulting damage almost invariably present distinct, individualized questions. *See, e.g.*, *Saldana v. City of Camden*, 252 NJ Super 188, 197, 599 A2d 582 (App Div 1991) (affirming denial of certification); *Bradford v. Union Pac. R.R. Co.*, 2007 WL 2893650, at *8 (WD Ark Sept 28, 2007) (denying certification); *Perkin v. San Diego Gas &*

Elec. Co., 225 Cal App 4th 492, 495, 170 Cal Rptr 3d 335 (2014) (purported wildfire class would not have been certified). After all, the more far-flung the class, the greater the danger that a jury will improperly rely on generalizations instead of performing the plaintiff-by-plaintiff determination the law requires. *See In re Fibreboard Corp.*, 893 F2d 706, 711-12 (5th Cir 1990) (trial of 2,990 class members "cannot focus upon such issues as individual causation").

This case "presents both unique and complex circumstances" and thus is not the "common" type of class action proceeding that is an "appropriate" candidate for a common evidence instruction. *James*, 348 Or App at 377; *see Strawn*, 350 Or at 358. Unlike more straightforward class action cases with a single act that affects all class members in the same way, Plaintiffs have identified no single ignition, no single fire, no common theory of liability, and no common theory for causation binding this class together. Plaintiffs cite no case that has ever certified a wildfire damages class action, and certainly no case that has offered an instruction like this in such circumstances.

3. Plaintiffs' Remaining Arguments Should Be Rejected.

Plaintiffs are wrong to accuse the Court of Appeals of "reviewing [class certification] under the guise of *de novo* instructional review." (Op. Br. 30.) The Court of Appeals did not decide whether the class certification order was correct; it ruled on the distinct instructional error and expressly held that "the *trial court* has the authority on remand to reconsider its class certification decision and

reconsider whether a single class is appropriate in this case." *James*, 348 Or App at 380 (emphasis added).

Plaintiffs are also incorrect in arguing that the Court of Appeals ruled on the instructional error simply to exploit a more favorable standard of review. As Plaintiffs' cited authority acknowledges, predominance and commonality determinations are reviewed for *legal error*, not abuse of discretion. *See* Op. Br. 33-34 (citing *Delgado v. Del Monte Fresh Produce, N.A., Inc.*, 260 Or App 480, 489, 317 P3d 419 (2014)); *see also Pearson*, 358 Or at 108 ("superiority" factors are "legal in nature"). Thus, PacifiCorp's challenge to predominance and commonality also would have been reviewed *de novo*.

Plaintiffs' argument that the instruction conveyed only that evidence "applies" to all class members, not that it "proves" any member's case, fares no better. (Op. Br. 49.) Jurors do not consult *Webster's Third* when delivering verdicts—they take the instructions as a whole. And on the whole, the instruction told jurors they "can answer the class questions based on evidence that applies to the class as a whole"—and to "assume that the evidence at the trial applies to all class members." *James*, 348 Or App at 364-65. Thus, the instruction *did* tell jurors that class questions could be decided or "proved" based on only one class member's evidence. And Plaintiffs' counsel emphasized that understanding by repeatedly telling jurors, for example, that PacifiCorp's

admission to starting any fire in the Santiam Canyon meant it caused harm to *everyone* in that fire area. *Id.* at 377-78.

Plaintiffs are wrong that the trial court's certification order and class instructions were "likely the only way the survivors could seek justice in their lifetimes." (Op. Br. 2.) These unprecedented class action proceedings have proved far less efficient than the alternatives.

- When PacifiCorp filed this appeal, it had already paid over $1.3 billion to settle more than 2,000 claims outside of this error-ridden class action. And PacifiCorp has since settled nearly 90 percent of known claims outside the Beachie Creek/Santiam Canyon fire area—and paid more than $2.2 billion in settlements. Press Release, PacifiCorp, *PacifiCorp Announces Settlement of All Federal Claims for Damages from 2020 Labor Day Wildfires and 2022 McKinney Fire* (Feb 20, 2026), https://tinyurl.com/43chp794.

- Similarly, plaintiffs in other consolidated, non-class action wildfire actions have recovered *tens of billions* of dollars. *E.g.*, Fire Victim Trust, *Latest Progress*, https://www.firevictimtrust.com (accessed Aug 28, 2026) ($13 billion from PG&E to more than 70,000 wildfire claimants).

- One utility in Colorado resolved claims brought by more than 4,000 plaintiffs in consolidated individual actions arising from a wildfire in less time than it took for a *single* class member in these proceedings to get a final judgment. *Kupfner v. Xcel Energy, Inc.*, No 2022CV30195 (Colo Dist Ct, Boulder Cnty) (settlement announced Sept 24, 2025); Xcel Energy Inc., Current Report (Form 8-K) (Sept 24, 2025); Xcel Energy Inc., Quarterly Report (Form 10-Q) (Q3 2025).

- Two utilities in California resolved similarly large numbers of claims on comparable timelines—and without any class component. *See* Press Release, S. Cal. Edison, *SCE Resolves All Insurance Subrogation Claims for the Thomas and Koenigstein Fires and Montecito*

> *Mudslides* (Sept 23, 2020); Edison Int'l & S. Cal. Edison Co., Current Report (Form 8-K) (Jan 22, 2021).

This litigation has not resulted in compensation to a single plaintiff—and if this Court remands, nearly a dozen issues await—while plaintiffs from other fire areas have received full compensation. Plaintiffs' focus on efficiency is remarkable.

In any event, efficiency does not justify disregarding "settled principles of substantive and procedural law simply to make the class action manageable." *Bernard*, 275 Or at 159 n 5; *see Strawn*, 350 Or at 354-59. And here, the law prohibited "replac[ing]" PacifiCorp's right to litigate "defenses to individual claims" with a "'Trial by [Assumption]' approach." *Clippinger v. State Farm Auto. Ins. Co.*, 173 F4th 817, 834 (6th Cir 2026). PacifiCorp recognizes the tragic property loss Oregonians suffered from the Labor Day 2020 fires. But these unprecedented and ultimately unlawful class action proceedings are not the way to effectively or legally adjudicate Plaintiffs' claims. The trial court erred, and this Court has no reason to salvage its mistakes.

* * *

This class is unprecedented in the history of Oregon. The class was fractured with internal divisions—sweeping in divergent fires separated by hundreds of miles and covering thousands of plaintiffs. *See James*, 348 Or App at 380. It was certified based on the promise of an expert who never testified,

and it was re-certified after trial evidence—and an "eleventh-hour" attempt by Plaintiffs to cross-off part of their class—only revealed more problems with the class and the serious holes in Plaintiffs' case. *See id.*; *see also, e.g.*, *Off. of Gen. Treasurer ex rel. Emps. Ret. Sys. v. Boeing Co.*, 182 F4th 422, 428 (4th Cir 2026) (reversing certification—flawed expert); *State Farm*, 173 F4th at 823 (reversing certification—non-cohesive class). Nevertheless, the trial court—despite the critical differences between and within the fire areas—gave an instruction that jurors could simply "assume" that evidence applied classwide. The class was unprecedented, the instruction was erroneous, and the trial was flawed.

II. The Improper Instruction Prejudiced PacifiCorp.

The trial court's instruction misstated the law by telling the jury that it could assume evidence about class representatives applied to all class members across all fires, despite material inter- and intra-fire differences between class members. Plaintiffs' counsel amplified that error in closing arguments. The instruction *permitted* the jury to impose liability for harms PacifiCorp could not have caused, based on evidence that could not have applied classwide. And that is exactly what happened. At a minimum, the instruction created "some likelihood that the jury reached a legally erroneous result," *Purdy I*, 355 Or at 232, requiring a new trial.

A. An Instruction Is Prejudicial If There Is "Some Likelihood" The Jury Reached An Erroneous Result.

An erroneous jury instruction is prejudicial when it substantially affects a party's rights. This standard is met when, considering the instructions "as a whole in light of the evidence and the parties' theories of the case at trial[,] there is *some likelihood* that the jury reached a legally erroneous result." *Purdy I*, 355 Or at 232 (emphasis added). Because "[w]e presume that a jury follows a trial court's instructions," if the erroneous instruction "*permits* the jury to reach a legally erroneous result," it is prejudicial. *Wallach*, 344 Or at 326, 329 (emphasis added).

While paying lip service to *Purdy I*, Plaintiffs espouse a different rule: "an error must cause something *more* than the 'possibility' of a different result"—it must actually "*produce* a material influence." (Op. Br. 52-53 (first emphasis added).) That is not the law. The case Plaintiffs rely on—*Shoup v. Wal-Mart Stores, Inc.*, 335 Or 164, 61 P3d 928 (2003)—concerned an invalid specification of negligence, where it was not evident that the jury relied on it. In *Purdy I*, the court recognized that "*Shoup* was careful to distinguish the problem in that case from circumstances involving instructional error," where courts "presume that a jury follows a trial court's instructions." 355 Or at 230. Accordingly, the court held that prejudice for instructional error does *not* require actual reliance, but just "*some* likelihood that the jury reached a legally erroneous result," *id.* at 227,

230, 232 (emphasis added), i.e., if the instruction "*permits* the jury to reach a legally erroneous result," *Wallach*, 344 Or at 329 (emphasis added).

This Court has consistently applied this well-settled principle. *Wallach* is instructive. There, the jury instruction "gave the jury the wrong legal rule to apply"—"that it could hold Allstate liable for damages for which the jury could not, on this record, hold it legally responsible." *Wallach*, 344 Or at 322. Because it "permit[ted] the jury to reach a legally erroneous result," it "substantially affected Allstate's rights" and required "revers[al]." *Id.* at 329.

Similarly, in *State v. Pine*, 336 Or 194, 209, 82 P3d 130 (2003), the instruction contradicted the criminal statute by allowing conviction without causation. That was prejudicial because even "if the jury had believed the defendant's version of the facts"—"that he had not caused physical injury to" the victim—"it nonetheless could have convicted him under the challenged instruction." *Id.* at 200, 210; *see also Bjorndal v. Weitman*, 344 Or 470, 480-81, 184 P3d 1115 (2008) (similar).

The Court of Appeals routinely reverses similar types of errors as prejudicial. *See, e.g.*, *Elan v. Tate*, 294 Or App 76, 87, 430 P3d 179 (2018) ("invit[ing] the jury to speculate that plaintiff had suffered permanent injury" was prejudicial given failure to prove permanent injury); *Sherertz v. Brownstein Rask*, 288 Or App 719, 728, 407 P3d 914 (2017) (prejudicial to instruct jury that

"defendant was not negligent *merely* for failing to achieve the desired result, when, in fact," that "formed the central question"); *State v. Berry*, 293 Or App 717, 731, 429 P3d 1011 (2018) (prejudicial to relieve party's burden of proof by giving the "erroneous impression" that it was met).

B. There Is Some Likelihood That The Trial Court's Erroneous Instruction Caused The Jury To Reach An Erroneous Result.

Here, the trial court's error was prejudicial because it allowed Plaintiffs to escape their failure to establish liability on a classwide basis—and "permit[ted] the jury to reach a legally erroneous result." *Wallach*, 344 Or at 329. And that is exactly what happened: The jury held PacifiCorp liable for harms to class members for which Plaintiffs had no causation evidence, because they resided in portions of the class boundary where PacifiCorp owned no equipment and did not provide service—and that were *upwind* of PacifiCorp's lines.

The risk of jury error was also "amplified by plaintiffs' counsel's closing argument." *Purdy II*, 311 Or App at 259. Contrary to Plaintiffs' assertion that "no lawyer argued" that evidence of one fire "proved causation in another" (Op. Br. 55), Plaintiffs' counsel emphasized the instruction during closing argument and in rebuttal, telling the jury it could "assume that the evidence that came in applies to the class members as a whole"—such as evidence about particular plaintiffs that "live[d] right by Echo Mountain," hundreds of miles from other fires. *James*, 348 Or App at 368. Plaintiffs say their counsel "conveyed" the

instruction's "correct meaning" (Op. Br. 56 n 7), but they just prove PacifiCorp's point: Plaintiffs' counsel reinforced the error by telling the jury it did not need individualized evidence as to each class member because it could extrapolate evidence about class representatives.

Plaintiffs' counsel also argued that PacifiCorp's admission to starting any fire in the Santiam Canyon meant it caused harm to *everyone*. Because counsel "emphasized those instructions in his closing argument, there was some likelihood that the jury relied on the erroneous instructions and, consequently, reached a legally erroneous result." *Elan*, 294 Or App at 87; *see Purdy II*, 311 Or App at 259. Plaintiffs do not dispute this point, but claim that the evidence did, in fact, apply "canyon-wide." (Op. Br. 60-62.) But this argument assumes the instruction was correct. If the instruction was erroneous (it was), Plaintiffs do not offer any basis for the Court to conclude it was not prejudicial.

Despite the many individualized issues of proof in the Santiam Canyon discussed above, the instruction permitted the jury to improperly apply Santiam-Canyon evidence throughout the class boundary. And the jury did just that when it voted 9-3 to find PacifiCorp liable for causing "harm to the entire class within the boundaries" of the Santiam Canyon. (*E.g.*, ER-292.) The Court of Appeals thus found the error prejudicial because it unjustifiably "permitted" the jury to "assume that PacifiCorp's admission to starting any particular fire in the Santiam

Canyon was sufficient to determine that it caused harm to every plaintiff in the Santiam Canyon." *James*, 348 Or App at 378. Plaintiffs cannot transform the Court of Appeals' finding of prejudice—plainly backed by the record, *id.* at 356-68, 377-78—into an "implausible" "hypothetical" simply because they were "in the courtroom" and view the record and the trial differently. (Op. Br. 55.)

C. Plaintiffs' Prejudice Arguments Do Not Withstand Scrutiny.

Plaintiffs also try to justify the instruction by arguing that it is improbable that jurors would have applied proof of one *fire* to *other fires*. (Op. Br. 55-56 (citing examples of the jury being told "to decide each fire *separately*").) But that is a strawman. The prejudice is not simply that the jury could have applied proof of one *fire* to another *fire*, but that the jury was permitted to apply evidence about *class representatives* to all *class members*—whether across fire areas or within a single fire area. Plaintiffs did not prove that PacifiCorp harmed each class member. So their examples are beside the point, because they do not disprove the lack of common evidence as to every class member in each fire area, or even as to class members within the Santiam Canyon.

Plaintiffs look for a cure in PacifiCorp's closing argument that Plaintiffs "had to prove causation for each and every single" class member, and in the court's answer to the jury's mid-deliberation question, that "a decision for the named plaintiffs" does "not necessarily in all circumstances" "automatically extend[] to class members." (Op. Br. 55-56, 58.) But the jury still could have

concluded that Plaintiffs proved causation "for each and every single" class member—not because one *decision* applied across the class—but because the same *evidence* applied across the class. To the extent PacifiCorp contradicted the instruction, Plaintiffs provide no reason to believe the jury would have followed a *party's* argument instead of the court's instruction.

Plaintiffs claim the jury could not have interpreted the instruction erroneously because the special verdict form "required the jury to determine liability and causation on a fire-by-fire basis, and to determine causation separately for class representatives and for the entire class." (Op. Br. 57.) Plaintiffs say the form "contained 80 separate, fire-by-fire questions," *id.*, but they omit that it did not contain any class-member-by-class-member questions. Instead, it grouped all class members together and repeatedly asked whether PacifiCorp was liable to "the entire class" (ER-290-305), and whether "the entire class" was entitled to punitive damages (ER-316-18)—the opposite of Plaintiffs' characterization. The unanimous Court of Appeals found prejudice for that very reason. *See James*, 348 Or App at 378.

At bottom, Plaintiffs argue that the jury *could have* understood the instruction in a non-erroneous way, which is irrelevant if there is also "some likelihood" that the jury could have understood it in an erroneous way to come to the wrong legal result. *See Hadley v. Extreme Techs., Inc.*, 272 Or App 49,

68-69, 355 P3d 132 (2015); *State v. Keegan*, 349 Or App 1, 8-9, 591 P3d 714 (2026); *Wallach*, 344 Or at 326. And here, there was more than "some likelihood" that the jury's verdict was "legally erroneous," *Purdy I*, 355 Or at 232, because the trial court "gave the jury the wrong legal rule to apply" and "permit[ted] the jury to reach a legally erroneous result," *Wallach*, 344 Or at 322, 329.

Plaintiffs also claim the verdict shows the jury actually "differentiated among the fires rather than assuming the evidence PacifiCorp caused one fire proved it caused another." (Op. Br. 59.) The fire-to-fire point is, again, irrelevant. In any case, the verdict *strongly suggests* the jury followed the instruction and extrapolated evidence about class representatives to all class members across all fires. As Plaintiffs note, the jury voted 11-1 that PacifiCorp's negligence caused Plaintiffs' harm in the Echo Mountain Complex, South Obenchain, and 242 Fires, and 9-3 for the Santiam Canyon Fire. *Id.* The jury may have "differentiated among the fires," *id.*, but it did not differentiate between class representatives and class members—the same jurors voted the exact same way to find PacifiCorp's negligence "a cause of harm *to the entire class*." (ER-291-92 (emphasis added); *see* ER-294-95 (gross negligence), 297-98 (private nuisance), 300-01 (public nuisance), 302-03 (trespass).)

In sum, the only explanation for finding PacifiCorp liable to *all class members* in *every fire area*—despite the "material variation" between them, *Strawn*, 350 Or at 359, the lack of evidence as to each class member, and evidence disproving liability to several class members—is that the jury followed the court's instruction. Based on the "record as a whole and in the light of the parties' theories at trial," the trial court's erroneous instruction not only gave rise to "some likelihood that the jury reached a legally erroneous result," it did, in fact, lead to such a result. *Purdy II*, 311 Or App at 259. The Court of Appeals was correct to reverse.

CONCLUSION

The Court should affirm.

DATED: September 17, 2026

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CERTIFICATE OF COMPLIANCE WITH
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I certify that this brief complies with the 14,000-word count limitation for answering briefs in ORAP 5.05(1)(b)(i)(B) and that the word count as described in ORAP 5.05 is 13,997 words. I further certify that the font size in this brief is Times New Roman 14-point for both the text of the brief and the footnotes, as required by ORAP 5.05(3)(b)(ii).

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CERTIFICATE OF FILING AND SERVICE

I certify that on September 17, 2026, I filed the original of this **RESPONDENTS' ANSWERING BRIEF** with the Appellate Court Administrator by the Court of Appeals' eFiling system.

I further certify that on September 17, 2026, I caused true copies of this **RESPONDENTS' ANSWERING BRIEF** to be served upon the parties listed via e-service on the Oregon Court of Appeals website and via email pursuant to the agreement of the parties.

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