

1 Gerald Singleton (WA 59010)
gsingleton@singletonschreiber.com
2 Stephen J. Hill (WA 7651)
shill@singletonschreiber.com
3 SINGLETON SCHREIBER, LLP
450 Alaskan Way South Suite 200
4 Seattle, WA 98104
5 Tel. (206) 466-0809

6 John C. Lemon (CA 175847) *Pro Hac Vice*
jlemon@singletonschreiber.com
7 SINGLETON SCHREIBER, LLP
591 Camino de la Reina, Ste. 1025
8 San Diego, CA 92108
9 Tel. (619) 771-3473

10 Attorneys for Plaintiffs

11
12 **UNITED STATES DISTRICT COURT**
13 **WESTERN DISTRICT OF WASHINGTON**
14 **AT TACOMA**

15
16 LANCE DOUGLAS BROOKS;
MATTHEW BAIRD;
17 DONALD BERNHARDT;
SUSAN BERNHARDT;
18 DONALD J. BERNHARDT, as trustee of THE
BERNHARDT FAMILY TRUST DATED
19 NOVEMBER 15, 2022;
ANGELES GOMEZ;
20 RACHAEL HORN;
HECATE’S KEY;
21 ANICHE CELLARS WASHINGTON LLC;
22 MARK KEEN;
ELIZABETH GIBSON;
23 BRIAN MARLOW;
ROSS MCCRACKEN;
24 ROLAND MURPHY II;
CHEYANNE PATTERSON;
25 MICHAEL PARSLEY;
26 KRISTY PODRUCHNY;
27 JOHN GALLAGHER;

Case No.: 3:24-CV-05158-DGE

FIRST AMENDED COMPLAINT

JURY DEMAND

1 EMILY STYLES;
2 JENNIFER SZOLNOKI;
3 RYAN MURTFELDT;
4 MATTHEW TROSKEY;
5 NATHAN ZIEGLER;
6 SARAH ZIEGLER;
7 KEVIN ZIEGLER; and
8 ZIEGLER CONSTRUCTION INC.

9 Plaintiffs,

10 v.

11 BNSF RAILWAY COMPANY,

12 Defendant.

1 Plaintiffs Lance Douglas Brooks; Matthew Baird; Donald Bernhardt; Susan Bernhardt; Donald J.
2 Bernhardt, as trustee of The Bernhardt Family Trust Dated November 15, 2022; Angeles Gomez;
3 Rachael Horn; Hecate’s Key; AniChe Cellars Washington LLC; Mark Keen; Elizabeth Gibson; Brian
4 Marlow; Ross Mccracken; Roland Murphy II; Cheyanne Patterson; Michael Parsley; Kristy Podruchny;
5 John Gallagher; Emily Styles; Jennifer Szolnoki; Ryan Murtfeldt; Matthew Troskey; Nathan Ziegler;
6 Sarah Ziegler; Kevin Ziegler; and Ziegler Construction Inc. (“Plaintiffs”), by and through their
7 undersigned counsel, hereby file the following complaint for damages (“Complaint”) against Defendant
8 BNSF Railway Company (hereinafter “Defendant” or “BNSF”).

9 **I. INTRODUCTION**

- 10 1. This Complaint arises from the Tunnel 5 Fire, a catastrophic wildfire that ignited on July 2,
11 2023, in Skamania County, Washington.
- 12 2. The Tunnel 5 Fire was sparked by one of BNSF’s trains, which consisted of locomotive
13 number 2322, a non-turbocharged engine that is over 40 years old and is notorious for
14 emitting superheated diesel carbon and other particles; locomotive number 2600; and 12-15
15 cars loaded with lumber (the “Train”).



25 **The Tunnel 5 Fire near White Salmon. Photo courtesy of Heather Tianen.**
26 **(Photo credit: Jurgen Hess).**

- 1 3. The Tunnel 5 Fire started when superheated particles emitted from Defendant’s Train ignited
2 dry brush and other vegetation in three locations over an approximately 690 foot distance, all
3 on the north side of BNSF’s tracks and east of Tunnel 5.
- 4 4. The fire quickly spread, displacing about 1,000 residents, including Plaintiffs, destroying 10
5 homes, and burning over 500 acres. At least 40 fire engines, 256 firefighters and other
6 personnel, five helicopters, six bulldozers and 16 water tenders were needed to fight the fire.



19 **The BNSF train shortly before it ignited the Tunnel 5 fire. (Photo credit: Washington DNR/Bryan**
20 **Baller).**

21

22

23

24

25

26

27



12 This image was captured by an Amtrak train's forward-facing camera about two and a half hours
13 before the start of the Tunnel 5 Fire. The arrow below the box that states "06/27/23 Fire" indicates the area
14 where BNSF's track maintenance activities started a small fire only five days before BNSF's Train started the Tunnel 5
15 Fire. (Photo credit: Washington DNR/Bryan Baller).

16 **II. PARTIES**

17 **A. Plaintiffs**

18 5. Plaintiffs are individuals, representatives, and legal entities. At all times relevant to this
19 pleading, Plaintiffs were homeowners, renters, business owners, residents, and occupants of real
20 property located in Skamania County, Washington, and/or had property interests located therein. All
21 Plaintiffs are residents of the state of Washington.

22 6. Plaintiffs have elected to join their individual lawsuits in a single action under rules of
23 permissive joinder as set forth in Rule 20(a)(1) of the Federal Rules of Civil Procedure. Plaintiffs do not
24 seek class certification or any relief on any collective basis. Instead, they seek compensation on an
25 individual basis for damages suffered due to the Tunnel 5 Fire.

26 **B. Defendant**

27 7. Defendant is and was, at all times relevant to this pleading, a Delaware corporation doing

1 business in the State of Washington and specifically in Skamania County. At all times relevant to this
2 pleading, Defendant’s business activities in Skamania County included the operation of a railroad.

3 **III. JURISDICTION & VENUE**

4 8. This Court has jurisdiction pursuant to 28 U.S.C. § 1332(a) because the parties are
5 citizens of different states and the matter in controversy exceeds the amount of \$75,000.

6 9. Venue is proper in this judicial district under 28 U.S.C. § 1391(b)(2) because this is the
7 judicial district in which acts and omissions giving rise to Plaintiffs’ claims occurred, and in which the
8 properties that are the subject of this action are situated.

9 **IV. FACTUAL BACKGROUND**

10 **A. Defendant’s railroad operations.**

11 10. Defendant acts as a common carrier throughout western states, including Washington. It
12 owns, operates, maintains, and repairs a railroad system that transports supplies and provides
13 transportation to residents, businesses, schools, and industries in Washington, including in and around
14 Skamania County.

15 11. Defendant owns, operates, maintains, and repairs a railway in Skamania County,
16 Washington, including a right of way, tracks, roadbed, and other improvements (collectively, the
17 “Tracks”).

18 **B. Prior to July 2, 2023, Defendant’s railroad operations had ignited fires in
Washington, including in the exact location of the Tunnel 5 Fire.**

19 12. In 2007, the Broughton Fire burned 200 acres and seven structures (including five
20 houses) in the precise location as the Tunnel 5 Fire. The Broughton Fire was caused by Defendant’s
21 grinding of its Tracks.

22 13. In 2015, according to the Washington State Department of Resources (“DNR”),
23 Defendant’s railroad caused a catastrophic wildfire in Spokane County known as the “Fish Lake Fire.”

24 14. According to the DNR’s investigation of the Tunnel 5 Fire, five and eight days before the
25 ignition of the Tunnel 5 Fire, sparks from Defendant’s grinding of its Tracks started brush fires just east
26 of the general area of origin of the Tunnel 5 Fire.

1 **C. On July 2, 2023, Defendant’s railroad operations ignited the Tunnel 5 Fire.**

2 15. Older non-turbocharged locomotives such as BNSF’s locomotive 2322 have a propensity
3 to start fires.

4 16. Due to this propensity, the common practice among railroad operators during summer
5 months, including the summer of 2023, was not to use older non-turbocharged locomotives in the area
6 where the Tunnel 5 Fire ignited, and to limit their use during those months to railroad yards.

7 17. Defendant’s Train, and particularly locomotive number 2322, did not use available
8 technologies and safety equipment to mitigate fire risk, including a spark arrester, spark shields,
9 turbocharged engine, and spark resistant brake pads.

10 18. Defendant failed to properly manage the vegetation on or near its Tracks on or before
11 July 2, 2023, so as to mitigate the risk of wildfire.

12 19. A combination of strong winds, low relative humidity, and warm temperatures resulted in
13 “red flag warnings” of extreme wildfire risk prior to and on July 2, 2023, in Skamania County.

14 20. Despite the extreme risk of wildfires in Skamania County on July 2, 2023, Defendant
15 operated its Train in an area with dry, overgrown vegetation on and next to its Tracks.

16 21. The Tunnel 5 Fire started when sparks, hot debris, particles, emissions, and other
17 materials from Defendant’s Train ignited the overgrown vegetation on and/or next to Defendant’s
18 Tracks.

19 22. The high temperatures, together with winds gusting up to 20 miles per hour, spread fire
20 over the landscape, scorching several hundred acres. The rapid spread of the fire forced firefighters to
21 focus on saving lives and initiating evacuations, rather than extinguishing the fire.

22 23. The DNR investigated the cause and origin of the Tunnel 5 Fire, making several site
23 visits. The DNR investigator’s report (the “DNR Report”) summarized the investigation as follows:

24 A BNSF train travelled through the origin area of the Tunnel 5 fire at aprx 1053 to 1100 hours on
25 Sunday, 07/02/23. This train emitted some object(s) which started fire in 3 areas over an aprx
26 690-foot distance, all on the North side of the tracks and East of Tunnel 5. Several witnesses not
27 known to each other identified this origin area along the North side of the BNSF tracks near
Railroad MP 70, just East of Tunnel 5, North of Highway 14 in Skamania County, WA. Two

1 witnesses photographed an older vintage non-turbocharged BNSF engine pulling 12 to 15 loaded
2 cars WB through the origin areas aprx 25 minutes prior to the fire being seen and reported. I
3 examined advancing, backing, and lateral/transition fire indicators in and near the 3 SOAs. I
4 collected 72 possible train wheel solid polymer lubrication pad parts, and 2 possible emission
5 carbons, within and near the SOAs and IAs. These items were deposited into fine and seasonally
6 dry grass/small brush growing in mineral soil on the North side of the BNSF Tracks. Gusty winds
7 were from the West at 12 to 22 MPH, mild humidity at 47%, and the aprx temperature was 75
8 degrees F. A steep and heavily wooded 85% slope was on the North side of the origin area, and
9 according to local fire personnel this slope had not been burned in decades. Additionally, BNSF
10 track maintenance activities had ignited two other fires in the same vicinity just 5 and 8 days
11 earlier. These two track maintenance fires occurred during hours of darkness when temperatures
12 would have been cooler and humidity higher. A localized fire danger along the tracks in this
13 general area should have been known to BNSF.¹

14 24. The DNR Report concluded:

15 After eliminating other probable causes for [the Tunnel 5 Fire], the Wildland Fire Investigation
16 determined this fire was started by Human means: Railroad Operations; Right of Way Vegetation
17 Maintenance; Wheel Lubrication Parts; and Exhaust Particles.²

18 25. As stated in the DNR Report, the DNR collected materials and debris near the area of
19 origin of the fire, including 72 solid polymer pads and 2 carbon emission particles that were deposited
20 onto fine and seasonally dry grass/small brush growing on the north side of Defendant's Tracks.

21 26. The DNR concluded that superheated particles emitted from Defendant's Train ignited
22 vegetation in and surrounding the Tracks, causing the Tunnel 5 Fire.

23 **D. Due to the Tunnel 5 Fire, Plaintiffs have suffered substantial harms.**

24 27. The Tunnel 5 Fire caused Plaintiffs to evacuate and be displaced from their homes and
25 properties. Due to the Fire, Plaintiffs suffer, and will continue to suffer, substantial harms, including, but
26 not limited to, damage to, destruction of, and loss of real and personal property, including property that
27 was unique and/or had peculiar personal value to Plaintiffs; annoyance, inconvenience, disturbance, and
loss of use and enjoyment of property; diminution in property value; loss of business income and
business goodwill; out-of-pocket expenses directly and proximately incurred because of the fire;

¹ State of Washington Department of Natural Resources, Wildland Fire Investigation, Case File Number 23-E-LAB, August 24, 2023, at 11.

² *Id.*

1 evacuation and additional living expenses; personal injuries; medical bills; lost wages; discomfort, fear,
2 upset, mental distress, increased risk of associated disease or illness, and the present need for medical
3 monitoring to ensure early detection of such disease or illness; investigation and litigation costs, and
4 attorney fees.

5 **V. CLAIMS FOR RELIEF**

6 **FIRST CLAIM FOR RELIEF**
7 **Negligence and Negligence Per Se**

8 28. Plaintiffs reallege and incorporate the foregoing allegations as if fully set forth herein.

9 29. Defendant has a duty of care to maintain, inspect, and operate its railway with the utmost
10 care and prudence, because the operation of a railway exposes the public to serious accident or death.

11 30. Operating a railroad is a matter of public concern. Defendant owes a duty to the public to
12 operate its railroad in a safe and prudent manner in compliance with Washington state law and federal
13 regulations.

14 31. Under 49 CFR Part 229, Defendant has a duty, among other things, to inspect, maintain,
15 repair, and operate its Train, to ensure that it is in proper condition and safe to operate without
16 unnecessary peril to life and limb.

17 32. Under 49 CFR Part 137, Defendant has a duty, among other things, to inspect and
18 maintain its Tracks, including managing and maintaining vegetation on or near its Tracks, so as to
19 prevent a fire hazard.

20 33. In addition, consistent with federal regulations and industry practices and procedures,
21 Defendant has the duty to:

22 a. Conduct prompt, proper, and frequent inspections of its locomotives and railcars,
23 including particularly the Train;

24 b. Manage vegetation on or near its Tracks so as not to create a fire hazard;

25 c. Operate, maintain, and/or repair its locomotives, and railcars, including particularly the
26 Train, in such a way as to ensure their safe and proper operation, especially under dry, windy conditions
27 where there is a high risk of wildfires;

- 1 d. Use appropriate and available technology, such as “track warning detectors”;
2 appropriately place such detectors to ensure timely alerting of any potential problems; implement
3 appropriate policies for the use of such detectors including, but not limited to, setting appropriate alarm
4 thresholds and criteria for determining when a potentially dangerous condition exists; and ensure that
5 such detectors are timely and properly inspected and maintained;
- 6 e. Ensure a proper mechanism for stopping or slowing malfunctioning locomotives and/or
7 railcars, including the Train, in a timely manner so as to avoid ignition of a wildfire;
- 8 f. As required under RCW 9.40.040, equip its locomotives that have a spark-emitting
9 engine or boiler with a modern spark-arrester in good condition;
- 10 g. Promptly de-activate or de-commission older locomotives with non-turbocharged diesel
11 burning engines that have a propensity to emit sparks and ignite fires;
- 12 h. Hire, train, manage, oversee, and supervise its agents, servants, and employees,
13 including, but not limited to, the train engineer, conductor, brake operator, and dispatcher, concerning
14 the operation of its Train on July 2, 2023;
- 15 i. Properly determine the adequacy and skill of its agents, servants, and employees,
16 including, but not limited to, the train engineer, conductor, brake operator, and dispatcher concerning the
17 operation of its Train on July 2, 2023;
- 18 j. Ensure that the agents, servants, and employees, including the train engineer and
19 dispatcher, were properly instructed and trained regarding the risk of wildfires, and concerning safety
20 and emergency procedures if a fire were ignited along its Tracks on July 2, 2023;
- 21 k. Develop and implement a wildfire mitigation plan;
- 22 l. Timely implement an emergency response plan in the event of fire ignition on or near its
23 Tracks; and
- 24 m. Contain the spread of fire on or near its Tracks.

25 47. However, inconsistent with federal regulations, Washington state law, and industry
26 practice, Defendant negligently, carelessly and/or recklessly breached its duties to Plaintiffs by, among
27

1 other things:

2 a. Failing to properly inspect, repair, and maintain the Train on or before July 2, 2023;

3 b. Failing to properly manage vegetation on or near its Tracks on or before July 2, 2023, so
4 as to mitigate the risk of wildfire;

5 c. Failing to operate, maintain, and/or repair its Train in a manner that would assure its safe
6 and proper operation, and would mitigate the risk of wildfire;

7 d. Failing to maintain vigilant lookout during the operation of the Train on July 2, 2023;

8 e. Failing to immediately notify train dispatchers about fires observed along its Tracks on
9 July 2, 2023;

10 f. Failing to ensure a proper mechanism for stopping or slowing its malfunctioning Train in
11 a timely manner on July 2, 2023, so as to avoid ignition of a wildfire;

12 g. Failing to use, and/or respond to messages from, its “track warning detectors” along the
13 Tracks on July 2, 2023, so as to prevent and/or rapidly respond to a fire;

14 h. Failing to appropriately place such detectors along the Tracks in Skamania County prior
15 to July 2, 2023, to ensure timely alerting of any potential problems; implement appropriate policies for
16 the use of such detectors in Skamania including, but not limited to, setting appropriate alarm thresholds
17 and criteria for determining when a potentially dangerous condition exists; and ensure that such
18 detectors were timely and properly inspected and maintained.

19 i. Failing to properly calibrate, maintain, test, and operate the brake systems on the Train;

20 j. Failing to equip the Train’s spark-emitting engine or boiler with a modern spark-arrester
21 in good condition;

22 k. Operating a non-turbocharged diesel-burning engine on locomotive 2322 on July 2, 2023,
23 under dry, windy conditions with a high risk of wildfires;

24 l. Failing to adequately hire, train, manage, oversee, and supervise its agents, servants, and
25 employees, including but not limited to the train engineer, conductor, brake operator, and dispatcher
26 involved in the operation of the Train on July 2, 2023;

27

1 m. Failing to properly determine the adequacy and skill of its agents, servants, and
2 employees, including but not limited to, the train engineer, conductor, brake operator, and dispatcher
3 involved in the operation of the Train on July 2, 2023;

4 n. Failing to adequately ensure that the agents, servants, and employees, including the train
5 engineer and dispatcher, were properly instructed and trained regarding the risk of wildfires and
6 concerning safety and emergency procedures in the event of a fire along its Tracks on July 2, 2023;

7 o. Failing to properly develop and implement a wildfire mitigation program;

8 p. Failing to implement an emergency response plan in the event of fire on or near its
9 Tracks on July 2, 2023; and

10 q. Failing to promptly contain the spread of fire on or near its Tracks on July 2, 2023.

11 48. Additionally, the Federal Rail Safety Act (“FRSA”), 49 U.S.C. § 20101 et seq., and its
12 accompanying regulations are implemented to promote safety in every area of railroad operations and
13 reduce railroad-related accidents and incidents. 49 U.S.C. § 20101. After a reasonable opportunity for
14 further investigation or discovery, Plaintiffs will likely have evidentiary support to establish that
15 Defendant’s conduct violated one or more regulations, including but not limited to the following:

16 a. 49 CFR Part 213, including but not limited to 49 CFR § 213.37;

17 b. 49 CFR Part 229, including but not limited to 49 CFR §§ 229.7, 229.9, 229.21, 229.23,
18 229.25, 229.27, 229.29, 229.45, 229.46, 229.49, 229.57, 229.91, and 229.101;

19 c. 49 CFR Part 232, including but not limited to 49 CFR §§ 232.15, 232.103, 232.109 and
20 232.203; and

21 d. 49 CFR Part 271, including but not limited to 49 CFR §§ 271.101, 271.211, and 271.213.

22 49. Defendant’s violation of such safety laws and regulations constitutes negligence per se.

23 50. As a direct and proximate result of Defendant’s negligence as described above, Plaintiffs
24 presently suffer, and will continue to suffer damages, including, but not limited to, Plaintiffs suffer, and
25 will continue to suffer, substantial harms, including, but not limited to, damage to, destruction of, and
26 loss of real and personal property, including property that was unique and/or had peculiar personal value
27

1 to Plaintiffs; annoyance, inconvenience, disturbance, and loss of use and enjoyment of property;
2 diminution in property value; loss of business income and business goodwill; out-of-pocket expenses
3 directly and proximately incurred because of the fire; evacuation and additional living expenses;
4 personal injuries; medical bills; lost wages; discomfort, fear, upset, mental distress, increased risk of
5 associated disease or illness, and the present need for medical monitoring to ensure early detection of
6 such disease or illness.

7 51. Plaintiffs are entitled to damages to be determined according to proof at trial.

8 **SECOND CLAIM FOR RELIEF**
9 **Negligent Trespass**

10 52. Plaintiffs reallege and incorporate by reference the foregoing allegations as if fully set
11 forth herein.

12 53. On July 2, 2023, Plaintiffs were residents and owners of real and personal property in the
13 Tunnel 5 Fire area, and thus had an interest in exclusive possession of such property.

14 34. As described above, Defendant owed Plaintiffs numerous duties regarding the operation,
15 inspection, maintenance and repair of its Train, so as to ensure that it was in proper condition and safe to
16 operate on July 2, 2023, without causing unnecessary peril to life and limb and/or without igniting a
17 wildfire.

18 54. Defendant also owed Plaintiffs numerous duties regarding the inspection and
19 maintenance of its Tracks, including managing and controlling vegetation on or near its Tracks, so as to
20 ensure that the Tracks were in proper condition and safe to have a Train run on them on July 2, 2023,
21 without causing unnecessary peril to life and limb and/or without igniting a wildfire.

22 55. Defendant negligently, carelessly, and/or recklessly breached these duties, causing the
23 Tunnel 5 Fire to ignite and spread out of control, and to intrude onto or into Plaintiffs' real and personal
24 property.

25 56. Plaintiffs did not grant permission for any fire, smoke, or ash to enter their properties.

26 57. As a direct and proximate result of Defendant's trespass, Plaintiffs presently suffer, and
27 will continue to suffer damages, including, but not limited to, damage to, destruction of, and loss of real

1 and personal property, including property that was unique and/or had peculiar personal value to
2 Plaintiffs; annoyance, inconvenience, disturbance, and loss of use and enjoyment of property;
3 diminution in property value; loss of business income and business goodwill; out-of-pocket expenses
4 directly and proximately incurred because of the fire; evacuation and additional living expenses;
5 personal injuries; medical bills; lost wages; discomfort, fear, upset, mental distress, increased risk of
6 associated disease or illness, and the present need for medical monitoring to ensure early detection of
7 such disease or illness.

8 58. Plaintiffs are entitled to damages to be determined according to proof at trial.

9
10 **THIRD CLAIM FOR RELIEF**
11 **Intentional Trespass**

12 59. Plaintiffs reallege and incorporate by reference the foregoing allegations as if fully set
13 forth herein.

14 60. On July 2, 2023, Plaintiffs were residents and owners of real and personal property in the
15 Tunnel 5 Fire area, and thus had an interest in exclusive possession of such property.

16 61. Defendant knew of the extreme risk of wildfire in Skamania County on July 2, 2023.
17 Defendant also knew of the high risk that its Train would emit sparks and ignite fires under hot, dry
18 conditions; that vegetation on or near its Tracks had not been adequately maintained to mitigate the risk
19 of fire; and that due to windy conditions on July 2, 2023, if its Train ignited a fire, the fire would spread
20 rapidly out of control.

21 62. Therefore, Defendant knew that its operation of the Train in Skamania County on July 2,
22 2023, was substantially certain to ignite a fire that would grow into a wildfire that would invade
23 Plaintiffs' properties and/or interfere with their exclusive possession of their properties, and cause the
24 damages for which Plaintiffs seek compensation in this action.

25 63. Despite such knowledge, Defendant intentionally operated its Train in Skamania County
26 on July 2, 2023, which ignited the Tunnel 5 Fire.

27 64. It was reasonably foreseeable that Defendant's operation of its Train on July 2, 2023,
would ignite a wildfire that would invade Plaintiffs' real and personal property and/or disturb Plaintiffs'

1 possessory interests in their property.

2 65. Plaintiffs did not grant permission for any fire, smoke, or ash to enter their properties.

3 66. As a direct and proximate result of Defendant's knowing and intentional conduct, which
4 ignited the Tunnel 5 Fire, and the resulting intentional trespass of Plaintiffs' properties, Plaintiffs
5 presently suffer, and will continue to suffer, actual and substantial damages, including, but not limited
6 to, damage to, destruction of, and loss of real and personal property, including property that was unique
7 and/or had peculiar personal value to Plaintiffs; annoyance, inconvenience, disturbance, and loss of use
8 and enjoyment of property; diminution in property value; loss of business income and business
9 goodwill; out-of-pocket expenses directly and proximately incurred because of the fire; evacuation and
10 additional living expenses; personal injuries; medical bills; lost wages; discomfort, fear, upset, mental
11 distress, increased risk of associated disease or illness, and the present need for medical monitoring to
12 ensure early detection of such disease or illness.

13 67. Plaintiffs are entitled to damages to be determined according to proof at trial.

14
15 **FOURTH CLAIM FOR RELIEF**
16 **Statutory Waste**
17 **RCW 4.24.630**

18 68. Plaintiffs reallege and incorporate by reference the foregoing allegations as if fully set
19 forth herein.

20 69. RCW 4.24.630(1) provides:

21 Every person who goes onto the land of another and who removes timber, crops, minerals, or
22 other similar valuable property from the land, or *wrongfully causes waste or injury to the land,*
23 *or wrongfully injures personal property or improvements to real estate on the land,* is liable to
24 the injured party for treble the amount of the damages caused by the removal, *waste, or injury.*
25 For purposes of this section, a person acts "wrongfully" if the person intentionally and
26 unreasonably commits the act or acts while knowing, or having reason to know, that he or she
27 lacks authorization to so act. (Emphasis added.)

70. On July 2, 2023, Plaintiffs were residents and owners of real and personal property in the
Tunnel 5 Fire area.

71. Defendant knew of the extreme risk of wildfire in Skamania County on July 2, 2023.

1 Defendant also knew of the high risk that its Train would emit sparks and ignite fires under hot, dry
2 conditions; that vegetation on or near its Tracks had not been adequately maintained to mitigate the risk
3 of fire; and that due to windy conditions on July 2, 2023, if its Train ignited a fire, the fire would spread
4 rapidly out of control.

5 72. Therefore, Defendant knew that its operation of the Train in Skamania County on July 2,
6 2023, was substantially certain to ignite a fire that would grow into a wildfire that would cause fire,
7 smoke, and ash to physically enter Plaintiffs' land, and cause the damages for which Plaintiffs seek
8 compensation in this action.

9 73. Under the circumstances, Defendant's intentional operation of its Train on July 2, 2023,
10 in Skamania County was unreasonable.

11 74. Plaintiffs did not authorize Defendant to cause fire, smoke, or ash to enter their
12 properties.

13 75. As a direct and proximate result of Defendant's knowing and intentional conduct, which
14 ignited the Tunnel 5 Fire, and the resulting intentional trespass of Plaintiffs' properties, Plaintiffs' land,
15 personal property, and/or real estate improvements were injured. Plaintiffs presently suffer, and will
16 continue to suffer damages, including, but not limited to, damage to, destruction of, and loss of real and
17 personal property, including property that was unique and/or had peculiar personal value to Plaintiffs;
18 annoyance, inconvenience, disturbance, and loss of use and enjoyment of property; diminution in
19 property value; loss of business income and business goodwill; out-of-pocket expenses directly and
20 proximately incurred because of the fire; evacuation and additional living expenses; personal injuries;
21 medical bills; lost wages; discomfort, fear, upset, mental distress, increased risk of associated disease or
22 illness, and the present need for medical monitoring to ensure early detection of such disease or illness.

23 76. As provided in RCW 4.24.630(2), Plaintiffs are entitled to treble damages, reasonable
24 investigation and litigation costs, and attorneys' fees, to be determined according to proof at trial.

FIFTH CLAIM FOR RELIEF

Nuisance

RCW 7.48.010 et seq.

1
2
3 77. Plaintiffs reallege and incorporate the foregoing allegations as if fully set forth herein.

4 78. RCW 7.48.010 states: “[W]hatever is injurious to health or indecent or offensive to the
5 senses, or an obstruction to the free use of property, so as to essentially interfere with the comfortable
6 enjoyment of the life and property, is a nuisance and the subject of an action for damages and other and
7 further relief.”

8 79. RCW 7.48.120 states: “Nuisance consists in unlawfully doing an act, or omitting to
9 perform a duty, which act or omission either annoys, injures or endangers the comfort, repose, health or
10 safety of others; . . . or in any way renders other persons insecure in life, or in the use of property.”

11 80. RCW 7.48.130 states: “A public nuisance is one which affects equally the rights of an
12 entire community or neighborhood, although the extent of the damage may be unequal.”

13 81. RCW 7.48.150 states: “Every nuisance not included in the definition of RCW 7.48.130 is
14 private.”

15 82. As more fully described above, despite the propensity of its Train and particularly
16 locomotive 2322 to ignite fires, and the inadequacy of maintenance of its Tracks, on July 2, 2023, under
17 hazardous weather conditions, Defendant operated its Train near Tunnel 5 in violation of Washington
18 state law and federal regulations.

19 83. Defendant’s unlawful operation of its Train on July 2, 2023, which resulted in the Tunnel
20 5 Fire, caused annoyance, injury and danger to the comfort, repose, health, and safety of an entire
21 community, including Plaintiffs, and rendered them insecure in life, and the use of their properties, and
22 therefore created a public nuisance.

23 84. Alternatively, Defendant’s conduct, which resulted in the Tunnel 5 Fire, created a private
24 nuisance.

25 85. As a direct and proximate result of Defendant’s creation of a private nuisance, Plaintiffs
26 presently suffer, and will continue to suffer damages, including, but not limited to, damage to,
27

1 destruction of, and loss of real and personal property, including property that was unique and/or had
2 peculiar personal value to Plaintiffs; annoyance, inconvenience, disturbance, and loss of use and
3 enjoyment of property; diminution in property value; loss of business income and business goodwill;
4 out-of-pocket expenses directly and proximately incurred because of the fire; evacuation and additional
5 living expenses; personal injuries; medical bills; lost wages; discomfort, fear, upset, mental distress,
6 increased risk of associated disease or illness, and the present need for medical monitoring to ensure
7 early detection of such disease or illness.

8 86. As provided in RCW 7.48.010 and RCW 7.48.020, Plaintiffs are entitled to damages and
9 other relief to be determined according to proof at trial.

10 **SIXTH CLAIM FOR RELIEF**
11 **Infliction of Emotional Distress**
12 **(Brought Only By Plaintiffs Who Are Natural Persons)**

13 87. Plaintiffs reallege and incorporate by reference the foregoing allegations as if fully set
14 forth herein.

15 88. As set forth above, the Tunnel 5 Fire was a direct and legal result of the intentional,
16 negligent, careless, reckless, and/or unlawful conduct of Defendant.

17 89. As a result of Defendant's wrongful conduct, Plaintiffs were forced to evacuate their
18 homes, suffered damage to and/or loss of real and personal property, and/or were in the zone of danger
19 while evacuating from the Tunnel 5 Fire.

20 90. Emotional distress suffered by people who, due to wildfire, are forced to evacuate their
21 homes, and/or who suffer damage to and/or loss of real or personal property, is reasonably foreseeable.

22 91. Defendant knew or should have known that Plaintiffs would suffer serious emotional
23 distress due to its wrongful conduct that caused the Tunnel 5 Fire.

24 92. Plaintiffs acted reasonably in evacuating their homes to escape the fire and to save their
25 lives and the lives of family members.

26 93. As a direct and legal result of Defendant's wrongful acts and/or omissions, as will be
27 confirmed and/or proven by objective symptomology, Plaintiffs have suffered and will continue to suffer

1 great mental pain and suffering, including emotional suffering, anguish, fright, horror, nervousness,
2 grief, anxiety, depression, worry, shock, humiliation, embarrassment, shame, and/or other emotional
3 distress.

4 94. Plaintiffs are entitled to damages for emotional distress according to proof at trial.

5 **SEVENTH CLAIM FOR RELIEF**
6 ***Res Ipsa Loquitur***

7 95. Plaintiffs reallege and incorporate by reference the foregoing allegations as if fully set
8 forth herein.

9 96. At all relevant times, Defendant's Train was the only Train that operated on the Tracks in
10 the general area of origin of the Tunnel 5 Fire.

11 97. There is no information or evidence that any individual or entity other than Defendant
12 caused or contributed to the release or emission of superheated particles, sparks, or other materials that
13 ignited the Tunnel 5 Fire.

14 98. The wildfire was not caused by any voluntary action or contribution by Plaintiffs.

15 99. The DNR Report ruled out all causes of the Tunnel 5 Fire other than particles emitted
16 from Defendant's Train, which at all relevant times was an instrumentality within Defendant's exclusive
17 control.

18 100. After a reasonable opportunity for further investigation or discovery, Plaintiffs will likely
19 have evidentiary support to establish an inference that Defendant's negligence caused Plaintiffs'
20 injuries.

21 101. One or more wrongful acts or omissions of Defendant amounting to a breach of its duty
22 of care to Plaintiffs caused the release of superheated particles or sparks that ignited dry grasses and
23 vegetation on or near the Tracks, causing the Tunnel 5 Fire.

24 102. As a direct and proximate result of Defendant's acts or omissions that caused the Tunnel
25 5 Fire, Plaintiffs presently suffer, and will continue to suffer damages, including, but not limited to,
26 damage to, destruction of, and loss of real and personal property, including property that was unique
27 and/or had peculiar personal value to Plaintiffs; annoyance, inconvenience, disturbance, and loss of use

1 and enjoyment of property; diminution in property value; loss of business income and business
2 goodwill; out-of-pocket expenses directly and proximately incurred because of the fire; evacuation and
3 additional living expenses; personal injuries; medical bills; lost wages; discomfort, fear, upset, mental
4 distress, increased risk of associated disease or illness, and the present need for medical monitoring to
5 ensure early detection of such disease or illness.

6 103. Plaintiffs are entitled to damages according to proof at trial.

7
8 **EIGHTH CLAIM FOR RELIEF**
9 **Inverse Condemnation**
10 **Washington Constitution Article 1, Section 16**

11 104. Plaintiffs reallege and incorporate the foregoing allegations as if fully set forth herein.

12 105. Article 1, Section 16 of the Washington State Constitution states that no private property
13 shall be taken or damaged for public or private use without just compensation having been first made.

14 106. Under RCW 81.36.010 and RCW 81.53.180, Defendant has the power of eminent
15 domain.

16 35. As such, prior to and on July 2, 2023, Defendant designed, constructed, installed,
17 operated, controlled, used, and/or maintained a railroad within Skamania County for the purpose of
18 transporting goods and people.

19 107. On July 2, 2023, Defendant operated its Train in Skamania County under hazardous fire
20 conditions, and thereby caused the Tunnel 5 Fire, which damaged and destroyed Plaintiffs' real and
21 personal properties, and substantially interfered with Plaintiffs' use, access, enjoyment, and value of
22 such properties.

23 108. The damage to Plaintiffs' properties was a necessary incident to Defendant's operation of
24 its Train under hazardous fire conditions on July 2, 2023.

25 109. The harms and damages to Plaintiffs' properties are extensive and ongoing, including,
26 without limitation, damage to and destruction of homes, outbuildings and other structures; automobiles,
27 equipment, tools, personal effects, cherished items, and other personal property; and ancient trees, crops
and other plants, and other landscape features. The harms and damages include contamination of soils,

1 erosion, and land instability, especially on or near cliffs overlooking the Columbia River. The harms and
2 damages to Plaintiffs' properties are permanent and/or are so extensive that those properties may not be
3 restored for generations.

4 110. Accordingly, the damage and substantial interference to Plaintiffs' properties is
5 permanent and recurring.

6 111. In causing the Tunnel 5 Fire and the resultant damage and destruction, Defendant--
7 because of its power of eminent domain pursuant to RCW 81.36.010 and its status as a common carrier,
8 among other things--acted as an instrumentality of state power.

9 112. Defendant took Plaintiffs' property without just compensation being paid.

10 113. Plaintiffs are entitled to recover damages from Defendant for the taking of their real and
11 personal property in an amount to be proven at trial.

12 114. Plaintiffs are also entitled, pursuant to RCW 8.25.070, to recover reasonable attorney,
13 appraisal, and other fees, actually incurred because of this proceeding in the trial court and/or in any
14 appellate proceeding in which Plaintiffs prevail.

15 **VI. PRAYER FOR RELIEF**

16 Plaintiffs seek the following damages in amounts according to proof at the time of trial:

17 a. On their First, Second, Third, Fifth, Sixth and Seventh Claims for Relief:

- 18 1. General and/or special damages determined on an individual basis according to proof;
 - 19 2. Loss of the use, benefit, goodwill, and enjoyment of Plaintiffs' real and personal property;
 - 20 3. Loss of wages, earning capacity, goodwill, and/or business profits or proceeds and/or any
21 related displacement expenses;
 - 22 4. Evacuation expenses and additional living expenses;
 - 23 5. Attorneys' fees, expert fees, consultant fees, and litigation costs and expense, as allowed
24 under any and all applicable law;
 - 25 6. Prejudgment interest from July 2, 2023; and
 - 26 7. Such other and further relief as the Court shall deem proper, all according to proof.
- 27

1 b. On their Fourth Claim for Relief, pursuant to RCW 4.24.630:

2 1. General and/or special damages trebled, as determined on an individual basis according
3 to proof, including without limitation;

4 (a) Loss of the use, benefit, goodwill, and enjoyment of Plaintiffs' real and personal
5 property;

6 (b) Loss of wages, earning capacity, goodwill, and/or business profits or proceeds
7 and/or any related displacement expenses;

8 (c) Evacuation expenses and additional living expenses;

9 2. Attorneys' fees, expert fees, consultant fees, and litigation costs and expense, as allowed
10 under any and all applicable law;

11 3. Prejudgment interest from July 2, 2023; and

12 4. Such other and further relief as the Court shall deem proper, all according to proof.

13 c. On their Eighth Claim for Relief:

14 8. Repair and/or replacement of damaged and/or destroyed real and personal property, or,
15 alternatively, diminution in value of real and personal property;

16 9. Loss of the use, benefit, goodwill, and enjoyment of real and personal property;

17 10. Loss of wages, earning capacity and/or business profits and/or any related displacement
18 expenses;

19 11. Prejudgment interest from July 2, 2023;

20 12. Pursuant to RCW 8.25.070 and all other applicable law, all reasonable attorney, appraisal,
21 and other fees, actually incurred because of this proceeding in the trial court and/or in any
22 appellate proceeding in which Plaintiff prevails on any issue; and

23 13. Such other and further relief as the Court shall deem proper, all according to proof.
24
25
26
27

1 **VII. JURY TRIAL DEMAND**

2 Plaintiffs respectfully request that this Court provide them with a jury trial on all causes of action
3 for which a jury trial is available under the law.

4
5 SINGLETON SCHREIBER, LLP

6 Dated: June 13, 2024

7 By: /s/ Stephen J Hill
8 Gerald Singleton
9 Stephen J. Hill
10 Attorneys for Plaintiffs
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

1 ***Lance Douglas Brooks, et al. v. BNSF Railway Company.***
2 **Case No.: 3:24-CV-05158**

3 **PROOF OF SERVICE**

4 I hereby certify that on June 13, 2024, I electronically filed the following documents with
5 the Clerk of the Court by using the CM/ECF system:

6 **FIRST AMENDED COMPLAINT**

7 I certify that all participants in the case are registered CM/ECF users and that service will be
8 accomplished by the CM/ECF system.

9 I declare under penalty of perjury under the laws of the United States of America and the State
10 of California the foregoing is true and correct and that this declaration was executed on June 13,
11 2024, in California.

12 *Katia Ramos*
13 _____
14 Katia Ramos