

IN THE SUPREME COURT OF THE STATE OF OREGON

Jeanyne James; Robin Colbert; Jane Drevo; Sam Drevo; Brooke Edge and Bill Edge, Sr.; Lori Fowler; Iris Hampton; James Holland; Rachelle McMaster; Kristina Montoya; Northwest River Guides, LLC; Shariene Stockton and Kevin Stockton, Victor Palfreyman; Palfreyman Family Trust; Duane Brunn, individually and on behalf of all others similarly situated; Alfred Cuzzo; Deborah Jo Fawcett; David Giller, Sr.; Richard Jensen; Scott Johnson; Frank King, individually and in his capacity as trustee of the King Revocable Trust; Stephen David Nielsen; Cory Staniforth; Deborah Tank; Christian Bigness; Kelly Davis; Christine Grom; Maria Guadalupe Elosa Martinez; Carl Seyboldt and the Seyboldt Revocable Living Trust; Diane Turnbull; Joy Wilson; Richard Wilson; the Upward Bound Camp for Persons with Special Needs; and William Browning in his capacity as Personal Representative of the Estate of Delores Stowell,
Plaintiffs-Respondents, Cross-Appellants, Petitioners on Review,

and

Mary Kathleen Becherer et al.,
Plaintiffs,

and

Oregon Department of Justice,
Creditor-Respondent,

v.

PacifiCorp, an Oregon Corporation, and Pacific Power, an Oregon registered electric utility and assumed business name of PacifiCorp,
Defendants-Appellants, Cross-Respondents, Respondents on Review.

**PLAINTIFFS-RESPONDENTS' PETITION FOR
REVIEW**

Petition for Review of Decision of the Court of Appeals,
348 Or App 347, ___ P3d ___ (April 8, 2026); Opinion by
Joyce, J., joined by Ortega and Hellman, JJ.

In an appeal from the Limited Judgments of the
Multnomah County Circuit Court, Case No. 20CV33885
The Honorable Steffan Alexander

Petitioners intend to file a Brief on the Merits

CA A183140

MAY 2026

Alexander G. Tievsky
Nicholas Rosinia
Megan Delurey
Schuyler Daum
Landon Webster
EDELSON PC
350 North LaSalle Street, 14th Floor
Chicago, Illinois 60654
Telephone: (312) 589-6370
Email: atievsky@edelson.com
nrosinia@edelson.com
mdelurey@edelson.com
sdaum@edelson.com
lwebster@edelson.com

Todd Logan, OSB No. 261139
Patrick Ntchobo
EDELSON PC
150 California Street, 18th Floor
San Francisco, California 94111
Telephone: (415) 212-9300
Email: tlogan@edelson.com
pntchobo@edelson.com

Ali Moghaddas
EDELSON PC
11601 Wilshire Boulevard, Suite 1970
Los Angeles, California 90025
Telephone: (310) 694-0331
Email: amoghaddas@edelson.com

Keith A. Ketterling, OSB No. 913368
Timothy S. DeJong, OSB No. 940662
Cody Berne, OSB No. 142797
Emily A. Johnson, OSB No. 183791
Erin E. Roycroft, OSB No. 184371
STOLL STOLL BERNE LOKTING
& SHLACHTER P.C.
209 SW Oak Street, Suite 500
Portland, Oregon 97204

Telephone: (503) 227-1600
Email: kketterling@stollberne.com
tdejong@stollberne.com
cberne@stollberne.com
ejohnson@stollberne.com
erocroft@stollberne.com

Nicholas A. Kahl, OSB No. 101145
NICK KAHL, LLC
2246 E Burnside Street, Suite A
Portland, Oregon 97204
Telephone: (971) 231-1342
Email: nick@nickkahl.com

Matthew J. Preusch, OSB No. 134610
KELLER ROHRBACK L.L.P.
801 Garden Street, Suite 301
Santa Barbara, California 93101
Telephone: (805) 456-1496
Email: mpreusch@kellerrohrback.com

Yoona Park, OSB No. 980904
Sarah R. Osborn, OSB No. 222119
KELLER ROHRBACK L.L.P.
601 SW 2nd Avenue, Suite 1900
Portland, Oregon 97204
Telephone: (971) 253-4600
Email: ypark@kellerrohrback.com
sosborn@kellerrohrback.com

Daniel Mensher, OSB No. 074636
Benjamin Gould, OSB No. 256994
Natida Sribhibhadh
KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, Washington 98101
Telephone: (206) 623-1900
Email: dmensher@kellerrohrback.com
bgould@kellerrohrback.com
natidas@kellerrohrback.com

Derek C. Johnson, OSB No. 882340
Marilyn A. Heiken, OSB No. 923308
JOHNSON JOHNSON LUCAS & MIDDLETON, PC
975 Oak Street, Suite 1050
Eugene, Oregon 97401
Telephone: (541) 484-2434
Email: djohnson@justicelawyers.com
mheiken@justicelawyers.com

*Attorneys for Plaintiffs, Plaintiffs-Respondents, Cross-Appellants,
Petitioners on Review*

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

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

Douglas J. Dixon
Craig A. Fligor
HUESTON HENNIGAN LLP

620 Newport Center Drive, Suite 1300
Newport Beach, California 92660
Telephone: (949) 229-6840
Email: ddixon@hueston.com
cfligor@hueston.com

Theodore J. Boutrous, Jr.
GIBSON, DUNN & CRUTCHER LLP
333 S Grand Avenue
Los Angeles, California 90071-3197
Telephone: (213) 229-7804
Email: tboutrous@gibsondunn.com

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

*Attorneys for Defendants-Appellants, Cross-Respondents,
Respondents on Review*

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

Attorney for Creditor-Respondent

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I. INTRODUCTION

This case arises from one of the largest disasters in Oregon history. On Labor Day 2020, during a forecasted windstorm and despite pleas from top state officials, Defendants-Appellants PacifiCorp and Pacific Power (together, “PacifiCorp”) chose to leave their power lines energized in places where the topography, tinder-dry forests, and winds created extreme fire conditions. As the wind blew, PacifiCorp’s power lines ignited fires across the state. Residents were forced to flee through walls of fire, entire communities burned, and thousands of Oregonians suffered harm.

Four of those fires—the 242 Fire, the Echo Mountain Complex Fire, the South Obenchain Fire, and the Santiam Canyon Fire—are the subject of this lawsuit. The fire victims alleged that PacifiCorp had for years failed to properly manage vegetation around its powerlines, failed to develop a de-energization plan, failed to monitor weather and conditions on the ground, and, ultimately, failed to shut off the power beginning on Labor Day 2020. Faced with thousands of fire victims bringing the same claims arising from the same corporate conduct, the trial court determined that a bifurcated class action was the best way to manage the case. The alternative—

hundreds of duplicative liability trials presenting the same evidence against the same defendant—would have tied up the courts for a decade or more and denied fire survivors any reasonable path to relief.

The first phase of the case proceeded to trial on PacifiCorp's liability. After eight weeks of evidence, the jury found that PacifiCorp had caused harm to every class member within the boundaries of the four fires. The case then proceeded to the second phase, with juries determining each fire survivor's damages. By the time of the Court of Appeals' decision, eighteen damages trials had proceeded, resulting in awards exceeding \$1 billion for more than 170 fire survivors.

The Court of Appeals' decision upends all of this. The court did not find the evidence at trial wanting; it held the evidence was sufficient to support the liability verdict as to every class member. But it reversed the liability verdict because of a single sentence in a standard instruction defining how a class action works. In doing so, the Court of Appeals applied a new and erroneous rule of class-action law, misunderstood the class-wide evidence at trial, and hypothesized prejudice that the trial record conclusively disproves.

The result leaves Oregon trial courts without a workable framework for instructing class-action juries and threatens verdicts impacting thousands of fire survivors. This Court should allow review and reverse.

II. HISTORICAL AND PROCEDURAL FACTS

A. Class Certification and the Two-Phase Trial Structure

The plaintiffs are fire survivors who owned real or personal property damaged by one of the four fires PacifiCorp started during the Labor Day windstorm. They filed suit in September 2020 and moved for class certification in 2021, proposing a two-phase procedure. ER-1-30 (Complaint); TCF-10/27/21 (Plaintiffs' Motion for Issues Class Certification) at 20-41). In a first trial ("Phase I"), class representatives would present common evidence to resolve PacifiCorp's liability to class members. In the second phase ("Phase II"), juries would determine class members' individual damages.

PacifiCorp opposed class certification on the ground that questions about the cause and spread of the fires were not common across the class. TCF-12/23/21 (Defendants' Opposition to Plaintiffs' Motion for Issues Class Certification) at 15-26. The trial court rejected that view due to the common evidence concerning

PacifiCorp’s liability. ER-61-73. Across all four fire areas, Plaintiffs showed that PacifiCorp (1) neglected vegetation management across the company’s service area; (2) declined to install fire-safe equipment; (3) ignored meteorologists’ warnings; (4) disregarded state officials’ pleas to de-energize; (5) failed to monitor weather conditions on the ground; (6) allowed dysfunction at its emergency operations center; (7) made a common, centralized decision across the fires not to shut off the power when they began; and (8) destroyed physical evidence and internal communications. The trial court further found that any fire-specific causation issues could be managed and “addressed at trial by plaintiffs identifying or electing which factual theories support each of the four geographic fire areas.” ER-69.

The trial court concluded that the bifurcated class procedure was “the best and most efficient way to resolve the victims’ claims,” and certified an issues class under ORCP 32 G to litigate PacifiCorp’s liability to the class—which, if proven, would lead to a damages phase. ER-77. The Court of Appeals denied PacifiCorp’s request for interlocutory review. *See James v. PacifiCorp*, 323 Or App 764, 778, 524 P3d 506 (2023).

B. The Phase I Liability Trial

The Phase I liability trial unfolded as anticipated. The jury heard, for instance, that PacifiCorp had neglected its wildfire preparation for years in all fire areas, was deficient in its wildfire mitigation work, lacked the infrastructure to monitor and respond to local conditions in any of the fire areas, had no plan to shut off the power in any of the fire areas despite the extreme fire risk, ignored repeated warnings, failed to respond to any of the fires once its powerlines began igniting them, and destroyed evidence following the fires.

Plaintiffs also presented evidence specific to the cause and progression of each fire, as the certification order contemplated. For the 242, South Obenchain, and Echo Mountain Complex Fires, Plaintiffs presented evidence of individual fire ignitions and resulting fire spread. PacifiCorp countered that it was not negligent but offered no alternative cause.

For the Santiam Canyon Fire, Plaintiffs presented evidence that PacifiCorp ignited a series of fires in the Canyon, which

collectively became the Santiam Canyon Fire.¹ Plaintiffs also presented evidence that PacifiCorp's fires forced the evacuation of hundreds of firefighters stationed in the Canyon that night to fight a preexisting fire called the Beachie Creek Fire, which was burning to the northeast and would burn through the Canyon at some time after the start of the windstorm, leaving the entire Canyon unprotected. In doing so, Plaintiffs presented a common "substantial factor" causation theory for all class members affected by the Santiam Canyon Fire, through which they contended PacifiCorp was a cause of harm to every class member in the Canyon. PacifiCorp argued that its power line fires were extinguished and that the Beachie Creek Fire was the sole cause of harm.

C. The Phase I Jury Instructions and Verdict Form

Because the parties presented competing factual theories, the trial court developed a verdict form that required the Phase I jury to determine liability and causation on a fire-by-fire basis. For each claim for relief, the verdict form asked separately for each fire (a)

¹ Plaintiffs also showed that PacifiCorp destroyed evidence at many ignition locations in the Canyon after the fires. The jury was instructed that it could infer the destroyed evidence was adverse to PacifiCorp. ER-274. PacifiCorp did not contest this instruction on appeal.

whether the Plaintiffs had proven PacifiCorp's liability "as to the Plaintiffs and the entire class within the boundaries of the fire areas," (b) whether PacifiCorp's conduct was "a cause of harm to the Plaintiffs within the boundaries of the fire areas," and (c) whether PacifiCorp's conduct was "a cause of harm to the entire class within the boundaries of the fire areas." ER-290-312 (Final Verdict).

All agreed that the jury should also be instructed on how a class action trial works. As PacifiCorp put it, "the jury needs to be told that when they're answering the class question, their answer will bind that class[.]" Tr 7812:18-21. Plaintiffs also sought to instruct that, in a class action, class representatives present evidence on behalf of absent class members who need not appear. TCF-06/07/23 (Defendants' Submission RE Draft Jury Instructions and Draft Verdict Forms), Ex 1 at 18-19.

In the absence of an Oregon model instruction or specific Oregon case law, both parties presented proposals relying in part on the California Civil Jury Instruction No. 115. TCF-06/07/23 (Defendants' Submission RE Draft Jury Instructions and Draft Verdict Forms), Ex 1 at 17-19. Using that model instruction, the trial court gave the following instruction, in relevant part:

“CLASS QUESTIONS DEFINED

* * * 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. * * * Each class question is broken down by fire.”

ER-278-79.

Closing argument emphasized the fire-by-fire structure of the evidence, jury instructions, and verdict form. *See* Tr 8363-8376, 8499:3-9. For example, PacifiCorp told the jury at closing, “[n]ow, there are four classes. One for each fire at issue in this matter.” Tr 8363:9-10. PacifiCorp’s lawyer also argued that “[t]o obtain a verdict for all class members, [Plaintiffs] have to prove causation for each and every single one[.]” *id.* at 8363:17-19, and argued at length that Plaintiffs particularly could not do so for class members in the Santiam Canyon, *id.* at 8363-8376.

D. The Phase I Verdict

The jury returned a verdict finding PacifiCorp liable to every class member across all four fires on all but one claim for relief. ER-290-312 (Final Verdict). The jury determined that PacifiCorp’s conduct was negligent, grossly negligent, reckless, and willful, and that it constituted a public nuisance, private nuisance, and a trespass. *Id.*

Reflecting the fire-by-fire structure, the jury voted differently as to different fires on the Class's claims for negligence, private nuisance, and trespass. The verdict, for example, was 11-1 in favor of Plaintiffs on the Echo Mountain Complex, South Obenchain, and 242 Fires, and 9-3 for the Santiam Canyon Fire. The following is an excerpt from the negligence portion of the verdict form reflecting this difference:

8	QUESTION 3:	Was the Defendant's negligence a cause of harm to the entire class																										
9	within the boundaries of the fire areas below?																											
10	Echo Mountain Complex fire	YES <input checked="" type="checkbox"/>	NO _____	<table border="1"> <tr> <td>2</td><td>8</td><td>11</td><td>24</td><td>32</td><td>37</td> </tr> <tr> <td>N</td><td>Y</td><td>Y</td><td>Y</td><td>Y</td><td>Y</td> </tr> <tr> <td>44</td><td>48</td><td>61</td><td>69</td><td>83</td><td>96</td> </tr> <tr> <td>Y</td><td>Y</td><td>Y</td><td>Y</td><td>Y</td><td>Y</td> </tr> </table>	2	8	11	24	32	37	N	Y	Y	Y	Y	Y	44	48	61	69	83	96	Y	Y	Y	Y	Y	Y
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13	Santiam Canyon fire	YES <input checked="" type="checkbox"/>	NO _____	<table border="1"> <tr> <td>2</td><td>8</td><td>11</td><td>24</td><td>32</td><td>37</td> </tr> <tr> <td>N</td><td>Y</td><td>Y</td><td>Y</td><td>Y</td><td>N</td> </tr> <tr> <td>44</td><td>48</td><td>61</td><td>69</td><td>83</td><td>96</td> </tr> <tr> <td>Y</td><td>N</td><td>Y</td><td>Y</td><td>Y</td><td>Y</td> </tr> </table>	2	8	11	24	32	37	N	Y	Y	Y	Y	N	44	48	61	69	83	96	Y	N	Y	Y	Y	Y
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16	South Obenchain fire	YES <input checked="" type="checkbox"/>	NO _____	<table border="1"> <tr> <td>2</td><td>8</td><td>11</td><td>24</td><td>32</td><td>37</td> </tr> <tr> <td>N</td><td>Y</td><td>Y</td><td>Y</td><td>Y</td><td>Y</td> </tr> <tr> <td>44</td><td>48</td><td>61</td><td>69</td><td>83</td><td>96</td> </tr> <tr> <td>Y</td><td>Y</td><td>Y</td><td>Y</td><td>Y</td><td>Y</td> </tr> </table>	2	8	11	24	32	37	N	Y	Y	Y	Y	Y	44	48	61	69	83	96	Y	Y	Y	Y	Y	Y
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19	242 fire	YES <input checked="" type="checkbox"/>	NO _____	<table border="1"> <tr> <td>2</td><td>8</td><td>11</td><td>24</td><td>32</td><td>37</td> </tr> <tr> <td>N</td><td>Y</td><td>Y</td><td>Y</td><td>Y</td><td>Y</td> </tr> <tr> <td>44</td><td>48</td><td>61</td><td>69</td><td>83</td><td>96</td> </tr> <tr> <td>Y</td><td>Y</td><td>Y</td><td>Y</td><td>Y</td><td>Y</td> </tr> </table>	2	8	11	24	32	37	N	Y	Y	Y	Y	Y	44	48	61	69	83	96	Y	Y	Y	Y	Y	Y
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ER-292. On other claims, however, the jury's vote was consistent across all four fires. ER-290-304. The jury also awarded economic and noneconomic damages to each of the named plaintiffs, as well as punitive damages to the named plaintiffs and the entire class. ER-306-12; ER-313-18 (Verdict Form-Punitive Damages). The trial court

then entered a limited judgment in favor of the Phase I named plaintiffs, which PacifiCorp appealed. ER-351-456 (Limited Judgment and Money Award).

E. Phase II Damages Trials and Appeals

The trial court proceeded with Phase II damages trials beginning in January 2024, at which approximately ten plaintiffs in each trial have, based on the Phase I liability verdict, presented their individual damages claims.² As of the Court of Appeals' decision, eighteen damages trials had proceeded, resulting in awards exceeding \$1 billion for more than 170 fire survivors. The Multnomah County Circuit Court was also presiding over multiple damages trials every month, so that each class member could have their damages determined by 2028.

F. The Decision of the Court of Appeals

On April 8, 2026, the Court of Appeals reversed the Phase I jury verdict on the sole ground that the trial court erred in instructing the jury that it “may assume that the evidence at the

² The limited judgments entered in the first two Phase II trials are included within the present appeal. ER-541-624, 707-818. A number of additional limited judgments have been entered in the circuit court, many of which are the subject of separate appeals presently before the Court of Appeals.

trial applies to all class members.” *James v. PacifiCorp*, 348 Or App 347, 355 ___ P3d ___ (2026) (attached as App-1). The Court of Appeals held that sentence was “legally erroneous” because, in its view, “certain evidence at trial, particularly related to causation, did not necessarily apply to every class member” because the four fires burned in different locations. App-1, 29-30. The court also held the sentence sufficiently prejudicial to warrant reversal on the theory that the sentence might have caused the jury to misunderstand its task to adjudicate causation separately for each fire. App-38-40.

At the same time, the Court of Appeals held that the evidence was sufficient to support the jury’s finding that PacifiCorp caused harm to every class member for each fire, including in the Santiam Canyon. *See* App-41-42.

III. QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

1. After a trial court has exercised its discretion to certify a class under ORCP 32, may the trial court inform the jury that absent class members will not be present to offer their own liability evidence by instructing the jury that it “may assume that the evidence at trial applies to all class members”?

Proposed Rule of Law: Yes. Such an instruction describes the legal effect of class certification under ORCP 32, which is that named representatives present evidence on behalf of the entire class. When a class is properly certified under ORCP 32, the instruction is correct, and an appellate court may not reverse

on the ground that the evidence was insufficiently common across the class without applying ORCP 32 and affording the trial court the deference its certification decision is owed.

2. May an appellate court deem a putative instructional error prejudicial under ORS 19.415(2) without considering evidence gleaned from the use of “appropriately tailored verdict forms,” as the Court endorsed in *Purdy v. Deere & Co.*, 355 Or 204, 232 n 10, 324 P3d 455 (2014)?

Proposed Rule of Law: No. When the trial court uses a specially “tailored” verdict form that poses separate liability questions and thus “provided greater insight into the basis for the jury’s verdict,” *id.* at 238 (Balmer, C.J., concurring), a reviewing court must evaluate the jury’s differing responses to those separate liability questions when determining whether putative instructional error substantially and prejudicially affected the appellant’s rights.

IV. REASONS FOR GRANTING REVIEW

This Court should grant review for four primary reasons.

First, this is a case of statewide importance. ORAP 9.07(3). This may be the largest case in Oregon history. The certified class contains over 2,000 members, many of whom lost everything. More than 50 plaintiffs who survived PacifiCorp’s fires have since died. Many more are seniors, have serious health conditions, remain displaced, or are in financial distress because of the fires.

The consequences of the Court of Appeals’ decision are also important to the judicial system, as well as to the public’s perception of it. ORAP 9.07(3). Based on its interpretation of a single sentence

in a standard jury instruction, the decision wiped out verdicts for approximately 200 plaintiffs across 20 trials in a case that has significantly impacted the Multnomah County Circuit Court for nearly six years—and will now for years more. The Court of Appeals’ decision, issued under conditions that raise unfortunate appearance-of-justice concerns,³ leaves thousands of fire victims in limbo.

Second, the Court of Appeals’ decision is wrong and will result “in a serious or irreversible injustice.” ORAP 9.07(14)(a). The challenged instruction was appropriate for the class the trial court certified and the trial it conducted. The Court of Appeals’ contrary view rests on a misinterpretation that no party held at trial and no juror adopted. The decision also awards costs, leading PacifiCorp, a company with \$39.6 billion in assets and \$11.2 billion in shareholder equity, to seek reimbursement of some \$6 million from a handful of its victims. *See* Berkshire Hathaway Energy Company, Quarterly

³ Post-decision reporting has revealed that the judge who authored the Court of Appeals’ opinion previously represented PacifiCorp, including during the pendency of this case. Jeff Manning, *Appeals Judge Who Wrote Opinion Favorable to PacifiCorp in Landmark Wildfire Case Formerly Represented the Utility Giant*, Willamette Week (May 4, 2026), <https://www.wweek.com/news/state/2026/05/04/appeals-judge-who-wrote-opinion-favorable-to-pacificorp-in-landmark-wildfire-case-formerly-represented-the-utility-giant/>.

Report (Form 10-Q) (Mar 31, 2026) at 50-51; Appellant's Cost Bill, Filed April 29, 2026, *James v. PacifiCorp* (CA A183140).

More fundamentally, the decision goes further and opines on class certification, suggesting that the case is more appropriately tried as four class actions, or decertified in some other way. But the Court of Appeals did not analyze a single element of certification under ORCP 32 and never engaged with the evidence the trial court weighed at certification and the jury heard at trial. Had the Court of Appeals undertaken that analysis, it would have seen what the trial court saw: most of the evidence and defenses at trial were common to the class, and the few fire-specific causation questions were managed fire-by-fire on the verdict form. The Court of Appeals' suggestion could potentially mean scores of duplicative trials for years to come, based on no ORCP 32 analysis and no guidance from this Court. That would be unworkable and would deny PacifiCorp's victims access to justice.

Third, this appeal presents a novel and significant issue of Oregon law. ORAP 9.07(1)(e), (5). In any class case, how to instruct the jury on the nature of a class action is a critical part of trial management. This Court has not considered what types of

instructions might be appropriate for that task, and no Uniform Civil Jury Instruction provides guidance. The decision below holds that the trial court’s chosen instruction “might be appropriate in some class actions—where *every* important issue is *truly* capable of proof through common evidence,” App-11 (emphasis added), and thereby announces a new standard without identifying its source or providing trial courts a framework for applying it. Guidance from this Court is needed.

Fourth, the issues to be decided, which arise solely under state law, are cleanly presented and preserved. *See* ORAP 9.07(4), (7), (8). PacifiCorp’s objections to the jury instruction were briefed, and the parties also briefed whether the instruction was error, and whether the error was prejudicial, in the Court of Appeals. *See* ORAP 9.07(15). Numerous *amici* appeared in the Court of Appeals, and the same would be true in this Court. *See* ORAP 9.07(16).

V. BRIEF ARGUMENT ON THE MERITS

Petitioners intend to file a brief on the merits should the Court allow review but provide this brief argument on the questions presented.

A. The Challenged Instruction Is Legally Correct

The first question the Court of Appeals considered was whether the trial court’s “Class Questions” instruction, “when read together with the other instructions given, completely and accurately stated the law applicable to the case.” *Sherertz v. Brownstein, Rask, Sweeney, Kerr, Grim, Desylvia & Hay, LLP*, 288 Or App 719, 722, 407 P3d 914 (2017). It did. The Court of Appeals held otherwise by reading one sentence in isolation and disregarding the context of the instructions as a whole, the evidence and theories presented, and the verdict form that the jurors filled out. That was error, and this Court should grant review and reverse.

1. The instruction accurately informs jurors about the effect of class certification.

The challenged instruction is a standard explanation of how a class action works. “[M]ost class action trials employ some version of a ‘class action explanatory’ jury instruction.” 4 Newberg & Rubenstein on Class Actions § 11:22 (6th ed 2025). One function of this instruction is to explain “that most of the class will not be present for the trial” and instruct the jury “not to hold that fact against the absent class members.” *Id.* That explanation reflects the basic legal effect of class certification: Once the proponent of class

treatment carries her burden to show that certification is appropriate, only the named plaintiffs bear any burden to appear in court and present evidence on behalf of absent class members. *See Pearson v. Philip Morris, Inc.*, 358 Or 88, 114, 361 P3d 3 (2015).

The challenged instruction explained that to the jury. The relevant portion read:

“CLASS QUESTIONS DEFINED

* * * 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. * * * Each class question is broken down by fire.”

ER-278-79. The instruction reflects the fundamental nature of a class action. Absent class members need not appear in court and may rely on class representatives to present evidence that will prove their claims.

2. **The Court of Appeals took the instruction out of context and, in doing so, avoided affording deference to the trial court’s class certification ruling.**

The Court of Appeals focused on a single sentence in the challenged instruction: that the jury could “assume that the evidence at the trial applies to all class members.” App-4. Reading that sentence in isolation, the court concluded that “aspects of causation

were not proven through use of common evidence,” App-43, and that the jury, accordingly, might take the sentence to mean that evidence that PacifiCorp caused one wildfire could prove causation for a different wildfire entirely, *see* App-32-34, 35.

But “[i]n determining whether it was error to give a particular instruction, [the Court] read[s] the instructions *as a whole* to determine whether they state the law accurately.” *State v. Woodman*, 341 Or 105, 118, 138 P3d 1 (2006) (emphasis added). The Court of Appeals did the opposite and missed two critical pieces of context. First, it failed to consider the preceding sentence, which provided that “[t]here is no requirement that individual class members appear in court to prove their case.” ER-278-79; App-24. When read together with the sentence the Court of Appeals focused on, the two provide—in what is a standard-form California instruction—a routine class-action explanation: absent class members need not appear, because the named plaintiffs are obligated to prove absent class members’ claims on their behalf.

That context, importantly, was the only way any party referenced the challenged instruction. Plaintiffs’ counsel explained to the jury that the class definition instruction meant that “you don’t

need to hear from each and every class member to say there's a fire that harmed my property." Tr 8495:16-18. Counsel also explained: "It's not as though each and every class member is required to be in this courtroom and explain what happened that night to you. That would be unreasonable." *Id.* at 8348:15-19.

The Court of Appeals further erred by failing to consider the instruction's final sentence, which clarified that "[e]ach class question is broken down by fire." ER-279; App-24. This sentence reinforced the fire-by-fire nature of the jury's factual determinations and foreclosed any contrary reading. The special verdict form also removed any possible confusion by requiring the jury to answer liability and causation questions separately for each of the four fires—ensuring that the jury would not make cross-fire assumptions. ER-290-312. With this context, the instruction accurately described a class action where absent class members need not appear and the named plaintiffs' evidence proved the case, with class questions answered separately for each fire.

More fundamentally, though, the Court of Appeals' analysis confused two distinct inquiries. The court found the challenged instruction erroneous because, in its view, "aspects of causation were

not proven through use of common evidence.” App-43. On that ground, the court “emphasize[d]” that “the trial court has the authority on remand to reconsider its class certification decision.” App-43. That is, while formally declining to consider whether class certification was an abuse of discretion, the Court of Appeals looked through the instructional error to consider the certification question, and did so unbounded by the “considerable” deference an appellate court owes to the trial court. *See Pearson*, 358 Or at 106 (citing circuit court’s “considerable discretion” under ORCP 32).

That reasoning improperly collapsed the ORCP 32 certification framework into instructional review, and risks unsettling class-action jurisprudence. Whether class-certification is appropriate is logically antecedent to whether a class-action instruction is appropriate, and is a separate inquiry governed by a different standard of review. The trial court conducted that predominance analysis before, during, and after trial and, each time, reaffirmed that common evidence of PacifiCorp’s conduct predominated. The Court of Appeals, on the other hand, did not assess a single element of ORCP 32 but functionally reached the certification question anyway through *de novo* review of a jury instruction. That was error.

The Court of Appeals' approach is particularly problematic here because the trial court's decision to certify an issues class (and to refuse to decertify it after a trial in which a jury found PacifiCorp liable to every member of the certified class) was squarely within its discretion. In the face of the unprecedented disaster PacifiCorp caused, the trial court's class-certification decision ensured prompt access to justice for thousands of victims while appropriately considering and balancing all ORCP 32 factors. *See* ER-53-77. The Court of Appeals, by contrast, incorrectly resolved, in a case of enormous consequence, a novel question of state law in a way that leaves trial courts without any meaningful guidance. The Court should allow review of the first question presented and reverse the decision of the Court of Appeals.

B. The Challenged Instruction Could Not Have Prejudiced PacifiCorp

The Court of Appeals also misapplied this Court's precedent on prejudice from instructional error. As this Court has made clear, the prejudice standard exists to protect verdicts against speculative or hypothetical error. ORS 19.415(2) "protects the trial court judgment from reversal or modification 'except for' error substantially affecting a party's rights." *Shoup v. Wal-Mart Stores, Inc.*, 335 Or 164, 173, 61

P3d 928 (2003). Even when an appellate court can identify ostensible error, “reversal of a judgment is the exception, not the rule.” *Id.* To warrant reversal, the record must show “‘some’ or a ‘significant’ likelihood that the error influenced the result.” *Purdy*, 355 Or at 226.

When error should lead to reversal has “vexed” appellate courts “for centuries.” *Purdy*, 355 Or at 233 (Balmer, C.J., concurring). Appellate courts “have struggled” with the “nuanced task of applying” ORS 19.415(2). *Id.* This Court in *Purdy* recognized, however, that trial practitioners have tools at their disposal to create a record that might show whether an ostensible error had a prejudicial effect on the verdict. *Id.* at 232 n 10. In his concurrence, then-Chief Justice Balmer offered that things like “[s]pecial verdict forms” might be utilized so that litigants are not “at the mercy of an appellate court” trying to divine the effect of a trial error from a cold record. *Id.* at 237.

Here, the trial court utilized such a verdict form, providing the appellate court with hard evidence that its hypothesized prejudice had not come to pass. But the Court of Appeals ignored that evidence, as well as the trial record, which demonstrated the same. The Court of Appeals’ principal concern appears to have been that

the instruction might have caused the jury to “misunderstand[] its task” to adjudicate causation separately for each of the fires. App-39; *see also* App-38-40. For example, the court questioned how evidence that an individual “had property destroyed by the Echo Mountain Complex Fire, can be ‘assumed’ to apply to plaintiffs over a hundred miles away whose property was destroyed by a different wildfire entirely.” App-33.

But that hypothetical would have been implausible to anyone in the courtroom. Over eight weeks of trial, no one suggested that the jury could apply evidence from one wildfire to find that PacifiCorp caused one of the other three fires. Nor did the Court of Appeals identify any such evidence. While the bulk of the evidence applied uniformly at trial, causation was tried—and determined—on a fire-by-fire basis.

Beginning in opening statements, jurors heard Plaintiffs’ counsel describe how PacifiCorp caused each of the four fires. Tr 312-342. The jury heard from the parties’ various fire cause-and-origin experts, who addressed each fire individually—ensuring the causation analysis in particular was separated by fire. *E.g.*, Tr 1887-1931; 2178-2236; 2250-2290; 2521-2567; 4246-4373; 4379-4445. The

jury instructions and verdict form broke down each class question on a fire-by-fire basis, and the verdict form required the jury to answer liability and causation separately for each fire. ER-264-89 (Final Jury Instructions); ER-290-312 (Final Verdict Form). So clear was the jury's task that PacifiCorp's lawyer told the jury in closing that, in reality, "there are four classes. One for each fire at issue in this matter." Tr 8363:9-10. He also reminded the jurors that

"[p]roving causation for the entire class within each fire area doesn't mean that plaintiffs can just prove causation for only some of the class members, but not others and declare a victory. No. To obtain a verdict for all class members, they have to prove causation for each and every single one."

Id. at 8363:13-19.

All of this should have been enough to show that any error was not prejudicial in the way hypothesized by the Court of Appeals. But the trial record also contains specific evidence rebutting that appellate court's conclusion. First, during jury deliberations, the jury submitted a question asking the trial judge whether a finding for the named plaintiffs automatically extended to the rest of the class. Tr 8572-91. The answer from the trial court was "not necessarily in all circumstances." *Id.* at 8589:12. In other words, the jury was explicitly told that an answer about PacifiCorp's liability, or about causation,

as to one plaintiff need not apply—let alone could be assumed to apply—to all class members.

Second, as discussed above, the jury returned verdicts that showed jurors differentiated between individual fires and did not just assume the evidence applied to all: on the Class's claims for negligence, private nuisance, and trespass, the verdict was 11-1 in favor of Plaintiffs for the Echo Mountain, South Obenchain, and 242 fires, but 9-3 for the Santiam Canyon fire. ER-290-304.

In short, the jury fully understood its task and properly concluded that PacifiCorp caused harm to every member of the certified class for each of the fires. In holding otherwise, the Court of Appeals failed to consider the whole record and ignored specific evidence rebutting any finding of prejudice. This Court should therefore allow review of the second question presented, make clear that hypothetical claims of prejudice must yield to actual record evidence disproving them, and reverse the decision of the Court of Appeals.

VI. CONCLUSION

The Court should allow review and reverse the decision of the Court of Appeals.

STOLL STOLL BERNE LOKTING
& SHLACHTER P.C.

By: s/ Cody Berne

Keith A. Ketterling, OSB No. 913368
Timothy S. DeJong, OSB No. 940662
Cody Berne, OSB No. 142797
Emily Johnson, OSB No. 183791
Erin E. Roycroft, OSB No. 184371
209 SW Oak Street, Suite 500
Portland, Oregon 97204
Telephone: (503) 227-1600
Email: kketterling@stollberne.com
tdejong@stollberne.com
cberne@stollberne.com
ejohnson@stollberne.com
eroycroft@stollberne.com

Alexander G. Tievsky
Nicholas Rosinia
Megan Delurey
Schuyler Daum
Landon Webster
EDELSON PC
350 North LaSalle Street, 14th Floor
Chicago, Illinois 60654
Telephone: (312) 589-6370
Email: atievsky@edelson.com
nrosinia@edelson.com
mdelurey@edelson.com
sdaum@edelson.com
lwebster@edelson.com

Todd Logan, OSB No. 261139
Patrick Ntchobo
EDELSON PC
150 California Street, 18th Floor
San Francisco, California 94111

Telephone: (415) 212-9300
Email: tlogan@edelson.com
pntchobo@edelson.com

Ali Moghaddas
EDELSON PC
11601 Wilshire Boulevard, Suite 1970
Los Angeles, California 90025
Telephone: (310) 694-0331
Email: amoghaddas@edelson.com

Matthew J. Preusch, OSB No. 134610
KELLER ROHRBACK L.L.P.
801 Garden Street, Suite 301
Santa Barbara, California 93101
Telephone: (805) 456-1496
Email: mpreusch@kellerrohrback.com

Daniel Mensher, OSB No. 074636
Benjamin Gould, OSB No. 256994
Natida Sribhibhadh
KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, Washington 98101
Telephone: (206) 623-1900
Email: dmensher@kellerrohrback.com
bgould@kellerrohrback.com
natidas@kellerrohrback.com

Yoona Park, OSB No. 077095
Sarah R. Osborn, OSB No. 222119
KELLER ROHRBACK L.L.P.
601 SW 2nd Avenue, Suite 1900
Portland, Oregon 97204
Tel: (206) 623-1900
Email: ypark@kellerrohrback.com
sosborn@kellerrohrback.com

Derek C. Johnson, OSB No. 882340
Marilyn A. Heiken, OSB No. 923308
JOHNSON JOHNSON LUCAS &
MIDDLETON, PC
975 Oak Street, Suite 1050
Eugene, Oregon 97401
Telephone: (541) 484-2434
Email: djohnson@justicelawyers.com
mheiken@justicelawyers.com

Nicholas A. Kahl, OSB No. 101145
NICK KAHL, LLC
2246 E Burnside Street, Suite A
Portland, Oregon 97214
Tel: (971) 634-0829
Email: nick@nickkahl.com

*Attorneys for Plaintiffs, Plaintiffs-
Respondents, Cross-Appellants,
Petitioners on Review*

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the 5,000 word limitation for petitions for review in ORAP 9.05(3)(a), and that the word count of this brief as described in ORAP 5.05(1)(a) is 4,955 words.

I certify that the size of the type in this brief is not smaller than 14-point for both the text of the brief and footnotes as required by ORAP 5.05.

DATED this 13th day of May, 2026.

By: s/ Cody Berne

Cody Berne, OSB No. 142797
STOLL STOLL BERNE LOKTING
& SHLACHTER P.C.
209 SW Oak Street, Suite 500
Portland, Oregon 97204
Telephone: (503) 227-1600
Email: cberne@stollberne.com

*Attorney for Plaintiffs, Plaintiffs-
Respondents, Cross-Appellants, Petitioners
on Review*

FILED: April 8, 2026

IN THE COURT OF APPEALS OF THE STATE OF OREGON

Jeanyne James; Robin Colbert; Jane Drevo; Sam Drevo; Brooke Edge and Bill Edge, Sr.;
Lori Fowler; Iris Hampton; James Holland; Rachelle McMcaster; Kristina Montoya;
Northwest River Guides, LLC; Shariene Stockton and Kevin Stockton, Victor
Palfreyman; Palfreyman Family Trust; Duane Brunn, individually and on behalf of all
others similarly situated; Alfred Cuzzo; Deborah Jo Fawcett; David Giller, Sr.; Richard
Jensen; Scott Johnson; Frank King, individually and in his capacity as trustee of the King
Revocable Trust; Stephen David Nielsen; Cory Staniforth; and Deborah Tank,
Plaintiffs-Respondents
Cross-Appellants,

and

Mary Kathleen Becherer et al.,
Plaintiffs,

and

Oregon Department of Justice,
Creditor-Respondent,

v.

Pacificorp, an Oregon Corporation, and Pacific Power an Oregon registered electric
utility and assumed business name of Pacificorp,
Defendants-Appellants
Cross-Respondents.

Multnomah County Circuit Court
20CV33885

A183140

Steffan Alexander, Judge.

Argued and submitted on February 04, 2026.

Theodore J. Boutrous, Jr., California, argued the cause for appellants-cross-respondents.
On the briefs were Per A. Ramfjord, Brad S. Daniels, Reilley D. Keating, and Stoel Rives
LLP; Alison L. Plessman, Rajan S. Trehan, Stephanie W. Xiao, Khoa D. Nguyen, and
Hueston Hennigan LLP, California; Douglas J. Dixon, Craig A. Fligor, and Hueston
Hennigan LLP, California; and Blaine H. Evanson and Gibson, Dunn & Crutcher LLP,
California.

Erin Roycroft and Nicholas Rosinia, Illinois, argued the cause for respondents-cross-
appellants. Also on the answering brief and opening brief on cross-appeal were

Alexander G. Tievsky, Megan Delurey, Schuyler Daum, Landon Webster, and Edelson PC, Illinois; Todd Logan and Edelson PC, California; Matthew J. Preusch and Keller Rohrback L.L.P., California; Daniel Mensher, Natida Sribhibhadh, and Keller Rohrback L.L.P., Washington; Yoona Park, Sarah R. Osborn, and Keller Rohrback L.L.P.; Keith A. Ketterling, Timothy S. DeJong, Cody Berne, Emily Johnson, and Stoll Stoll Berne Lokting & Shlachter P.C.; and Nicholas A. Kahl and Nick Kahl, LLC. Also on the reply brief were Lydia Anderson-Dana; Rafey Balabanian and Brandt Silver-Korn, and Edelson PC, California; Amy Hausmann, Zoë Seaman-Grant, and Edelson PC, Illinois; Derek C. Johnson, Marilyn A. Heiken, and Johnson Johnson Lucas & Middleton, PC.

Matthew J. Kalmanson and Hart Wagner LLP and Meghana D. Shah, John S. Pruitt, and Eversheds Sutherlands (US) LLP filed the brief *amicus curiae* for Associated Electric & Gas Insurance Services Limited.

Jeremy C. Rice and Parks Bauer LLP filed the brief *amicus curiae* for Oregon Association of Defense Counsel.

Irion Sanger, John Maxwell Greene, and Sanger Law, P.C., filed the brief *amicus curiae* for Oregon People's Utility Districts.

J. Aaron Landau and Harrang Long P.C. and Jeremy C. Marwell and Vinson & Elkins LLP, District of Columbia, filed the brief *amicus curiae* for Edison Electric Institute.

Paul S. Stewart and Paine Hamblen, P.S., Washington, filed the brief *amicus curiae* for Pacific Northwest Investor-Owned Utilities.

Iván Resendiz Gutierrez, KC Lynne Hovda, and Miller Nash LLP filed the brief *amicus curiae* for Oregon Business & Industry Association.

Sara Kobak and Andrew J. Lee filed the brief *amicus curiae* for Oregon Forest Industries Council.

Matthew Kirkpatrick and Oregon Consumer Justice Law P.C.; and Elizabeth Savage and Elizabeth Savage Law LLC filed the brief *amicus curiae* for Oregon Consumer Justice and Oregon Trial Lawyers Association.

No appearance for respondent Oregon Department of Justice.

Before Ortega, Presiding Judge, Joyce, Judge, and Hellman, Judge.

JOYCE, J.

Reversed and remanded.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Appellants

- No costs allowed.
 Costs allowed, payable by Respondents.
-

1 JOYCE, J.

2 This class action proceeding arises from devastating wildfires that occurred
3 in Oregon around Labor Day in 2020 during the course of what plaintiffs' counsel
4 described in the trial court as a "historic windstorm."

5 A jury determined that defendant, PacifiCorp, a public utility providing
6 electricity in various parts of Oregon, engaged in tortious acts or omissions in relation to
7 certain of those wildfires and that those tortious acts or omissions caused plaintiffs to
8 suffer both economic and noneconomic damages. PacifiCorp appeals the resulting
9 limited judgments against it, raising thirteen assignments of error. Plaintiffs cross-appeal,
10 raising two cross-assignments of error.

11 In this opinion, we address PacifiCorp's fourth assignment of error, which,
12 with one exception noted below, is dispositive as to the issues before us on appeal. In
13 that assignment, PacifiCorp contends that the trial court erred in instructing the jury that
14 in determining whether PacifiCorp was liable to plaintiffs it could "assume that the
15 evidence at the trial applies to all class members." We agree with PacifiCorp that the trial
16 court erred in giving that instruction to the jury. We conclude that, given this particular
17 class action proceeding--that is, the nature of the class the trial court certified, the
18 evidence presented, and plaintiffs' theories of causation--that instruction was legally
19 erroneous, because certain evidence at trial, particularly related to causation, did not
20 necessarily apply to every class member. We further conclude that giving the instruction
21 was prejudicial to PacifiCorp. Consequently, we reverse and remand.

I. INTRODUCTION

Prior to turning to the facts of this case, to put the jury instruction that is at issue in PacifiCorp's fourth assignment of error and the facts of this case in their proper context, we summarize the legal framework under which class certification occurs in Oregon. We also provide an overview of the class that was certified in this case and plaintiffs' theories of causation at trial.

"The standards that govern class certification are set out in ORCP 32." *Pearson v. Philip Morris, Inc.*, 358 Or 88, 106, 361 P3d 3 (2015). Under ORCP 32, "a class certification determination divides into two basic inquiries." *Id.*

First, "the trial court must determine if the action meets five prerequisites" set forth in ORCP 32 A:

"[1] The class must be so numerous that simple joinder is impracticable ('numerosity'); [2] there must be questions of law or fact common to the class ('commonality'); [3] the named representatives' claims must be typical of those of the class ('typicality'); [4] the named representatives must be individuals who will adequately protect the interests of the class ('adequacy'); and [5] prelitigation notice requirements must have been complied with ('notice')."

Pearson, 358 Or at 106 (quoting ORCP 32 A). If any one of the five requirements is not satisfied, the case cannot go forward as a class action. *Id.*

Second, the trial court must determine whether "a class action is superior to other available methods for the fair and efficient adjudication of the controversy," ORCP 32 B, by looking to the factors identified in ORCP 32 B. That rule identifies eight "factors 'pertinent' to assessing superiority." *Pearson*, 358 Or at 106 (quoting ORCP 32

1 B). The third of those factors, "predominance"--*i.e.*, "the extent to which questions of
2 law or fact common to the members of the class predominate over any questions affecting
3 only individual members," ORCP 32 (B)(3)--is one that "frequently drives class
4 certification decisions," though neither "the 'predominance' factor nor any of the other
5 seven [factors] is controlling," *Pearson*, 358 Or at 106.

6 Predominance, "[i]n effect, * * * asks: What do the individual class
7 members have in common, what don't they have in common, and how much will those
8 similarities and dissimilarities matter in litigating the case?" *Id.* at 110-11. The inquiry is
9 "designed to determine if proof as to one class member will be proof as to all, or whether
10 dissimilarities among the class members will require individualized inquiries." *Id.* at
11 111; *Delgado v. Del Monte Fresh Produce, N. A., Inc.*, 260 Or App 480, 491, 317 P3d
12 419, *rev den*, 355 Or 380 (2014) (noting that "the class certification question requires us
13 to look at whether the claimed common issues are susceptible to and appropriate for
14 proof by common evidence"); *accord Black Lives Matter Los Angeles v. City of Los*
15 *Angeles*, 113 F4th 1249, 1264 (9th Cir 2024) (holding that a class cannot be certified
16 when plaintiffs "merely alleg[e] that a policy applies class-wide--and that a common
17 question thus exists--without showing how common evidence can be used to prove their
18 claims across the class members").

19 The predominance inquiry is a "pragmatic" one, turning on the evidence
20 predicted to be presented at trial:

21 "whether common issues predominate in a particular case for purposes of
22 class certification depends on a pragmatic assessment of how a case, if

1 fairly and fully tried, is likely to be litigated. The point of asking whether
2 common issues predominate is to predict the degree to which litigation of
3 the controversy will require delving into individualized proof or,
4 conversely, the degree to which the issues lend themselves to resolution
5 through common proof--that is, proof for one individual class member will
6 be proof for all."

7 *Pearson*, 358 Or at 114.

8 The question of "the degree to which the issues lend themselves to
9 resolution through common proof," *id.*, is important, because to prevail, the plaintiffs in a
10 class action must prove their claims as to all class members. *See Strawn v. Farmers Ins.*
11 *Co.*, 350 Or 336, 358, 258 P3d 1199, *adh'd to on recons*, 350 Or 521, 256 P3d 100
12 (2011), *cert den*, 565 US 1177 (2012) (noting that, to "prevail in a class action for fraud,
13 the class plaintiff must prove reliance on the part of all class members"); *accord*
14 *Bowerman v. Field Asset Servs., Inc.*, 60 F4th 459, 479 (9th Cir 2023) (holding that "a
15 putative employer cannot be liable to an entire class of putative employees for failing to
16 reimburse their business expenses and pay them overtime unless the putative employer in
17 fact failed to do so *for each of them*" (emphasis added)).

18 The decision to certify a class is generally forward-looking; a prediction of
19 how a case is "likely to be litigated." *Pearson*, 358 Or at 114. But trial courts retain the
20 authority under ORCP 32 C(1) to "alter or amend" class certification decisions at any
21 time "before the decision on the merits." *See also James v. PacifiCorp*, 323 Or App 764,
22 777-78, 524 P3d 506 (2023) (noting, in declining to exercise our discretion to accept an
23 interlocutory appeal in this case of the trial court's class certification decision, that the
24 trial court may "rescind or amend its certification order at any point prior to a decision on

1 the merits, if the litigation does not pan out the way the court expects").

2 Indeed, "because the results of class proceedings are binding on absent
3 class members," federal courts considering the parallel Federal Rule of Civil Procedure
4 concerning the alteration or amendment of class certification orders, FRCP 23(c)(1)(C),
5 have held that the district court has not just the authority to alter or amend class
6 certification orders when necessary but an "*affirmative duty* of monitoring its class
7 decisions in light of the evidentiary development of the case."¹ *Mazzei v. Money Store*,
8 829 F3d 260, 266-67 (2d Cir 2016), *cert den*, 580 US 1198 (2017) (emphasis added;
9 internal quotation marks omitted); *see Barnes v. Am. Tobacco Co.*, 161 F3d 127, 140 (3d
10 Cir 1998), *cert den*, 526 US 1114 (1999) ("Under Rule 23(c)(1), District Courts are
11 required to reassess their class rulings as the case develops.").

12 Ultimately, as federal courts have recognized, the ability of trial courts to
13 revisit class certification decisions in light of how a case develops protects "absent class
14 members[]" * * * due process rights (and defendants') by ensuring that any class claim
15 that proceeds to final judgment--and thus binds them--is fairly and appropriately the
16 subject of class treatment." *Mazzei*, 829 F3d at 268.

17 In this case, as explained in more detail below, the trial court certified a
18 single issues class and specified "fourteen issues" for "classwide treatment."²

¹ FRCP 23(c)(3)(C) provides, "An order that grants or denies class certification may be altered or amended before final judgment."

² Among the fourteen issues certified for class-wide treatment were:

1 Nevertheless, at the end of the trial, it ultimately submitted to the jury the question of
2 PacifiCorp's liability for the various causes of action alleged in plaintiffs' complaint.

3 The single class in this case included the owners of over 2,000 parcels of
4 property that were damaged by at least four different wildfires--the 242 Fire, the South
5 Obenchain Fire, the Echo Mountain Complex Fire, and the Santiam Canyon Fire--certain
6 of which were separated by well over a hundred miles. For each of those four wildfires,
7 the trial court identified a "boundary" based on what its certification order termed the

"1. What was PacifiCorp's level of culpable conduct in the operation of its utility infrastructure?

"* * * * *

"3. Was PacifiCorp's conduct a cause of harm to the class?

"4. If PacifiCorp's conduct was a cause of harm to the class, was that harm reasonably foreseeable?

"5. Did PacifiCorp's action or inaction cause or contribute to the cause of the wildfire or cause or contribute to the spreading of the wildfire?

"* * * * *

"7. Did PacifiCorp's action or inaction bring about an unauthorized entry into property in the exclusive possession of another?

"8. Did PacifiCorp's culpable conduct cause the trespass or, alternatively, did PacifiCorp act intentionally, knowing that a trespass would result from their actions--and a trespass did indeed occur as a result of those actions?

"* * * * *

"14. Was the damage to Class Members' property the necessary, certain, predictable, or inevitable result of PacifiCorp's actions?"

1 "maximum extent of burn" for each wildfire.

2 For three of the wildfires--the 242 Fire, the South Obenchain Fire, and the
3 Echo Mountain Complex Fire--plaintiffs' theory at trial was that a particular, identifiable
4 ignition started a wildfire, which burned throughout that particular wildfire's boundaries,
5 and that "but for" PacifiCorp's tortious acts and omissions, the wildfire would not have
6 occurred, and plaintiffs would not have been harmed.

7 Plaintiffs' theory was different for the largest of those four wildfires: the
8 Santiam Canyon Fire. For that wildfire--unlike the other wildfires--plaintiffs did not
9 have a single, unified theory of causation as to how plaintiffs within the Santiam Canyon
10 Fire boundary were harmed by PacifiCorp. Instead, they argued that the evidence
11 permitted a finding that plaintiffs who owned property in the Santiam Canyon were
12 harmed either by (1) one of any number of PacifiCorp-caused fires, when those fires
13 destroyed plaintiffs' property in the Santiam Canyon directly, or (2) alternatively, for
14 some of the plaintiffs in the Santiam Canyon, by a lightning-caused wildfire, which was
15 burning to the northeast of the Santiam Canyon before Labor Day 2020 and swept
16 through the Santiam Canyon after the PacifiCorp-caused fires were ignited in the Santiam
17 Canyon. In making the latter argument--that the lightning-caused wildfire burnt
18 plaintiffs' property--plaintiffs' theory was that certain fires in the Santiam Canyon caused
19 by PacifiCorp's power equipment caused firefighters who were stationed in the Santiam
20 Canyon to evacuate the Santiam Canyon, leaving it "defenseless." Additionally, for the
21 Santiam Canyon Fire, the trial court instructed the jury that PacifiCorp was liable if its

1 acts or omissions were a "substantial factor" in causing harm to the plaintiffs.

2 Notwithstanding that the single class in this case consisted of plaintiffs who
3 were located in the "maximum extent of burn" for four different wildfires, which burnt in
4 four different geographic locations in Oregon, and that plaintiffs' theory of causation as to
5 one of those wildfires--the Santiam Canyon Fire--was different than the others,
6 ultimately, plaintiffs requested a jury instruction based on California Civil Jury
7 Instructions (CACI), Instruction No. 115, "Class Action Defined[.]" That instruction told
8 the jury that, "You may assume that the evidence at the trial applies to all class
9 members." And plaintiffs' counsel argued to the jury that it could "assume that the
10 evidence that came in applies to the class members as a whole." It is that jury instruction
11 that PacifiCorp challenges in its fourth assignment of error.

12 We conclude that given the particular class that the trial court certified in
13 this case and the evidence and theories at trial, the trial court erred in instructing the jury
14 that it could "assume that the evidence at the trial applies to all class members."
15 Although that instruction might be appropriate in some class actions--where every
16 important issue is truly capable of proof through common evidence--it was erroneous to
17 give in this case, where much of the evidence introduced during the trial related to
18 particular issues concerning particular wildfires (and for the Santiam Canyon Fire, to
19 particular ignitions at particular locations in the Santiam Canyon). We also conclude that
20 that error was prejudicial to PacifiCorp.

21 Consequently, we reverse and remand.

1 II. HISTORICAL AND PROCEDURAL FACTS

2 With that context, we turn to the historical and procedural facts, first
3 discussing the complaint and the certified class, then turning to plaintiffs' theories of
4 PacifiCorp's tortious conduct and causation during trial, plaintiffs' request for the jury
5 instruction that PacifiCorp challenges in its fourth assignment of error, plaintiffs' mid-
6 trial motion to reduce the boundary for the Santiam Canyon Fire, and, finally, we turn to
7 plaintiffs' closing argument and the verdict form.

8 Further, we set those items out in some detail, because in assessing whether
9 an erroneous jury instruction caused prejudice, we must consider "the record as a whole"
10 in "the light of the parties' theories at trial." *Purdy v. Deere & Co./Norton*, 311 Or App
11 244, 259, 492 P3d 99, *rev den*, 369 Or 110 (2021).

12 A. *The Complaint and the Certified Class*

13 As noted, numerous devastating wildfires burned in Oregon around Labor
14 Day in 2020. Plaintiffs' complaint asserted that PacifiCorp's tortious acts and omissions
15 caused four of those wildfires, which were referred to in the trial court as (1) the 242 Fire,
16 which burnt approximately 13,829 acres near Chiloquin, (2) the Echo Mountain Complex
17 Fire (made up of two separate fires, the Echo Mountain Fire and the Kimberling Fire),
18 which burnt approximately 1,890 acres near Lincoln City, (3) the South Obenchain Fire,
19 which burnt approximately 29,531 acres near Eagle Point, and (4) the Santiam Canyon
20 Fire, which burnt approximately 45,660 acres in the Santiam Canyon.

21 As relevant here, in the operative complaint, plaintiffs asserted claims

1 against PacifiCorp for negligence, gross negligence, public nuisance, private nuisance,
2 and trespass in relation to those wildfires. The operative complaint identified 17 named
3 plaintiffs--one within the boundary of the 242 Fire, four within the boundary of the Echo
4 Mountain Complex Fire, two within the boundary of the South Obenchain Fire, and 10
5 within the boundary of the Santiam Canyon Fire.

6 Plaintiffs moved for class certification. The trial court ultimately certified
7 an "issues class" consisting of "owners or residents" of "privately owned real property"
8 within the "boundary of the maximum extent of burn" for the 242 Fire, the Echo
9 Mountain Complex Fire, the South Obenchain Fire, and the Santiam Canyon Fire, whose
10 properties experienced "fire activity during those fires." Additionally, the class included
11 "owners of a motorhome, residential trailer, manufactured dwelling, other mobile home,
12 or any other personal property" that was located on any property within the "boundary of
13 the maximum extent of burn" for the 242 Fire, the Echo Mountain Complex Fire, the
14 South Obenchain Fire, or the Santiam Canyon Fire who "experienced fire activity during
15 those fires," and "whose motorhome, residential trailer, manufactured dwelling, other
16 mobile home, or any other personal property, experienced fire damage during those
17 fires."

18 The trial court's class certification order bifurcated the case into two phases:
19 During Phase I, the jury would decide certain liability questions on a class-wide basis,
20 and, assuming PacifiCorp was found liable, determine the amount of damages due to the
21 17 named class representatives. Phase II would consist of individual damages

1 proceedings for the absent class members.

2 The trial court ultimately instructed the jury that a single class was
3 certified, and as to the composition of that class, the court instructed the jury as follows:

4 **"CLASS DEFINED**

5 * * * * *

6 * * * In this case, the class consists of all:

7 "(1) owners or residents, as of September 7, 2020, of any (a)
8 privately owned real property; (b) that is wholly or partially within the
9 boundary of the maximum extent of burn for the Echo Mountain Fire, the
10 Kimberling Fire, the South Obenchain Fire, the 242 Fire, or the Santiam
11 Canyon Fire; and (c) experienced fire activity during those fires; or (2)
12 owners of a motorhome, residential trailer, manufactured dwelling, other
13 mobile home, or any other personal property that as of September 7, 2020,
14 was located on any property (a) wholly or partially within the boundary of
15 the maximum extent of burn for the Echo Mountain Fire, the Kimberling
16 Fire, the South Obenchain Fire, the 242 Fire, or the Santiam Canyon Fire;
17 that (b) experienced fire activity during those fires; and (c) whose
18 motorhome, residential trailer, manufactured dwelling, other mobile home,
19 or any other personal property, experienced fire damage during those
20 fires."³

21 (Boldface and uppercase in original.)

22 B. *Plaintiffs' Theories of Tortious Conduct and Causation*

23 Following class certification, the Phase I trial began. During the trial,
24 plaintiffs pointed to what they viewed as myriad tortious failures on PacifiCorp's part

³ Because the trial court's class certification order bifurcated the case into two "phases"--one involving questions of liability and one involving damages--it bears mentioning that "[a] class action is not inappropriate simply because each class member will have to make an individualized showing to recover damages." *Migis v. AutoZone, Inc.*, 282 Or App 774, 787, 387 P3d 381 (2016), *adh'd to on recons*, 286 Or App 357, *rev den*, 362 Or 300 (2017) (internal quotation marks omitted).

1 which, in their view, resulted in the 242 Fire, the Echo Mountain Complex Fire, the
2 South Obenchain Fire, and the Santiam Canyon Fire. They contended, for example, that,
3 for each of those wildfires, PacifiCorp tortiously failed to ensure vegetation was a safe
4 distance from electrical equipment, failed to shut off power before and during the Labor
5 Day 2020 windstorm, and failed to adequately monitor the windstorm.⁴

⁴ More specifically, in the final jury instructions, the jury was instructed that plaintiffs had alleged that, "for each of the four fires in this case":

"a. Defendant failed to reasonably inspect their power line infrastructure for hazardous conditions.

"b. Defendant failed to reasonably clear vegetation around power line infrastructure to mitigate the risk of fire.

"c. Defendant failed to reasonably de-energize power lines during critical and extremely critical fire conditions, when Defendant knew or in the exercise of reasonable care should have known that the then-present fire conditions would cause energized lines to fall or otherwise contact vegetation, structures, and objects.

"d. Defendant failed to reasonably de-energize power lines during the then-present critical and extremely critical fire conditions even after Defendant had knowledge that some power lines had fallen or otherwise come into contact with vegetation, structures, and objects.

"e. Defendant failed to reasonably de-energize power lines even after fires had been ignited by their power line infrastructure.

"f. Defendant failed to disable reclosers during critical and extremely critical fire conditions.

"g. Defendant failed to reasonably implement policies and procedures, and use equipment, to avoid igniting or spreading fire.

"h. Defendant failed to reasonably adjust their operations despite warnings about weather conditions that could cause rapid and dangerous fire growth

1 With respect to causation, as discussed above, plaintiffs presented different
2 theories of causation regarding the 242 Fire, the Echo Mountain Complex Fire, and the
3 South Obenchain Fire, on the one hand, and the Santiam Canyon Fire, on the other.

4 1. *The 242 Fire, the South Obenchain Fire, and the Echo Mountain*
5 *Complex Fire--"but for" causation*

6 Plaintiffs' theory at trial regarding the 242 Fire, the South Obenchain Fire,
7 and the Echo Mountain Complex Fire (both the Kimberling ignition and the Echo
8 Mountain ignition) was that those wildfires were started when vegetation came into
9 contact with PacifiCorp's energized power lines at particular locations, and that
10 vegetation came into contact with PacifiCorp's energized power lines because PacifiCorp
11 had tortiously acted or failed to act.

12 More specifically, for each of the 242 Fire, the South Obenchain Fire, the
13 Kimberling Fire, and the Echo Mountain Fire, plaintiffs identified a single ignition point
14 and presented evidence from which the jury could find that that ignition started a fire,
15 which spread throughout the particular wildfire's boundary, causing harm to the property
16 of the plaintiffs in that particular wildfire's boundary.

and spread on and after Labor Day.

"i. The fires ignited by Defendant on Labor Day diverted crucial resources from the fire areas.

"j. Defendant failed to obtain granular weather information to evaluate shutting off the power outside of limited areas designated Fire High Consequence Areas * * * or Proactive De-energization Zones * * *."

1 approximately 71 square miles)--was markedly different, both factually and legally, than
2 their theory as to the 242 Fire, the South Obenchain Fire, and the Echo Mountain
3 Complex Fire.

4 That is at least in part because prior to fires in the Santiam Canyon that
5 plaintiffs attributed to PacifiCorp, to the northeast of the Santiam Canyon, another
6 wildfire was burning: the Beachie Creek Fire. The Beachie Creek Fire was ignited by
7 lightning, not PacifiCorp. And it is undisputed that at some point around Labor Day
8 2020 the Beachie Creek Fire burned through Santiam Canyon where class members had
9 property. At trial, the disputes with respect to the Beachie Creek Fire were largely (1)
10 when, in particular, the Beachie Creek Fire burned through the Santiam Canyon, and (2)
11 whether PacifiCorp's power equipment or embers from the Beachie Creek Fire were
12 responsible for certain ignitions within the Santiam Canyon itself.

13 Specifically, at trial, regarding the Santiam Canyon Fire, plaintiffs
14 presented evidence that a number of ignitions that occurred in the Santiam Canyon were
15 attributable to PacifiCorp, but it did not seek to identify them all, instead telling the jury
16 "we'll never know just how many fires [PacifiCorp] started in the canyon that night."⁵
17 The particular fires that plaintiffs identified and attributed to PacifiCorp included fires at
18 particular locations in the Santiam Canyon--*e.g.*, at the Gates School, at Potato Hill, at

⁵ In advancing their argument in the trial court, plaintiffs highlighted a spoliation instruction that had been given to the jury based on PacifiCorp purportedly destroying evidence after the fires in the Santiam Canyon. On appeal, PacifiCorp does not assign error to the trial court giving that instruction.

1 Kelly Lumber, at Fishermen's Bend, at Gates Bridge East, and at 832 North Santiam
2 Highway. Those ignitions included two ignitions--the one at the Gates School and the
3 one at Fishermen's Bend--that plaintiffs argued forced the evacuation of wildland
4 firefighting crews who otherwise could have combatted the fires in the Santiam Canyon.
5 As plaintiffs put it, the evacuation of those crews left the "entire Santiam Canyon[]
6 defenseless against fires both already there and those that come that night."

7 Plaintiffs also presented evidence from which the jury could find that some
8 of those fires grew quite large--highlighting during their closing argument that the fire at
9 the Gates School had flames that were "50 feet in the air," that the fire at Fisherman's
10 Bend caused the campground to be "engulfed in flames," and that the fire at Kelly
11 Lumber was "hundreds of acres."⁶

12 Plaintiffs also presented the testimony of a fire progression expert with
13 respect to the Beachie Creek Fire. That expert testified, as plaintiffs put it on appeal, that
14 the Beachie Creek Fire "did not reach the Canyon until after midnight"--*i.e.*, until after
15 PacifiCorp's power lines had, in plaintiffs' view, started numerous fires in the Santiam
16 Canyon and caused the evacuation of firefighters.

⁶ Given the particular evidence at trial and arguments made below and on appeal, the precise number of fires plaintiffs attributed to PacifiCorp's equipment igniting in the Santiam Canyon is difficult to pin down--in their briefing, plaintiffs contend that their expert "identified over a dozen ignitions in the Santiam Canyon on the evening of September 7" attributable to PacifiCorp; at oral argument, plaintiffs' counsel noted "10 or 15 fires" started in the Santiam Canyon by PacifiCorp; and in its response to PacifiCorp's directed verdict motion in the trial court, plaintiffs noted their expert testified to "about 16 fires associated with PacifiCorp's power infrastructure."

1 Having presented evidence of certain fires that were started by PacifiCorp
2 in the Santiam Canyon, that those fires caused firefighters to evacuate, and that those
3 fires started prior to the Beachie Creek Fire reaching the Santiam Canyon, plaintiffs'
4 theory regarding PacifiCorp's culpability for harm to individuals whose property in the
5 Santiam Canyon was damaged by fire was that (1) PacifiCorp's conduct during Labor
6 Day weekend (and before) was tortious, and caused numerous fires throughout the
7 Santiam Canyon prior to the arrival in the Santiam Canyon of the Beachie Creek Fire; (2)
8 the fires that PacifiCorp caused in the Santiam Canyon resulted in firefighters who were
9 stationed in the Santiam Canyon to fight the Beachie Creek Fire evacuating; and (3) some
10 combination of either PacifiCorp-caused fires and/or the Beachie Creek Fire (which
11 firefighters were unable to stop because they evacuated) resulted in harm to the class
12 members in the Santiam Canyon.⁷

13 PacifiCorp, for its part, disputed that it was responsible for many of the
14 fires in the Santiam Canyon that plaintiffs argued it was responsible for, although it did
15 acknowledge that it was responsible for the fire at the Gates School. PacifiCorp instead

⁷ As plaintiffs put it on appeal with respect to the Beachie Creek Fire, "the jury could have concluded that firefighting personnel would have been in a position to contain the Beachie Creek Fire before it reached class member properties but for the fact that a power-line fire caused these personnel to evacuate the Canyon." And as plaintiffs explained to the trial court in a response to PacifiCorp's motion to stay the Phase II damages trials during the pendency of this appeal, "even setting aside the destruction PacifiCorp's own fires caused, the jury considered that people in the Santiam Canyon unnecessarily lost their homes and businesses *from the Beachie Creek Fire* because of PacifiCorp's gross negligence that night." (Emphasis in original.)

1 With that understanding of the evidence presented and plaintiffs' theories of
2 causation, we now turn to the jury instruction at issue in defendant's fourth assignment of
3 error.

4 During the trial, plaintiffs requested the jury be instructed with special jury
5 instructions concerning class actions. One of plaintiffs' requested special instructions
6 included a sentence reading, "You may assume that the evidence at the trial applies to all
7 class members except as I specifically tell you otherwise," which was based on CACI No.
8 115, "Class Action Defined."⁸ PacifiCorp objected to use of that instruction, and
9 proposed its own special jury instructions.

10 In arguing that the trial court should provide their special jury instruction,
11 plaintiffs contended that the instruction explained to the jury that plaintiffs could "use
12 class-wide proof" to prove their claims, and that they did not need "to go door-to-door,

⁸ CACI No. 115 provides:

"A class action is a lawsuit that has been brought by one or more plaintiffs on behalf of a larger group of people who have similar legal claims. All of these people together are called a 'class.' [Name of plaintiff] brings this action as the class representative.

"In a class action, the claims of many individuals can be resolved at the same time instead of requiring each member to sue separately. Because of the large number of claims that are at issue in this case, not everyone in the class will testify. You may assume that the evidence at this [stage of the] trial applies to all class members [except as I specifically tell you otherwise]. All members of the class will be bound by the result of this trial."

(Brackets in original.)

1 property-to-property to prove [their] case." PacifiCorp took the position that the
2 instruction was improper, noting that, "[w]hatever the manner of proof, whether it's
3 common or individualized, [plaintiffs] still have their burden of proving their case as to
4 the entire class and each of its members."

5 The trial court ultimately adopted plaintiffs' instruction, with slight
6 modifications, concluding:

7 "The plaintiffs' instruction, in part, is more aligned with CACI 115.
8 The correct sentence for plaintiffs' instructions is a direct quote from CACI
9 115.

10 "You may assume that the evidence at trial applies to all class
11 members, except as I specifically tell you otherwise."

12 Later in the proceedings, PacifiCorp again took exception to the special
13 instruction plaintiffs had proposed, moving the trial court to strike the sentence, "You
14 may assume that the evidence at the trial applies to all class members, except as I
15 specifically tell you otherwise." PacifiCorp argued that the instruction is an "unnecessary
16 comment on the evidence," it "doesn't fit with this case, at a minimum, because we have
17 four different fires," and it "suggests to the jury that the Court is going to give them
18 further instruction about the evidence, which the parties aren't contemplating."

19 The trial court granted PacifiCorp's motion, in part, striking the portion of
20 the sentence reading "except as I specifically tell you otherwise," but otherwise kept the
21 special jury instruction. In doing so, the trial court noted again that the remainder of the
22 sentence--"Assume that the evidence at the trial applies to all class members"--is "a direct
23 quote from" CACI No. 115.

1 Ultimately, in instructing the jury, the trial court provided the following
2 special instruction:

3 **"CLASS QUESTIONS DEFINED**

4 "Only some questions on the verdict form are common to all class
5 members. Those questions are called the class questions. The class
6 questions will be specified on the verdict form that you will use in the jury
7 room. In answering the class questions, you must determine the answer as
8 to the class. *Because the case is a class action, you can answer the class*
9 *questions based on evidence that applies to the class as a whole.* There is
10 no requirement that individual class members appear in court to prove their
11 case. *You may assume that the evidence at the trial applies to all class*
12 *members.* You should interpret the class questions according to these
13 instructions and the verdict form, understanding that for the purposes of
14 these class questions, the class is considered the plaintiff. Each class
15 question is broken down by fire."

16 (Boldface and uppercase in original; emphases added.)

17 D. *Plaintiffs' Motion to Modify the Boundary for the Santiam Canyon Fire*

18 Given how the trial developed, after plaintiffs had presented their rebuttal
19 case and the trial court had instructed the jury, but before closing argument, plaintiffs
20 made a motion to reduce the size of the class area in the Santiam Canyon so as to
21 "conform the class * * * boundary to the evidence presented at trial[.]" Plaintiffs
22 presented the trial court with a "rough" map that reduced the size of the Santiam Canyon
23 Fire boundary by what appears to be over half.

24 That map, which follows, proposed excising from the Santiam Canyon Fire
25 boundary the section of the map below that plaintiffs' counsel drew Xs through:



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Plaintiffs explained to the trial court that they proposed a new boundary for the Santiam Canyon Fire class area because the area to the west of the vertical black line was the area that "evidence suggests is predominant to the class[.]" Plaintiffs further told the court that the vertical black line "signifies a predominance line." That is, plaintiffs told the trial court that by excising the eastern half of the Santiam Canyon Fire from the class boundary, the new boundary on the eastern end, which was "adjacent to Potato Hill," would reflect the "eastern most predominant boundary indicated during trial."

We understand plaintiffs' counsel to have drawn the line near Potato Hill as the fire at Potato Hill, along with other fires close to Potato Hill, were the easternmost fires in the Santiam Canyon that plaintiffs' "cause and origin" expert identified as being

1 attributable to PacifiCorp.

2 PacifiCorp opposed the motion, arguing among other points, that it would
3 be prejudicial to change the boundary after it had built its "whole case" and "closing"
4 around the "evidence that has come in[.]" The trial court denied the motion.

5 E. *The Verdict Form, Closing Argument, and the Verdict*

6 Finally, we turn to the structure of the verdict form in this case as well as
7 aspects of plaintiffs' closing argument that have bearing on our analysis.

8 1. *The verdict form*

9 The verdict form that the trial court provided to the jury asked the jury, for
10 each claim, (1) whether defendant's conduct was tortious as to plaintiffs and the entire
11 class, and it required a separate response to that question for each of the four wildfires,
12 (2) whether that tortious conduct was a cause of harm to the named plaintiffs, and, again,
13 required a separate response for each of the four wildfires, and finally, (3) whether the
14 tortious conduct was "a cause of harm to the entire class," and, again, required a separate
15 response for each of the four wildfires.

16 2. *The closing argument and the verdict*

17 Both in their closing argument and rebuttal closing argument to the jury,
18 plaintiffs emphasized the jury instruction that PacifiCorp now challenges on appeal.

19 In their closing, plaintiffs told the jury:

20 "[Y]ou can assume--this is in your jury instructions--that the
21 evidence at trial applies to all class members. It's not as though each and
22 every class member is required to be in this courtroom and to explain what
23 happened that night to you. That would be unreasonable. So you can

1 assume based on the evidence. And the class questions allow you to do
2 that."

3 Then, in their rebuttal closing argument, plaintiffs again relied on the
4 instruction that PacifiCorp now challenges on appeal, this time pointing to specific
5 named plaintiffs who were harmed by specific fires in the Santiam Canyon, as well as
6 pointing to a particular plaintiff who lived near Echo Mountain, and encouraged the jury
7 to apply that evidence to "the class members as a whole":

8 "You can assume that the evidence that came in applies to the class
9 members as a whole. The Judge has instructed that you don't need to hear
10 from each and every class member to say there's a fire that harmed my
11 property, et cetera. You can assume the evidence applies to the class as a
12 whole.

13 "And there's no better example if you're thinking about who was
14 harmed by the fires. For example, [one of the named plaintiffs] at
15 Fisherman's Bend. No dispute there's a fire at Fisherman's Bend. It
16 destroys everything [that plaintiff] has ever known, has ever possessed in
17 this world.

18 "[Two other plaintiffs] live right across the street from the ignition at
19 832 North Santiam Highway. [Another plaintiff was] right by the fire at
20 Gates Hill Road. [Two other plaintiffs] live right by Echo Mountain. They
21 see the ignition."

22 Additionally, plaintiffs argued to the jury that, for the Santiam Canyon Fire,
23 in view of the "substantial factor" causation instruction, the jury could find that
24 PacifiCorp was liable based on PacifiCorp being "a cause" of the harm in the Santiam
25 Canyon (which, as noted above, was over 70 square miles):

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

1 After deliberating, the jury returned verdict in favor of plaintiffs on their
2 claims of negligence, gross negligence, public nuisance, private nuisance, and trespass.

3 III. ANALYSIS OF PACIFICORP'S FOURTH ASSIGNMENT OF ERROR

4 With that background, we turn to our analysis of PacifiCorp's fourth
5 assignment of error. As noted, in its fourth assignment of error, PacifiCorp contends that
6 the trial court erred when it instructed the jury that the jury could "assume that the
7 evidence at the trial applies to all class members."

8 A. *Legal Standard*

9 For claims of instructional error, "we review a trial court's decision to give
10 a particular instruction primarily to determine whether the instruction, when read together
11 with the other instructions given, completely and accurately stated the law applicable to
12 the case and, if not, whether any error in giving the instruction was prejudicial to the
13 party opposing the instruction." *Sherertz v. Brownstein Rask*, 288 Or App 719, 722, 407
14 P3d 914 (2017). As the Supreme Court has explained:

15 "The parties to any jury case are entitled to have the jury instructed in the
16 law which governs the case in plain, clear, simple language. The objective
17 of the mold, framework and language of [jury] instructions should be to
18 enlighten and to acquaint the jury with the applicable law. Everything
19 which is reasonably capable of confusing or misleading the jury should be
20 avoided. Instructions which mislead or confuse are ground for a reversal or
21 a new trial."

22 *Id.* (quoting *Williams et al. v. Portland Gen. Elec.*, 195 Or 597, 610, 247 P2d 494 (1952)
23 (brackets in *Sherertz*)).

24 If the trial court's giving of a particular jury instruction was erroneous, in

1 assessing whether giving the instruction was "prejudicial," the question for us is
2 "whether--in an important or essential manner--the error had a detrimental influence on a
3 party's rights." *Id.* at 727 (internal quotation marks omitted). To make that assessment,
4 "[w]e review the record to assess the likelihood that the error permitted the jury to reach
5 an incorrect result." *Id.*

6 If there "is 'little likelihood' that an error affected the verdict, we may not
7 reverse; if there is 'some' likelihood or a 'significant' likelihood that the error influenced
8 the jury's verdict, we must reverse." *Id.* And "[i]n the context of instructional error, that
9 standard will generally be met if, when the instructions are considered as a whole in light
10 of the evidence and the parties' theory of the case at trial[,] there is some likelihood that
11 the jury reached a legally erroneous result." *Id.* at 727-28 (internal quotation marks
12 omitted).

13 B. *The Parties' Arguments*

14 On appeal, PacifiCorp argues that the instruction was erroneous because
15 "by allowing the jury to apply the evidence relating to some individual class members to
16 **all** class members," the trial court "expressly relieved Plaintiffs of their evidentiary
17 burden of presenting evidence and proving their claims as to each individual class
18 member." (Boldface and emphasis in PacifiCorp's brief.)

19 PacifiCorp acknowledges that there may be "circumstances where a jury
20 may infer that individual evidence applies to the whole class" but contends that "for that
21 inference to arise and be reasonable, the same conduct must have occurred without

1 material variation to the members of the class." (Internal quotation marks, brackets, and
2 emphasis omitted.) That was not the circumstance here according to PacifiCorp, because
3 "the jury needed to consider four different sets of liability and causation evidence
4 applicable to the four different fire areas within the class boundary" and "even *within*
5 each of the fire areas--and in particular within the Santiam Canyon--there was substantial
6 variation." (Emphasis in PacifiCorp's brief.)

7 PacifiCorp also argues that the instruction "deprived PacifiCorp of its due
8 process right to present every individual defense." PacifiCorp contends that "by
9 instructing the jury that it could simply 'assume' that the evidence as to the individual
10 class representatives applied to the entire class, the trial court violated PacifiCorp's due
11 process rights, including the right to require each class member to individually prove
12 each of its claims and PacifiCorp's right to contest liability."

13 Plaintiffs respond that "the trial court's instruction accurately stated the law,
14 and worked no prejudice to PacifiCorp." In so contending, plaintiffs point out that
15 "PacifiCorp takes issue only with one sentence" in the "Class Questions Defined" jury
16 instruction, "which closely tracks a sentence in the California model instruction," CACI
17 No. 115. And in plaintiffs' view, the purpose of the instruction was "simply to tell the
18 jury that not every class member needs to appear in the witness box and tell their story in
19 order for the class to prevail."

20 Further, relying on *Strawn and Tyson Foods, Inc. v. Bouaphakeo*, 577 US
21 442, 136 S Ct 1036, 194 L Ed 2d 124 (2016), plaintiffs argue that the instruction was

1 proper because "the whole point of class certification is that a handful of class members
2 can litigate some or all of a claim (here, liability) on the entire class's behalf, so that
3 everyone does not need to individually prove their claim."

4 Finally, plaintiffs contend, among other points, that no juror could have
5 interpreted the instruction in the manner that PacifiCorp contends, because "the verdict
6 form instructed the jury to give separate answers for each of the four fires" and the
7 verdict form's "class questions" asked the jury whether "[p]laintiffs had proven their case
8 as to 'the entire class' within the class boundaries."

9 C. *The trial court erred in instructing the jury.*

10 Having considered the parties' arguments, we conclude that the trial court
11 erred in instructing the jury that it could simply "assume that the evidence at the trial
12 applies to all class members."

13 As an initial matter, as explained above, notwithstanding that this case was
14 certified as a class action, plaintiffs had the burden of proving their claims as to all class
15 members. *See Strawn*, 350 Or at 358 (noting that, to "prevail in a class action for fraud,
16 the class plaintiff must prove reliance on the part of all class members"); *see also Shady*
17 *Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 559 US 393, 408, 130 S Ct 1431,
18 176 L Ed 2d 311 (2010) ("A class action, no less than traditional joinder (of which it is a
19 species), merely enables a federal court to adjudicate claims of multiple parties at once,
20 instead of in separate suits. And like traditional joinder, it leaves the parties' legal rights
21 and duties intact and the rules of decision unchanged.").

1 That meant proving that PacifiCorp's tortious acts or omissions "caused"
2 each of the class member's harm. Specifically, for the Echo Mountain Complex Fire, the
3 242 Fire, and the South Obenchain Fire, it meant plaintiffs had to prove that the harm to
4 the plaintiffs within those class boundaries "would not have occurred but for"
5 PacifiCorp's tortious conduct. And for the Santiam Canyon Fire, plaintiffs had to prove
6 that PacifiCorp's tortious conduct "was a substantial factor in causing the harm to the
7 plaintiffs."

8 The difficulty with use of the challenged jury instruction in this case is that
9 much of the evidence introduced during the Phase I trial related to particular issues
10 concerning particular wildfires--and for the Santiam Canyon, to particular ignitions at
11 particular locations in the Santiam Canyon, such as Potato Hill and Kelly Lumber--and
12 the jury could not, in our view, simply "assume" that that evidence applied "to all class
13 members." For example, it is not apparent that the jury could "assume" that evidence of
14 the fire at "832 North Santiam Highway," which plaintiffs emphasized to the jury in
15 connection with the jury instruction PacifiCorp now challenges, also "applies" to, for
16 example, a different plaintiff, whose property was destroyed miles away, in a different
17 part of the Santiam Canyon, due to a different fire caused by a different ignition. In so
18 observing, we emphasize that the Santiam Canyon class area is over 70 square miles, the
19 Beachie Creek Fire undisputedly burned through the Santiam Canyon, and the jury was
20 not required to credit plaintiffs' account of the timing of the Beachie Creek Fire burning
21 through the Santiam Canyon.

1 Nor do plaintiffs explain how evidence that an individual saw an ignition
2 on Echo Mountain, as plaintiffs' closing emphasized, and had property destroyed by the
3 Echo Mountain Complex Fire, can be "assumed" to apply to plaintiffs over a hundred
4 miles away whose property was destroyed by a different wildfire entirely. Nor, for
5 example, do we see how evidence that PacifiCorp caused fires that forced firefighters to
6 evacuate the Santiam Canyon has any application to PacifiCorp's liability to plaintiffs in,
7 for example, the South Obenchain Fire boundary.

8 In reaching our conclusion that the trial court erred in instructing the jury,
9 "You may assume that the evidence at the trial applies to all class members," we note that
10 it is true, as we understand plaintiffs to contend, that in certain class action proceedings
11 certain evidence can apply "classwide," to resolve certain issues. Indeed, as explained
12 above, a fundamental aspect of class certification is a trial court's consideration of
13 predominance; that is, the trial court making a determination of the "degree to which
14 litigation of the controversy will require delving into individualized proof or, conversely,
15 the degree to which the issues lend themselves to resolution through common proof--that
16 is, proof for one individual class member will be proof for all." *Pearson*, 358 Or at 114.

17 Thus, in *Strawn*, on which plaintiffs rely, the court recognized that "to
18 prevail in a class action for fraud, the class plaintiff must prove reliance on the part of all
19 class members," but determined that "[d]irect evidence of reliance by each of the
20 individual class members is not always necessary." 350 Or at 358. Instead, it explained
21 that reliance can be inferred from "circumstantial evidence" if "the same

1 misrepresentation [was made] without material variation to the members of the class" and
2 the "misrepresentation [was] of a nature that the class members logically would have had
3 a common understanding of the misrepresentation, and naturally would have relied on it
4 to the same degree and in the same way." *Id.* at 358-59.

5 This case is not a circumstance like that discussed in *Strawn*, where a
6 tortious act (in *Strawn*, a misrepresentation) was uniform and without material variation.
7 In this case, which involved multiple wildfires, because much of the evidence introduced
8 during the Phase I trial, particularly regarding causation, related to particular issues
9 concerning particular wildfires--and for the Santiam Canyon, to particular ignitions at
10 particular locations in the approximately 71 square mile Santiam Canyon--it could not
11 just be "assumed" that it applied to "to all class members."

12 In *Tyson Foods, Inc.*, on which plaintiffs also rely, the United States
13 Supreme Court held that plaintiffs in a class action could prove their Fair Labor
14 Standards Act (FLSA) claim using "representative evidence," where "each class member
15 could have relied on that [representative evidence] to establish liability if [they] had
16 brought an individual action" and the representative evidence "could have sustained a
17 reasonable jury finding as to hours worked in each employee's individual action." 577
18 US at 455. The Court noted, however, that "[w]hether a representative sample may be
19 used to establish classwide liability will depend on the purpose for which the sample is
20 being introduced and on the underlying cause of action." *Id.* at 460; *see also id.* at 460
21 (noting that in "FLSA actions, inferring the hours an employee has worked from a study

1 [i.e., representative evidence] * * * has been permitted by the Court so long as the study
2 is otherwise admissible," but that the "fairness and utility of statistical methods in
3 contexts other than those presented here will depend on facts and circumstances
4 particular to those cases").

5 Plaintiffs' reliance on *Tyson Foods, Inc.* does not assist them because the
6 Supreme Court cautioned that the case "provide[d] no occasion" to adopt "broad and
7 categorical rules governing the use of representative and statistical evidence in class
8 actions," and, in any event, it does not appear all of the evidence central to important
9 issues in this class action proceeding could have been used by "each class member * * *
10 to establish liability if he or she had brought an individual action." *Id.* at 455, 459-60.

11 Put another way, although for some evidence--such as evidence of
12 PacificCorp's purported failure to "obtain granular weather information to evaluate
13 shutting off the power outside of limited areas designated Fire High Consequence
14 Areas"--it may be fair to say "applies to all class members," that is not the case for much
15 of the evidence presented at trial regarding causation. And that is in part because, as
16 described above, the trial court certified a single class consisting of the owners of
17 thousands of parcels of property, some of whom live over 100 miles away from one
18 another and whose properties were affected by different wildfires that ignited under
19 different circumstances.

20 Further, "when read together with the other instructions," *Sherertz*, 288 Or
21 App at 722, we think the difficulties with the instruction that PacificCorp challenges are

1 compounded, not improved. As noted above, the trial court instructed the jury that there
2 was a *single* class, which was defined in the jury instructions as all:

3 "(1) owners or residents, as of September 7, 2020, of any (a) privately
4 owned real property; (b) that is wholly or partially within the boundary of
5 the maximum extent of burn for the Echo Mountain Fire, the Kimberling
6 Fire, the South Obenchain Fire, the 242 Fire, or the Santiam Canyon Fire;
7 and (c) experienced fire activity during those fires; or (2) owners of a
8 motorhome, residential trailer, manufactured dwelling, other mobile home,
9 or any other personal property that as of September 7, 2020, was located on
10 any property (a) wholly or partially within the boundary of the maximum
11 extent of burn for the Echo Mountain Fire, the Kimberling Fire, the South
12 Obenchain Fire, the 242 Fire, or the Santiam Canyon Fire; that (b)
13 experienced fire activity during those fires; and (c) whose motorhome,
14 residential trailer, manufactured dwelling, other mobile home, or any other
15 personal property, experienced fire damage during those fires."

16 Given that instruction defining the single class that was certified--which
17 appeared in the jury instructions immediately prior to the "Class Questions Defined" jury
18 instruction PacifiCorp challenges on appeal--the jury could have understood the
19 instruction, "You may assume that the evidence at the trial applies to all class members,"
20 to mean that evidence demonstrating that plaintiffs were harmed in one wildfire due to
21 PacifiCorp could be "assumed" to be applicable to plaintiffs who were harmed in a
22 different wildfire entirely; after all, the jury was instructed that every class member was a
23 part of one, big, single class.

24 In seeking a different result, plaintiffs point out that the verdict form's
25 "class questions" asked the jury whether "[p]laintiffs had proven their case as to 'the
26 entire class' within the class boundaries" and that "the verdict form instructed the jury to
27 give separate answers for each of the four fires." And, in the "Class Questions Defined"

1 jury instruction, the trial court instructed the jury to interpret the "class questions"
2 according "to these instructions *and the verdict form*." (Emphasis added.) As noted, the
3 "Class Questions Defined" jury instruction, which contains the sentence that PacifiCorp
4 challenges on appeal, provided, in full:

5 "Only some questions on the verdict form are common to all class
6 members. Those questions are called the class questions. The class
7 questions will be specified on the verdict form that you will use in the jury
8 room. In answering the class questions, you must determine the answer as
9 to the class. *Because the case is a class action, you can answer the class*
10 *questions based on evidence that applies to the class as a whole.* There is
11 no requirement that individual class members appear in court to prove their
12 case. *You may assume that the evidence at the trial applies to all class*
13 *members. You should interpret the class questions according to these*
14 *instructions and the verdict form*, understanding that for the purposes of
15 these class questions, *the class is considered the plaintiff*. Each class
16 question is broken down by fire."

17 (Emphases added.)

18 Ultimately, we do not think the structure of the verdict form and its "class
19 questions" remedy the difficulties arising from the instruction that PacifiCorp challenges
20 on appeal. That is because, as set forth above, in the "Class Questions Defined" jury
21 instruction, the trial court told the jury that it should "answer the class questions based on
22 evidence that applies to the class as a whole," and also that it could "assume that the
23 evidence at the trial applies to all class members." The court also instructed the jury that
24 there was only a single class. And, finally, the court instructed the jury that it was to
25 "interpret the class questions according to *these instructions* and the verdict form."

26 (Emphasis added.)

27 Put another way, in the "Class Questions Defined" jury instruction the jury

1 was instructed to follow its instructions, and those instructions stated, in essence, that in
2 answering the "class questions," all the evidence was applicable to all class members.

3 Thus, we do not think the instructions as a whole--including consideration
4 of the verdict form as referenced in those instructions--"completely and accurately stated
5 the law applicable to the case." *Id.* at 725.

6 Additionally, because both the trial court and plaintiffs highlighted
7 repeatedly that the instruction that PacifiCorp challenges tracks a sentence in CACI No.
8 115, we note that, with regard to Oregon's uniform jury instructions, we have stated that
9 an "instruction's inclusion as a uniform instruction lends it no special credence or
10 presumed accuracy." *Sherertz*, 288 Or App at 725 n 2. We can discern no reason why
11 we would lend any "special credence or presumed accuracy" to a model instruction of
12 another state.

13 Moreover, the "user guide" for the Judicial Council of California Civil Jury
14 Instructions recognizes that the instructions therein, including CACI No. 115, are not
15 appropriate for use in every case. The "user guide" for those instructions states that the
16 model instructions were "drafted for the common type of case and can be used as drafted
17 in most cases," but that parties will need to adapt them when "unique or complex
18 circumstances prevail." *Judicial Council of California Civil Jury Instructions 2* (ed
19 2026), available at [https://courts.ca.gov/system/files/file/judicial_council_of_](https://courts.ca.gov/system/files/file/judicial_council_of_california_civil_jury_instructions_2026.pdf)
20 [california_civil_jury_instructions_2026.pdf](https://courts.ca.gov/system/files/file/judicial_council_of_california_civil_jury_instructions_2026.pdf) (accessed Mar 24, 2026). This class action
21 proceeding presents both unique and complex circumstances.

1 Thus, in sum, we conclude that the trial court erred in instructing the jury,
2 "You may assume that the evidence at the trial applies to all class members."

3 D. *The erroneous instruction was prejudicial to PacifiCorp.*

4 That brings us to prejudice. Considering the record as a whole and in the
5 light of the parties' theories at trial, we conclude that the instructional error "gave rise to
6 some likelihood that the jury reached an erroneous result." *Purdy*, 311 Or App at 259
7 (stating standard for prejudice due to erroneous jury instruction).

8 Here, not only was the instruction erroneous, but the risk of the jury
9 misunderstanding its task based on the instruction, and relying on the instruction during
10 its deliberations, was amplified by plaintiffs' counsel's closing argument to the jury
11 emphasizing that, based on that instruction, the jury could "assume that the evidence that
12 came in applies to the class members as a whole." *See Elan v. Tate*, 294 Or App 76, 86–
13 87, 430 P3d 179 (2018) (prejudice to defendant where plaintiff's attorney "emphasized"
14 erroneous instructions in his closing argument creating "some likelihood that the jury
15 relied on the erroneous instructions and, consequently, reached a legally erroneous
16 result"); *see also Purdy*, 311 Or App at 259 (considering counsel's closing argument
17 assessing prejudice caused by erroneous jury instruction).

18 And the risk was further amplified by plaintiffs' counsel arguing to the jury
19 that it could find PacifiCorp liable for the harm in the Santiam Canyon if PacifiCorp was
20 "a cause of the harm that night," and that PacifiCorp "admit[ted] they cause[d] harm in
21 the Santiam Canyon" because PacifiCorp "admit[ted] they started fires in the Santiam

1 Canyon." That is, if the jury was permitted to "assume that the evidence at the trial
2 applies to all class members," as the trial court instructed it, it could also assume that
3 PacifiCorp's admission to starting any particular fire in the Santiam Canyon was
4 sufficient to determine that it caused harm to every plaintiff in the Santiam Canyon, as
5 plaintiffs' counsel's argument suggested.

6 Finally, although, as articulated by plaintiffs, the verdict form's "class
7 questions" asked the jury whether "[p]laintiffs had proven their case as to 'the entire class'
8 within the class boundaries" and "the verdict form instructed the jury to give separate
9 answers for each of the four fires," as explained above, the "Class Questions Defined"
10 jury instruction instructed the jury, in essence, that in answering the "class questions," all
11 the evidence was applicable to all class members. Thus, contrary to plaintiffs' argument,
12 the verdict form's "class questions" did not render the erroneous jury instruction
13 nonprejudicial.

14 Because we conclude that the trial court erred in instructing the jury and
15 that the erroneous instruction was prejudicial to PacifiCorp, we reverse and remand.⁹

⁹ In this opinion, we have explained how, given the class that was certified, the evidence at trial, and plaintiffs' arguments to the jury concerning causation, the instruction that is the subject of PacifiCorp's fourth assignment of error was erroneous and was prejudicial to PacifiCorp.

We observe, however, that nothing in the erroneous instruction that PacifiCorp challenges--*i.e.*, "You may assume that the evidence at the trial applies to all class members"--limited the assumption that the jury was instructed that it could make to evidence of causation. As a result, given the erroneous instruction, the jury was permitted to "assume" that evidence of PacifiCorp's tortious conduct as to one plaintiff or group of plaintiffs was "applicable" as to the class as a whole. That too, on this record,

1 IV. PACIFICORP'S OTHER ASSIGNMENTS OF ERROR

2 As noted at the outset, there is one assignment of error for which our
3 disposition as to PacifiCorp's fourth assignment of error is not dispositive. That
4 assignment of error is PacifiCorp's third assignment of error. In that assignment of error,
5 PacifiCorp contends that the trial court "erred when it failed to grant judgment to
6 PacifiCorp on the class claims, given the absence of evidence that a PacifiCorp-caused
7 fire harmed every member of the class." As we understand it, PacifiCorp contends that
8 the trial court should have granted PacifiCorp's motions for directed verdict and judgment
9 notwithstanding the verdict, due to a lack of evidence regarding causation.

10 As to that assignment of error, having considered the record and the parties'
11 arguments, viewing the evidence in the light most favorable to plaintiffs, we conclude
12 that the trial court did not err in denying the motions that are the subject of PacifiCorp's
13 third assignment of error. *See Johnson v. Keiper*, 308 Or App 672, 678, 481 P3d 994
14 (2021) ("[A] directed verdict is appropriate only in the exceptional case where reasonable
15 people could draw only one inference and that inference is that defendant was not
16 liable."); *Currier v. Washman, LLC*, 276 Or App 93, 97, 366 P3d 811 (2016) (noting that,
17 "on appeal from the denial of a motion for directed verdict, we review the evidence and
18 any resulting inferences in the light most favorable to the party that obtained a favorable
19 verdict, and the verdict cannot be set aside unless we can affirmatively say that there is

seems problematic.

1 conclude that that error was prejudicial to PacifiCorp.

2 In reaching that conclusion, we emphasize that special jury instructions can
3 be proper and are even perhaps necessary in class actions. But the instruction that was
4 given in this case, which PacifiCorp challenges on appeal, was erroneous in view of the
5 class that was certified, the evidence at trial, and plaintiffs' theories of causation. That is,
6 the error is not in CACI No. 115 in the abstract, but in giving it in this case, because, in
7 view of how this case developed, aspects of causation were not proven through use of
8 common evidence.

9 We also emphasize that, with the benefit of knowing how the Phase I trial
10 developed, including plaintiffs' eleventh-hour motion to amend the boundary for the
11 Santiam Canyon Fire, the trial court has the authority on remand to reconsider its class
12 certification decision and reconsider whether a single class is appropriate in this case.
13 *See* ORCP 32 C(1) (class certification order "may be altered or amended before the
14 decision on the merits").

15 Reversed and remanded.

CERTIFICATES OF FILING AND SERVICE

I certify that on May 13, 2026, I filed the foregoing **PLAINTIFFS-RESPONDENTS' PETITION FOR REVIEW** and accompanying appendix with the Supreme Court using the Appellate Court's Electronic Filing System.

I further certify that on May 13, 2026, I caused two true copies of the foregoing to be served on the following persons at the following addresses via U.S. First Class Mail and via e-mail.

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

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

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

Theodore J. Boutrous, Jr.
GIBSON, DUNN & CRUTCHER LLP
333 S Grand Avenue
Los Angeles, CA 90071-3197
Telephone: (213) 229-7804
Email: tboutrous@gibsondunn.com

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

*Attorneys for Defendants-Appellants, Cross-Respondents,
Respondents on Review*

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

Attorney for Creditor-Respondent

J. Aaron Landau
MILLER NASH LLP
1140 SW Washington Street, Suite 700

Portland, Oregon 97205
Telephone: (541) 234-7622
Email: aaron.landau@millernash.com

Attorneys for Amicus Curiae Edison Electric Institute

Iván Resendiz Gutierrez
KC Lynne Hovda
MILLER NASH LLP
1140 SW Washington Street, Suite 700
Portland, Oregon 97205

Attorneys for Amicus Curiae Oregon Business & Industry Association

Sara Kobak
Andrew J. Lee
SCHWABE, WILLIAMSON & WYATT, PC
1211 SW Fifth Avenue, Suite 1900
Portland, OR 97204

Attorneys for Amicus Curiae Oregon Forest Industries Council

Irion Sanger
John Maxwell Greene
SANGER LAW, P.C.
4031 SE Hawthorne Boulevard
Portland, Oregon 97214

Attorneys for Amici Curiae Central Lincoln Public Utility District, Clatskanie Public Utility District, Columbia River Public Utility District, Northern Wasco Public Utility District, Tillamook People's Utility District

John Pruitt
Meghana Shah
EVERSHEDS SUTHERLAND (US) LLP
The Grace Building, 40th Floor
1114 Avenue of the Americas New York, New York 10036

Attorneys for Amicus Curiae Associated Electric & Gas Insurance Services Limited

Matthew J. Kalmanson
HART WAGNER LLP
1000 SW Broadway, Suite 2000
Portland, Oregon 97205

Attorney for Amicus Curiae Associated Electric & Gas Insurance services Limited

Paul S. Stewart
PAINE HAMBLEN PS
717 W Sprague Avenue, Suite 1200
Spokane, Washington 99201

Attorney for amicus curiae Pacific Northwest Investor-Owned Utilities

Jeremy Marwell
VINSON & ELKINS LLP
2200 Pennsylvania Avenue NW, Suite 500 West
Washington, DC 20037

Attorney for Amicus Curiae Edison Electric Institute

Jeremy Rice
PARKS BAUER LLP
570 Liberty Street SE, Suite 200
Salem, Oregon 97301

Attorney for Amicus Curiae Oregon Association of Defense Counsel

Matthew Kirkpatrick
Oregon Consumer Justice Law PC
850 SE 3rd Avenue, Suite 302
Portland, Oregon 97214

Attorney for Amicus Curiae Oregon Consumer Justice

Elizabeth Savage
Elizabeth Savage Law LLC
100 SW Main Street, Suite 400
Portland, Oregon 97204

Attorney for Amicus Curiae Oregon Trial Lawyers Association

DATED this 13th day of May, 2026.

STOLL STOLL BERNE LOKTING
& SHLACHTER P.C.

By: s/ Cody Berne

Cody Berne, OSB No. 142797
209 SW Oak Street, Suite 500
Portland, Oregon 97204
Telephone: (503) 227-1600
Email: cberne@stollberne.com

*Attorney for Plaintiffs, Plaintiffs-
Respondents, Cross-Appellants,
Petitioners on Review*