

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 THE GOODYEAR TIRE & RUBBER :

4 COMPANY, :

5 Petitioner : No. 15-1406

6 v. :

7 LEROY HAEGER, ET AL. :

8 Respondents. :

9 - - - - - x

10 Washington, D.C.

11 Tuesday, January 10, 2017

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13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States
15 at 11:09 a.m.

16 APPEARANCES:

17 PIERRE H. BERGERON, ESQ., Washington, D.C.; on behalf
18 of the Petitioner.

19 JOHN J. EGBERT, ESQ., Phoenix, Ariz.; on behalf of
20 the Respondents.

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1 P R O C E E D I N G S

2 (11:09 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next in case 15-1406 Goodyear v. Haeger.

5 Mr. Bergeron?

6 ORAL ARGUMENT OF PIERRE H. BERGERON

7 ON BEHALF OF THE PETITIONER

8 MR. BERGERON: Thank you, Mr. Chief Justice,
9 and may it please the Court:

10 A direct causation standard is necessary in
11 light of the historic restrictions on a court's inherent
12 authority, and it provides courts with a workable
13 framework that they customarily apply in the sanctions
14 context. Respondents, in fact, acknowledge that a
15 direct causation standard applies, sometimes, but not
16 always. Their two-teared suggestion, however, does not
17 provide concrete guidance to the district courts and it
18 would inevitably lead to the expansion of the inherent
19 authority.

20 One of the reasons this Court has been
21 reticent about any sort of broadening of the scope of
22 the inherent authority is because the due-process issues
23 and separation of powers issues combined with a court
24 determining the violation acting essentially as
25 prosecutor and fact finder and then imposing the

1 penalty. And --

2 JUSTICE SOTOMAYOR: How do you -- am I to
3 take that your -- I think what I read from your brief is
4 that we should draw the line that we drew in Bagli
5 between compensatory damages under the contempt inherent
6 power and punishment damages that require criminal civil
7 procedures. Is that the same thing you're asking us
8 to --

9 MR. BERGERON: Yes. That's essentially the
10 same thing.

11 JUSTICE SOTOMAYOR: So how do you deal with
12 Chambers?

13 MR. BERGERON: So we deal with Chambers a
14 couple of different ways. First of all, Chambers
15 factually distinguishably different from our case
16 because Chambers was based purely on pervasive
17 misconduct that was so bad that it tainted the entire
18 case because there was no -- there was no good faith
19 defense at the end of the day. We have the good faith
20 defense here.

21 But secondly --

22 JUSTICE GINSBURG: Wasn't, that wasn't that
23 what was found here was that it was pervasive from the
24 very first effort to get discovery continuing through
25 the settlement?

1 MR. BERGERON: No, Justice Ginsburg. In
2 fact, what the Court found ultimately was it recognized
3 it did not resolve the question whether the Heat Rise
4 test was dispositive. And it said plaintiffs believe it
5 would be helpful, but it did not make a determination of
6 that. And in light of that, we had good-faith defenses
7 as to even if the tests were produced, that there was
8 still a design defect. And beyond that, there were also
9 causation defenses as to the ultimate cause of the
10 accident, whether that was driver error or whether there
11 was impact damage.

12 JUSTICE GINSBURG: But weren't you given the
13 opportunity -- maybe you can clarify this -- the -- the
14 Court said, well, if we're wrong about giving all of the
15 counsel fees, then we will deduct -- what? -- some
16 \$700,000 based on Goodyear's filing of the amount that
17 should not be recovered because it was unrelated to
18 Goodyear's bad conduct.

19 MR. BERGERON: Correct. So there's two
20 points on that.

21 First of all, that was -- how that evolved
22 was the Court had already ruled against us on the
23 causation point; so we had lost that battle. And then
24 when we -- when the plaintiffs finally submitted their
25 fee application, we took a fallback position and said,

1 at a bare minimum, this needs to be carved out. So we
2 haven't waived that, but I think the second --

3 JUSTICE GINSBURG: And you represented that
4 that was the cost that was not attributable to
5 Goodyear's misconduct.

6 MR. BERGERON: What we represented was that
7 it was related to the medical costs, the medical
8 damages -- proven up the medical damages, as well as
9 pursuit of the other defendants. So that would be one
10 subset of the -- of the costs that were not caused by
11 the misconduct, but it wasn't the total one.

12 And what's significant about that as well is
13 that the court said it's impossible to make this
14 calculation. But then the court did, at least to a
15 certain extent, make a calculation based on the evidence
16 that was submitted.

17 CHIEF JUSTICE ROBERTS: Well, your test is
18 the direct directness of the causation. And I -- I
19 guess I'm curious as to how you would apply that in
20 practice. I mean, if you take a case, for example, they
21 don't get the Heat Rise test, they get something else
22 that isn't as, in their view --

23 MR. BERGERON: Right.

24 CHIEF JUSTICE ROBERTS: -- dramatic or
25 compelling.

1 MR. BERGERON: Right.

2 CHIEF JUSTICE ROBERTS: And they have to go
3 through all sorts of -- they're preparing somebody to
4 testify about this other test, and they incur \$100,000
5 in expenses to do that. Is that something that would be
6 directly caused by the failure to disclose the Heat Rise
7 test?

8 MR. BERGERON: I think there's a couple of
9 different ways you can look at it. I think we -- we --
10 we gravitate towards the Fox test, which is the
11 incremental harm. So if you're going to engage in that
12 litigation anyway, and you're going to engage in
13 prepping that witness anyway --

14 CHIEF JUSTICE ROBERTS: Well, let's say
15 they're not. They say, you know, if we get the Heat
16 Rise test, that's -- that's much more dramatic. We
17 don't need to worry about, you know, this less
18 compelling test.

19 MR. BERGERON: I think there certainly could
20 be situations where -- where the proponent of fees would
21 say, we would not have taken this deposition if we had
22 had this document, for instance, and then that would --
23 that could be something that they would then recover
24 for.

25 I think generally what you're looking at

1 is -- is the incremental costs going above a baseline.

2 And that's --

3 JUSTICE SOTOMAYOR: That's always a
4 guess-estimate to start with. Guess-estimate, I use it
5 in its colloquial sense of you're -- you're looking at
6 what happened and you're cutting broadly at the lines
7 because you can never set the line precisely.

8 But as Justice -- as the Chief Justice said
9 on the Heat Rise test, there was one expert that was
10 questioned, but would have been questioned in a totally
11 different way if the proper tests had been disclosed.

12 Why was that causal decision by the district
13 court wrong?

14 MR. BERGERON: Well, we think that they
15 could recover for that expert. And, in fact, you know,
16 the district court never got into the actual analysis of
17 causation.

18 JUSTICE SOTOMAYOR: No, but they -- they --
19 the district court asked you to tell them what you
20 thought wasn't caused, assuming that you accepted the
21 district court's findings.

22 MR. BERGERON: Well, in fairness, the
23 district court told us we -- we were not going to be
24 able to do that. And we -- that's -- that's how the
25 700,000 came up, because we took a fallback position and

1 tried to say, well, at a bare minimum, these things are
2 so far attenuated, so far removed from any misconduct,
3 that has to be removed. But you need to --

4 JUSTICE GINSBURG: Well, to be precise about
5 that, what were you asked by the district judge to
6 submit?

7 MR. BERGERON: So what happened was before
8 the district court issued its November 2012 order, we
9 had raised -- they -- they had requested all sorts of
10 remedies for sanctions, and we had raised the causation
11 point, the causation limitation. The district court
12 rejected that in the November 2012 order and said, no,
13 you get everything.

14 And so in response, the plaintiffs filed a
15 three-page fee application that said give us everything,
16 along with all of their time records.

17 So then in response to that, that's where we
18 filed our opposition and said, you know, that's where we
19 raised the issue of -- of the 700,000 as being too far
20 removed. But we --

21 JUSTICE GINSBURG: So why isn't it
22 appropriate, given that the plaintiff was put to a great
23 expense and probably got less in the settlement than
24 they would have gotten if Goodyear had lived up to its
25 discovery responsibilities, why isn't it appropriate to

1 say instead of making the plaintiff prove every single
2 item that's attributable to the discovery fault, it
3 should be the defendant's expert to point out what --
4 what items were not attributable?

5 MR. BERGERON: I think there's both a
6 practical and a legal answer to that. The practical
7 answer is because they are the ones that incurred the
8 fees, they are in the best position to say these fees
9 were incurred as a result of the misconduct. And I
10 think if you look at all the sanction regimes, the
11 burden is on the proponent to establish the propriety of
12 the award.

13 The legal answer is that Bagwell, although
14 it doesn't squarely address this point, does seem to
15 indicate that it is the proponent that needs to
16 establish the causation link. And I believe, Justice
17 Ginsburg, your concurrence seemed to -- to echo that as
18 well. And then when you look at Alyeska, that case
19 said, look, we want to be apprehensive about shifting
20 the litigation burdens, admittedly in a slightly
21 different context, without legislative guidance. And,
22 of course, that's part of the problem here is there is
23 no legislative guidance, which is the reason that there
24 needs to be a causation check on the inherent authority.

25 JUSTICE KAGAN: Mr. Bergeron, could I go

1 back to the question that the Chief Justice asked you.
2 You said that you favored the approach of Fox v. Vice,
3 which is a but-for test.

4 MR. BERGERON: Right.

5 JUSTICE KAGAN: It's would you have incurred
6 this cost anyway even --

7 MR. BERGERON: Right.

8 JUSTICE KAGAN: -- without the misconduct.

9 But Fox v. Vice never uses this language of
10 directness, which seems to me actually much more in line
11 with proximate cause inquiries.

12 Now, Fox v. Vice, you know, never addressed
13 proximate cause either way. It wasn't a proximate cause
14 fact pattern. This actually seems not really a
15 proximate cause fact pattern either; it just seems as
16 though it's a -- you know, should there be a but-for
17 test.

18 So I guess I'm wondering, where does this
19 language of -- you say "but for," but you also say
20 "direct." What do you mean when you use those two
21 terms?

22 MR. BERGERON: We borrowed "direct" from
23 Cooter & Gell and from the other sanction regimes that
24 all have various iterations of what I call direct
25 causation. Now, they may refer to it as direct effect;

1 they may refer to it as direct result. But at the end
2 of the day. That's what they're applying.

3 Now, we looked at Fox v. Vice and saw
4 essentially the same analysis, because what those cases
5 are trying to determine in -- in the other sanction
6 regimes is, what is the excess cost? And Fox approached
7 that slightly differently, looking at it -- calling it
8 incremental costs, calling it but-for. So, essentially,
9 we think the tests are synonymous. And the reason that
10 it's a little bit different than, say, proximate cause
11 is because we're dealing with the American rule and --
12 and coming up with an exception to the American rule.
13 But, obviously, the exception is not -- it's not an
14 all-or-nothing claim, and obviously Fox made that --

15 JUSTICE KAGAN: Well, suppose we say that
16 the Fox v. Vice but-for test is something along the
17 lines of what we should be applying here. So how
18 does -- in your reply brief, you basically say that a
19 court can "never." You don't -- you don't just say in
20 this case it was wrong. In your reply brief, you say a
21 court can never say, look, the case would have settled
22 right away, and all costs ought to go to the victimized
23 party.

24 Why is that? If it's a but-for test, why
25 couldn't a court on a proper set of facts say, look, if

1 this -- if this abuse hadn't occurred, this case would
2 just never have gone on?

3 MR. BERGERON: We think that that is just
4 far too speculative to satisfy a direct causation test.
5 And, obviously, in this case, it really illustrates the
6 point, because the district court said, I'm pointing to
7 Goodyear's experience in other cases. But in those
8 cases, it went all the way to or through trial.

9 But -- but the other problem with this is --

10 JUSTICE KAGAN: Well, I don't know what --
11 what -- too speculative. I mean, the Court says, look,
12 I understand that I have to find this; you know, that
13 it's more likely than not. That's how we make findings
14 about what costs would have been incurred anyway.
15 Would -- you know, there's never any certainty. We're
16 always saying more likely than not, would this cost have
17 been incurred? I think none of the costs of this suit
18 would have been incurred if this abuse hadn't taken
19 place.

20 MR. BERGERON: But we think the problem with
21 that is it ends up being a shortcut for causation.
22 And -- and the Court, then, is excused from the
23 performance of the task of actually looking at what the
24 misconduct was and how that impacted the fees incurred.

25 JUSTICE ALITO: I think it's pretty easy to

1 think of hypotheticals and how they might be
2 unrealistic, in which the eventual disclosure of some
3 piece of information that should have been disclosed a
4 lot earlier is so fatal to the defense that the case
5 would be settled as soon as that came to light.

6 You think it's impossible to imagine
7 something like that? Suppose there were some internal
8 Goodyear document here that said, you know, we are going
9 to sell this. We are going to market this to RVs, but
10 we know it's really not suitable for RVs. And so if
11 people put it on an RV and they are driving around in a
12 hot climate, the tire is going to explode.

13 I mean, if you had an internal document like
14 that, it wouldn't be very hard to say, wow, once this
15 comes out, we are going to have no option but to settle
16 the issue of liability.

17 MR. BERGERON: And I can certainly imagine
18 such a document. But the problem with that is if the
19 document shows that the entire litigation is not in good
20 faith, I think that's a different issue. That's getting
21 closer to Chambers.

22 But if it doesn't do that, the problem with
23 using a potential settlement date as the barometer for
24 causation here is -- I can't tell you how many
25 mediations I've walked into when knowing my client's

1 risk tolerance and what I thought the other side was
 2 going to say, I said, this case is going to settle.
 3 Absolutely it's going to settle today and it doesn't
 4 happen. It just ends up being too speculative because
 5 you can't -- you would have to really pierce the
 6 privilege on both sides to get any sort of determination
 7 as to whether they would actually settle.

8 JUSTICE KAGAN: Yes, but if a lack of
 9 certainty like that is going to prevent a judge from
 10 actually making an award, then people on the other side,
 11 people who are victimized, are going to be
 12 undercompensated in case after case after case.

13 MR. BERGERON: But I don't think that that's
 14 the case here because, obviously, if a direct causation
 15 test is applied and they get the incremental cost that
 16 they would have received in the absence of the
 17 misconduct, then they received the appropriate
 18 compensatory award and it satisfies the due process
 19 concerns.

20 JUSTICE KENNEDY: Justice Sotomayor asked
 21 you at the outset about the Chambers cases. I just
 22 can't find really strong language in this Chambers case
 23 from which to imply a causation or draw a causation
 24 conclusion. And Bagwell doesn't even cite Chambers.

25 MR. BERGERON: Right. Chambers was not

1 engaging in the same causation analysis that we are
2 talking about today.

3 JUSTICE KENNEDY: No, it wasn't. I know.
4 Clearly it was not. But why shouldn't it have?

5 MR. BERGERON: Well, because what Chambers
6 was recognizing was it did acknowledge that all of the
7 fees were caused by the misconduct, and it did point out
8 that the entirety of the case was built on a fraud, and
9 there was no good faith defense to the litigation. So
10 in that circumstance -- and, of course, the district
11 court in Chambers says, this is unique. And it probably
12 is a unique situation.

13 But then when we move to Bagwell, the other
14 point about Chambers is it was built on the foundation
15 of contempt. And so it was built on the contempt cases
16 in distilling a rule from those. But then that changed
17 with Bagwell because we have the clarification on the
18 distinction between criminal and civil, and Bagwell was
19 drawing that line at causation. And that's why, to the
20 extent there is any tension between Chambers and
21 Bagwell, Bagwell should prevail on that point.

22 JUSTICE SOTOMAYOR: Am I to understand the
23 question presented -- as presented was whether there is
24 a direct causation standard applicable to an award under
25 a court's inherent powers. And you're now saying we

1 wanted a but-for incremental cost analysis to define
2 direct cause. Then ask your adversary how he would
3 define it if it was going to be applied.

4 But you're also asking us to actually apply
5 it in your case. And to review the district court's
6 findings de novo or on abuse of discretion?

7 MR. BERGERON: The district court would be
8 reviewed under abuse of discretion. And our point is
9 the Court applied the wrong legal test which constitutes
10 an abuse of discretion. We think ultimately that the
11 Court should remand to the district court to allow the
12 Court to apply the direct causation test that the court
13 declined to apply the first time around.

14 JUSTICE KAGAN: When the district court gave
15 these two awards, the 2.7 and the 2 million, do you
16 understand that to have been 2.7 if I'm not bound by a
17 cause requirement; 2 million if I am?

18 MR. BERGERON: I think that's how the court
19 envisioned it, yes, Justice Kagan.

20 JUSTICE KAGAN: So then why hasn't that been
21 done already in the district court? In other words, if
22 you're right, that there is a causation requirement
23 here, we send it back to the district court, hasn't the
24 district court already performed that calculation?

25 MR. BERGERON: I think that would be what

1 the Respondents would say. And their whole argument on
2 that is that we waive anything beyond the 700,000. My
3 point is that we preserve that and, therefore, the Court
4 would need to go through and -- go through the exercise
5 of actually applying a direct causation test on these
6 facts as they are here.

7 And I think what -- if you look at what the
8 district court did, it found very specific dates of
9 misconduct. So you could look at those dates of
10 misconduct, what those episodes were, and then compare
11 them to the time records.

12 JUSTICE KAGAN: What's the difference
13 between the 2 million and the 2.7? What is the \$700,000
14 in there; costs for what?

15 MR. BERGERON: The \$700,000 represented the
16 fees incurred in pursuit of the other defendants,
17 because there were two other defendants in the
18 underlying litigation besides Goodyear. So saying,
19 look, if you're pursuing those other defendants, it's
20 clearly not being impacted by the misconduct of
21 Goodyear.

22 And then the second was proving up medical
23 damages because you're going to have to prove up --

24 JUSTICE SOTOMAYOR: When you gave this
25 figure to the district court you said, in your

1 submission, "Goodyear reviewed plaintiffs' billing
2 entries and created a category of cost." I'm quoting
3 you. "Unrelated to the alleged harm and outside the
4 scope of the court's order."

5 So if that was your definition of what was
6 unrelated to the harm, what's left for the district
7 court to do?

8 MR. BERGERON: And I understand that. I
9 understand the point we made. We did preserve in the
10 first footnote of that filing that we were preserving
11 our Miller argument which had been raised previously.
12 Miller was a Ninth Circuit decision, they didn't impose
13 direct causation in our view.

14 And so our point is we understand if you
15 disagree with us and say, we waive that; then that would
16 be the remedy. My point, though, is that because the
17 direct causation analysis was never done in the first
18 place, there would need to be a remand for that exercise
19 to take place.

20 And I think it's important as you look at
21 what the district court found, and this gets back to,
22 you know, why is this not like Chambers. The district
23 court found that the discovery costs were inflated by
24 the misconduct and that the case would have been more
25 complicated -- was rendered more complicated by the

1 misconduct. But that assumes that there was a baseline
2 for how litigation should have proceeded. And then
3 there is a difference, and that difference there is
4 capable of determination. And that's the point that we
5 are raising in terms of that this is something that can
6 be quantifiable.

7 JUSTICE KAGAN: What costs do you concede
8 you're responsible for?

9 MR. BERGERON: We would concede we are
10 responsible for the direct harm flowing from the
11 misconduct that the district court found. And that
12 would include the expert discovery, the deposition of
13 Mr. Osborn and any related preparation or follow-up to
14 that deposition, the efforts to get the tests, if there
15 was discovery requests or negotiations or discovery,
16 perhaps a status conference, the Olsen deposition where
17 the district court found misconduct in the preparing for
18 and following up on that deposition, and then the
19 hearings where the misconduct occurred and any
20 preparation for those.

21 JUSTICE KAGAN: So how much is that?

22 MR. BERGERON: I don't have a number for
23 you, Justice Kagan.

24 JUSTICE KAGAN: But that's not anything like
25 the full 2 million?

1 MR. BERGERON: It's not. It would not be.
2 And ultimately, I don't want to be exclusive here
3 because the challenge is we never had an actual fee
4 application that says, these are the categories of fees
5 that were incurred as a result of your misconduct and
6 then we could respond to that. We never had that,
7 because the district court said, you get everything. So
8 they said, we want everything. And so they may have
9 other categories that they would say and then we would
10 debate that before the district court.

11 JUSTICE KAGAN: You said you wanted to use
12 the Fox v. Vice standard, and part of that is the
13 but-for causation inquiry. And part of that is a pretty
14 clear statement that we don't expect district court
15 judges to be, you know, green eye-shade accountants, is
16 I think what we called them.

17 MR. BERGERON: Right.

18 JUSTICE KAGAN: To go over each, you know,
19 hour of an attorney's work. We understand the district
20 courts are going to have to make some broad categories
21 and some guesstimates. Do you agree with that too?

22 MR. BERGERON: We do. I mean, there is
23 certainly going to be discretion by the district court.
24 We actually think that this test is going to be easier
25 to apply at the end of the day, because if it's

1 incumbent upon the proponent to say -- to internalize a
2 direct causation but-for test, and then make the
3 arguments and say, these are the categories of fees that
4 were incurred as a result of misconduct and then here is
5 the concomitant fee -- time entries, that would be --

6 JUSTICE GINSBURG: What do you -- what do
7 you do then with the plaintiff's position that this case
8 would have settled much earlier, which the district
9 judge accepted?

10 MR. BERGERON: And we would say that that's
11 an inappropriate basis for the reasons I said earlier,
12 an inappropriate basis as a substitute for causation.
13 Allowing the court to use a cutoff date and just sweep
14 everything going forward would be inappropriate. But
15 even if you disagreed with me on that, as Judge Watford
16 noted in dissent, there was no record support for that
17 conclusion by the district judge.

18 JUSTICE KENNEDY: Suppose there was a
19 finding made in another case that the case would have
20 settled much earlier. Then what?

21 MR. BERGERON: Then I would go back to my
22 first point which is that's an inappropriate basis upon
23 which to obviate the need for causation, that the Court
24 should not be getting into a temporal line drawing in
25 terms of how we determine what fees may or may not have

1 been caused by misconduct.

2 Instead, it would be looking at, you know,
3 what are the categories that were caused by the
4 misconduct and making those calculations going forward.

5 But -- but once you start -- once you
6 sanction the ability to just draw a temporal line in the
7 sand, then I think that makes it too easy for courts to
8 avoid, actually, the -- the hard work sometimes -- some
9 cases can be easy -- but the harder work of going
10 through and looking at the -- the ultimate time entries.

11 JUSTICE ALITO: Well, if you're not -- and
12 I -- I thought you admitted earlier that it wouldn't be
13 appropriate for us to say that could never happen, or
14 maybe I misunderstood your answer.

15 But suppose we think that there could be
16 circumstances in which a court could say this would have
17 settled based on the fatal nature of the disclosure.
18 This would have settled sooner, had it been properly
19 disclosed. You would have to fall back on a rule that
20 says this is never -- it -- although a court is
21 sometimes permitted to do this, legal rule has to be it
22 has to be done only in the clearest of cases or
23 something like that.

24 MR. BERGERON: Well, and that's why I go
25 kind of with my -- with my first point, which is we

1 shouldn't be -- once you start going down -- once you
2 open the door to that, I think there is a problem on the
3 application. And what we are trying to do is provide a
4 rule that is workable and can be internalized by the
5 district court.

6 JUSTICE KAGAN: Is it odd that the --

7 JUSTICE KENNEDY: In other words, the more
8 egregious the -- the -- the violation the harder it is
9 to show causation. That seems odd.

10 MR. BERGERON: Well, no, Justice Kennedy, I
11 disagree. Because the -- the point is if you -- if you
12 engage in more misconduct, you are going to necessarily
13 generate more fees in response to that, and there is
14 obviously a deterrent effect of this award.

15 The -- the lead counsel no longer practices
16 law, Your Honors, and this order is going to follow
17 Goodyear for years. And -- and this is -- whether the
18 award is \$2.7 million or a million dollars, it has
19 significant deterrent effect, and obviously, we are
20 dealing with follow-on litigation going beyond this.
21 But that this is something that, at -- at the end of the
22 day, if there is an appropriate causation test applied,
23 then the proponent of sanction gets made whole by that,
24 and it satisfies any due process concerns.

25 JUSTICE KAGAN: But -- but, Mr. Bergeron,

1 you're saying well, you should use a causation test, but
2 you can't ever consider the likelihood of settlement.
3 But the likelihood of settlement might be -- might not
4 be here, but might be in another case, quite relevant to
5 the question of what fees have been caused by the
6 misconduct.

7 MR. BERGERON: It -- and I -- so what I
8 would say to that is yes, you could envision a case
9 where that might happen. At -- at -- on the facts of
10 this case, it couldn't. But if -- and obviously, my
11 preference is a rule of law that would said you can't,
12 but if you left the door open for that, that would be
13 one possibility.

14 If I could reserve the balance of my time.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 Mr. Egbert.

17 ORAL ARGUMENT OF JOHN J. EGBERT

18 ON BEHALF OF THE RESPONDENTS

19 MR. EGBERT: Thank you, Mr. Chief Justice,
20 and may it please the Court:

21 The district court and the Ninth Circuit in
22 this case both acknowledge that there needs to be a
23 causal link between the sanction misconduct and the fees
24 and costs awarded as sanctions. So to the extent there
25 has been argument that there was a rejection completely

1 of a causation link, completely, that simply is not the
2 case here.

3 CHIEF JUSTICE ROBERTS: How does it -- what
4 is the causation link between their misconduct and the
5 fees incurred with respect to other defendants?

6 MR. EGBERT: Well, one thing is -- well,
7 there's -- there is two answers to that, Your Honor.

8 One is that, on a very simple level, if we
9 had the very strong evidence of the -- that was
10 concealed here that showed that the tire was defective,
11 and -- because of the -- the Heat Rise test and that
12 evidence, that it may have been that we would not have
13 needed to go against any of the -- the other defendants
14 at all.

15 CHIEF JUSTICE ROBERTS: Well, but I mean
16 the -- as I understand it, the allegations with respect
17 to the other defendants did not have relationship to the
18 Heat Rise test, and if -- if -- or -- if that's the
19 case, you're saying well, we would have gotten enough
20 money from Goodyear; we wouldn't have cared about the
21 money from the others?

22 MR. EGBERT: No, Your Honor. This was a
23 situation where there -- there was an accident and
24 the -- there was -- the other defendants were the
25 builders of the chassis of the motor home and the

1 other -- the builder of the motor home, and then the --
2 the tire manufacturer. So we knew somebody was at fault
3 there.

4 If we knew that it was clearly Goodyear
5 because of the concealed evidence that was so
6 devastating to their case, it's possible that the --
7 there would be no need to go after the other chassis
8 maker who had nothing to do with the --

9 CHIEF JUSTICE ROBERTS: Well, is that the
10 standard? It could be possible?

11 MR. EGBERT: Well, Your Honor, it -- it's --
12 the -- the standard is that we are asking district court
13 judges to make factual determinations. And in this
14 case, we've got a district court judge who has sat
15 through five years of litigation. She knows what the
16 issues -- what the critical issues are in the case. She
17 knows whether or not that evidence that was withheld and
18 ultimately disclosed was crucial to that, and that's
19 what she characterized it as. She said it was crucial
20 evidence on a central issue.

21 JUSTICE SOTOMAYOR: Did the other defendants
22 contribute to the settlement that was ultimately
23 reached?

24 MR. EGBERT: Your Honor, I do not believe
25 that to be the case. They -- they were out of the case

1 earlier on than Goodyear was.

2 JUSTICE ALITO: You -- you just said, I
3 thought, that the Ninth Circuit accepted a causation
4 requirement. Did you just say that?

5 MR. EGBERT: Yes, Your Honor.

6 JUSTICE ALITO: I didn't read the -- the
7 Ninth Circuit opinion that way. I'm looking at page 32A
8 of the appendix of the petition. The Ninth Circuit
9 reads Chambers to mean that all attorneys' fees may be
10 awarded once the sanctionees begin to flout their clear
11 discovery obligations and engage in frequent and severe
12 abuses of the judicial system, and then it goes on to
13 say that -- that the district court -- that there
14 wasn't -- that the Supreme Court expressly rejected the
15 linkage argument made by the sanctionees.

16 So that doesn't seem to me to be accepting
17 any kind of causation requirement; rather, to say where
18 you've got very frequent and -- and pervasive abuse, you
19 get everything.

20 MR. EGBERT: No, no, Your Honor. There are
21 other sections in the opinion, and I'll talk about the
22 portions that you just read.

23 But they -- the Ninth Circuit says the
24 district court did all it was required to do in this
25 case in determining the appropriate amount of fees to

1 award as sanctions to compensate the plaintiffs for the
2 damages they suffered as a result of sanctionee's bad
3 faith. And then they went on, they expressly said in
4 this -- we next consider how close a link is required
5 between the harm caused and the compensatory sanctions.

6 Part of the confusion that exists here is
7 that Goodyear argued -- when they argued direct
8 causation initially, and even in the Ninth Circuit, they
9 were arguing a different concept than they do today.

10 What they were advocating for was that the
11 trial court judge needed to go through the billing
12 statements, and with respect to each line item, directly
13 link it to a specific instance of misconduct. The trial
14 court judge says, I don't have to do that.

15 When she rejected that direct causation, it
16 was that that was sanctionee's argument of that concept
17 that she was rejecting. She didn't reject the concept
18 that there had to be a causation, some compensatory
19 aspect of this.

20 JUSTICE KAGAN: Well, why did she say --

21 CHIEF JUSTICE ROBERTS: Judge Watford --
22 Judge Watford disagrees with your reading of the
23 majority, right?

24 MR. EGBERT: I think he does, Your Honor.

25 But here --

1 JUSTICE KAGAN: Why -- why did the district
2 court set two standards, the 2.7 and the 2.0, if she
3 thought that she was bound by causation? I thought that
4 the -- that the whole idea of those two was, one was, if
5 I'm bound by a causation requirement and one was if I'm
6 not.

7 MR. EGBERT: No, Your Honor. It -- it's
8 close to that, but what it was, was that, if I'm bound
9 by what they are saying that I'm bound by, that I have
10 to go through each of the billing record -- each billing
11 line item and link it to an individual instance of
12 misconduct, if I'm wrong on that, then I'm going to give
13 you -- I'm going to do an alternative award.

14 And -- and let me address for a moment what
15 was asked earlier about whether or not that's been
16 waived. Because they did, in fact, make the argument
17 that the 700,000 were all that was causally linked.
18 They didn't argue anything else was -- was suffered from
19 the causal link deficiency.

20 What they argued was just the 700,000. And
21 they -- they now claim that they preserved it in a
22 footnote in their -- in their papers. But what's
23 significant is if you look at their Ninth Circuit brief,
24 they didn't argue anything beyond the 700,000 there,
25 either.

1 So it's really in this Court for the first
2 time that they seek to expand beyond the 700,000. We --
3 we say that's too late, that they -- they had a chance
4 to argue the causal link deficiency and they did, but it
5 was only to 700,000, and that they should be held to
6 that.

7 JUSTICE ALITO: The Ninth Circuit did not
8 hold that there was a waiver, did it?

9 MR. EGBERT: It did not. It didn't address
10 the -- the contingent award at all. It didn't even
11 mention it, Your Honor.

12 JUSTICE KAGAN: You said you were going to
13 respond to Justice Alito's statements from the Ninth
14 Circuit. I have another one to give you.

15 I mean, this is the closest, it seems to me,
16 as to a standard that comes from the Ninth Circuit, that
17 the district court awarded the amount that the Court
18 reasonably believed it cost the Haegers to litigate
19 against a party during the time when that party was
20 acting in bad faith. So it seems to me that the Ninth
21 Circuit was viewing this chronologically. When the
22 party was acting in bad faith, all of those costs are --
23 and fees are appropriate.

24 MR. EGBERT: Well, I -- I disagree
25 respectfully, Your Honor. I think what the Ninth

1 Circuit concluded based on the totality of the district
2 court's extensive findings was that this evidence that
3 was concealed and all the related deceits were so
4 important to the plaintiff's claims and so devastating
5 to Goodyear's defense that it -- that it caused the
6 entire litigation as a whole to be a sham. And that's
7 the language that the Ninth Circuit said, we're -- we're
8 going to -- we believe that the whole thing was a sham.

9 And so to use a train analogy, most sanction
10 cases involved misconduct that merely delays the train
11 or perhaps ultimately -- you know, causes a detour. But
12 ultimately, that train arrives at the intended station.
13 In this case, the -- what the district court found, and
14 which the Ninth Circuit agreed, was that the train
15 jumped track and it went in an entirely wrong direction.
16 It didn't even try the case that the claims that -- that
17 my clients had. It -- it tried the case based on a
18 false set of facts and never, ever -- it was never --
19 because the misconduct was never discovered during the
20 course of this litigation, it was a completely empty
21 charade. It didn't try the real facts of this case. It
22 tried what Goodyear allowed us to have only.

23 And so because the whole thing was a sham,
24 the district court appropriately said, you know, the
25 whole thing was wasted. It was a wasted effort and,

1 therefore, I'm exercising my discretion in -- in holding
2 that the whole thing should be reimbursed. I've got to
3 put you back in the position you were before you started
4 down, jumped track, and went in the wrong direction
5 completely. And that's what she awarded.

6 And -- and who gets to make that kind of a
7 decision? That's a factual determination. The judge in
8 this case was entitled to make a determination of what
9 was the central issue in the case? How crucial was this
10 evidence to that central issue? What was the impact of
11 not having that? I think all of those are the types of
12 factual determinations that we want district court
13 judges to make.

14 And to Justice -- and to Justice Alito's
15 hypothetical, there can be situations where the -- it
16 can be so devastating that it really could be -- a court
17 could appropriately find that it would have settled at
18 this point and that -- this is such a case. This is a
19 case where the judge, in the exercise of her discretion,
20 made that determination and that we should be -- the --
21 the appellate court should be upholding that.

22 JUSTICE GINSBURG: What do you do with Judge
23 Watford who said that that finding that it would have
24 settled much earlier is not supported by the record?

25 MR. EGBERT: Well, the -- his main

1 criticism, Your Honor, was that there were other cases
2 in which the tests were disclosed and they didn't
3 settle.

4 But here's the important point, and this is
5 undisputed: Judge Silver specifically found -- the
6 district court judge specifically found that unlike in
7 our case where we had an expert that said -- admitted --
8 Goodyear's own internal expert admitted that anything
9 above 200 degrees would cause problems for the tire,
10 cause separation, they didn't have that evidence in
11 those other cases. All they had was the test results
12 that showed it was above 200 degrees, significantly
13 above 200 degrees. It's the combination of both that is
14 so damning. It's the --

15 JUSTICE SOTOMAYOR: Could you describe for
16 me your definition of direct causation or causation?

17 MR. EGBERT: Causation, Your Honor. I
18 prefer causation.

19 JUSTICE SOTOMAYOR: Give me a definition.

20 MR. EGBERT: The causation is that it has to
21 be the result of or caused by. It's just the "but for,"
22 it's what we've been -- what the case law has been
23 operating under. There is no use of the word "direct"
24 in prior case law, and there needs --

25 JUSTICE SOTOMAYOR: How is it different than

1 Fox, than the definition and the words Fox used?

2 MR. EGBERT: Well, I think it's -- I think
3 it's a very similar concept.

4 JUSTICE BREYER: But why? Why get into 19
5 different meanings of "cause" in the law? I mean,
6 proximate cause is normally defined as a but-for
7 condition and foreseeable.

8 MR. EGBERT: And -- and, Your Honor --

9 JUSTICE BREYER: And if we start having --
10 why should we have some other definition here?

11 MR. EGBERT: I -- I agree. I do not -- we
12 have not advocated for adding additional language or
13 modifying --

14 JUSTICE BREYER: Why don't we just say,
15 look, there's an argument here and you look at what the
16 district court said. She didn't say really that I'm
17 going to look and see if there's but for and
18 foreseeability. And, moreover, she said cause and then
19 she said, well, maybe it's not.

20 So it's sort of ambiguous what she did.
21 Send it back to the Ninth Circuit, say it's proximate
22 cause, that's the test, you apply it. Did she do it?
23 If not, send it back to her. Good-bye.

24 MR. EGBERT: Your Honor, to begin with,
25 whether or not we -- we need to make a clarification

1 with respect to cause generally is a separate issue.
 2 But in this case, we submit there's no basis for
 3 remanding to the trial court for any further
 4 consideration because she already took their causation
 5 argument at full face value and adopted 100 percent of
 6 their argument and entered the contingent award.

7 JUSTICE BREYER: Can we go back to the Ninth
 8 Circuit, too?

9 MR. EGBERT: Well, there's no -- there's
 10 nothing to be left. There's been a waiver of their
 11 argument. And -- and her -- this Court could simply say
 12 that the contingent award should be in effect.

13 CHIEF JUSTICE ROBERTS: Well, but I'm not
 14 sure that she, in calculating the \$700,000, applied an
 15 appropriate proximate cause analysis. I mean, those are
 16 things like the other defendants and all of that. I
 17 mean, I'm not sure that unless you accept the idea -- I
 18 understand your argument, well, it would have settled
 19 and, therefore, every -- every expense was caused. It
 20 seems to me that saying the only ones that were
 21 proximately caused -- that were not proximately caused
 22 were the \$700,000 is a bit of a stretch.

23 MR. EGBERT: Well, she -- she didn't have to
 24 make that determination, Your Honor, because they made
 25 the argument. They came forward and said that of this

1 \$2.7 million --

2 CHIEF JUSTICE ROBERTS: Oh. So your waiver
3 argument.

4 MR. EGBERT: The waiver argument. Exactly.

5 CHIEF JUSTICE ROBERTS: Which was not --
6 not -- the Ninth Circuit did not rely on the waiver
7 argument.

8 MR. EGBERT: The -- the Ninth Circuit did
9 not address the contingent award at all and so didn't
10 need to get into whether or not there was a waiver. The
11 Ninth Circuit affirmed on the basis of the larger award.

12 So here what we have is, if -- if we're
13 going to say that the trial court used the wrong
14 standard, then we have to say, well, do we need to send
15 it back to -- to use the right standard? They're --
16 they're arguing that the right standard was that they
17 should -- she should have used a different causation
18 standard. But they've already made that argument to her
19 and they've told her that if you accept our argument, it
20 adds up to \$700,000. She accepted their argument 100
21 percent.

22 CHIEF JUSTICE ROBERTS: Well, I -- I suppose
23 the idea would be that in an opinion, we would provide
24 greater guidance on exactly what type of analysis is to
25 be applied. And if the district court wants to go ahead

1 and say, well, that's exactly what I did, well, then
2 they -- they can take the case from there. But I mean,
3 simply because -- and -- and as I look at the
4 calculation, I understand why the 700,000 would be
5 carved out, but I don't think it can be regarded as the
6 application of proximate cause across the board.

7 MR. EGBERT: Well, I think it certainly was
8 the application of whatever it was the party was
9 arguing. And -- and my concern is that we're going to
10 give the party a second bite at the apple.

11 JUSTICE BREYER: Maybe we don't have to. I
12 mean, you -- but I have, she said -- the key words here,
13 the district court said is, she said the case is more
14 likely -- more likely than not would have settled much
15 earlier. When? Then she says, but, of course, the
16 evidence might have made plaintiffs realize they had a
17 winning trial and they would have refused to settle.

18 MR. EGBERT: And then she said --

19 JUSTICE BREYER: What?

20 MR. EGBERT: -- ultimately, I conclude that
21 the most appropriate award given these circumstances is
22 to award all of the fees and costs incurred.

23 And the reason for that, Your Honor, was
24 because the entire litigation became a sham, because we
25 were litigating a false set of facts and it -- and she

1 said that it permeated every aspect of the litigation.
2 Those facts aren't -- those findings are subject to
3 great deference and we -- we ought to be deferring to
4 that -- those findings. And she sat through five years
5 of this litigation and then had two years' worth of a
6 sanction proceeding --

7 CHIEF JUSTICE ROBERTS: Well, but you say it
8 was a sham, but I -- and maybe you disagree, but
9 Goodyear in its -- in its reply brief, details the
10 good-faith defenses it had that were unrelated to the
11 Heat Rise test; in other words, about the cause of the
12 accident, whether other parties were involved, that the
13 tire was already damaged, the -- you know, all sorts of
14 other things, including ones that went to the question
15 of damages, which surely would have been pertinent in
16 whether the case would have settled.

17 MR. EGBERT: And that's Goodyear's version
18 of the facts. That's Goodyear's argument about here's
19 the findings that she could have. There's evidence to
20 support these concepts. But those were arguments and
21 facts that were presented. Their version was presented
22 to the trial court. The trial court looked at that
23 version, looked at the contrary version, and made a
24 determination of what she found to be the facts.

25 CHIEF JUSTICE ROBERTS: Well, and -- and

1 it's hard for me to see how the district court would be
2 in a position, except perhaps in an extraordinary case
3 to -- to make the calculation, oh, the parties would
4 have settled this. I mean, you're involved in this;
5 your friend on the other side is. You know, discussions
6 about whether to settle the case and a lot of different
7 things go into that calculation, and sometimes they --
8 they line up and sometimes they don't.

9 But for the district court to -- to make
10 that determination, it seems to me that that would be a
11 very hard calculation. I mean, things like the extent
12 to which your clients need the money, the extent to
13 which your clients -- what their expectations were, what
14 their stomach for going on with more years of litigation
15 is, I don't know how a district court factors in all
16 those considerations.

17 MR. EGBERT: Well, Your Honor, even if we
18 accepted that -- that factual finding by the district
19 court as merely an indication of how critical and
20 crucial this evidence was to the case, then we can apply
21 that to her other findings unrelated to, well, it would
22 have settled immediately.

23 She also found that this misconduct was so
24 pervasive and -- that it permeated every aspect of the
25 litigation. That's -- that's the basis on which the

1 Ninth Circuit ultimately said that she found that it was
2 a sham. That the entirety of --

3 JUSTICE GINSBURG: What about -- what about
4 Goodrich's argument that the defect in the tire, all of
5 that was beside the point because the cause of the
6 accident was road debris? Road debris forced this car
7 to swerve off the road.

8 MR. EGBERT: Yes.

9 JUSTICE GINSBURG: That would have happened
10 even if you had a 100 percent fit tire.

11 MR. EGBERT: Your Honor, you're -- you're
12 right that they're -- that they make arguments that the
13 district court could have and indeed should have found
14 otherwise. What they're in effect doing is they're
15 saying, hey, there's other facts out here that if viewed
16 in our favor would help us and would contradict what the
17 district court judge found.

18 But just because there are two possible,
19 reasonable findings of fact from the evidence doesn't
20 mean that the trial court judge was clearly erroneous in
21 making her determination. It's her determination. --
22 as long as it's not clearly erroneous, her determination
23 should stand, not what Goodyear says was also a possible
24 interpretation of all the facts.

25 And I think that's what that goes to, Your

1 Honor. Here, there are other arguments that they could
2 make. Indeed they did make other arguments. And at the
3 end of a very long, excruciating process, the judge
4 stuck her neck out and made findings of fact. And those
5 findings of fact are not clearly erroneous. And because
6 they're not, they should be the basis on which we make
7 the determination here in this case.

8 CHIEF JUSTICE ROBERTS: Well, I'm not sure
9 you would call it -- it's not a typical finding of fact
10 to say that based on all of the, you know, issues in
11 terms -- I think the parties would have settled. I find
12 it more likely than not. I mean, it has factual
13 elements, but it's much more of a judgment determination
14 than simply this is what happened or this is what would
15 happen.

16 MR. EGBERT: Your Honor, I -- I agree that
17 it is an unusual finding, but I do think that it is
18 nevertheless a factual finding. And I -- and I think
19 that if we're going to put the burden on trial court
20 judges to grapple with cases in which the -- we're not
21 talking -- again, we're not talking about something that
22 slowed the train down. We're talking about something
23 that the district court judge found was pretty
24 monumental, went to the very heart of this case. And if
25 we're --

1 JUSTICE BREYER: And the one key thing, all
2 of that, we know there has been sham litigation in the
3 world. And she says maybe the plaintiffs wouldn't have
4 settled. Who knows? You probably know. But who knows?

5 And the key word she leaves out, and there
6 is some evidence she thought she was doing something
7 different -- namely, the 700,000 -- is that she applied
8 a proximate cause standard. She doesn't say she's doing
9 that. There is some indication to the contrary.

10 So to be -- I'd just repeat myself that we
11 don't have to decide all those things but for the
12 standard. And you go back to the Ninth Circuit, one
13 extra proceeding, and then you make your -- your
14 argument right there exactly what you're saying and say,
15 well, she did apply the right standard. And even if she
16 didn't, we lose the 700,000.

17 MR. EGBERT: Well, Your Honor, that is
18 certainly a possible procedure, but we see no need to
19 even send it back to the Ninth Circuit to further
20 embroil the plaintiffs in what has already been an
21 extraordinary long process.

22 Here, I think that the easiest part of this
23 case is that the -- Goodyear had an opportunity to make
24 its causation argument. It did. And it argued to the
25 tune of only 700,000. What can possibly be served by

1 not saying that they're bound by at least that part of
2 it? Even if we're not going to stand behind the -- the
3 broader finding, the more, the more -- the more
4 aggressive finding by the district court judge --

5 JUSTICE SOTOMAYOR: Assuming the bad faith
6 that the district court found -- not making a judgment,
7 because that hasn't been proffered before us. But if,
8 in fact, you were subjected to the bad faith the Court
9 found, then sending it back just costs you more money;
10 right?

11 MR. EGBERT: That's -- that's all that it
12 accomplishes from my perspective, Your Honor. It just
13 further delays and costs more money for my clients, who,
14 I believe, have already been adequately victimized
15 through this process.

16 JUSTICE GINSBURG: But the money -- and this
17 is an award of counsel fees, so the money would go to
18 counsel, not the plaintiff?

19 MR. EGBERT: Your Honor, that's -- that's
20 outside the record, but I can tell you that it's --
21 that's not how it works under the agreement with -- with
22 the client.

23 We would ask the Court to make -- to take
24 very careful look at not only the aspect of the
25 settlement piece of it that Justice Breyer has -- has

1 focused on, but it's also an alternative finding. That
2 was one of her two findings that allowed her to -- to
3 award the entirety of the fees and costs incurred.

4 The other one is that the misconduct was so
5 severe and pervasive that it permeated every aspect of
6 the litigation. Now, that's not a -- a speculation as
7 to who would settle or not. That's a distinct finding.

8 JUSTICE ALITO: What does that mean? Is
9 that different from saying that it caused everything?
10 To say that it permeated everything, is that the same
11 thing as saying that it -- it caused everything?

12 MR. EGBERT: I -- Your Honor, I -- I think
13 it is. I think that's what the district court judge
14 meant. If you look at the entirety of her 66-page
15 decision, I think that's what she was getting to, that
16 this was so significant in the context of these specific
17 facts that it -- it changed everything. We -- in -- you
18 know, they talk about, well, what -- what would you put
19 on your list of what we can recover? Well, every
20 deposition, we asked the wrong questions. Every motion,
21 we made the wrong argument. Everything -- every effort
22 that was done was affected by --

23 JUSTICE BREYER: That's the question, then.
24 That's the legal question. It's very suitable for us.
25 If, in fact, it is the case that a district court would

1 not have awarded \$15 or 15 million, whatever it is, this
2 amount, it would have found no causation or would not
3 have found causation and would not have awarded the fee
4 but for the fact it was absolutely egregious, does that
5 permit the district court to award the fee?

6 Now, that is a pure legal question. And
7 where -- where do you stand on that? I mean, that, it
8 seems, on the basis of the precedent -- Rule 11, the
9 mineworkers, and so forth -- the answer to that question
10 is no, unless you're going to criminal proceedings.

11 Now, where do you stand on that?

12 MR. EGBERT: I agree 100 percent, Your
13 Honor, that --

14 JUSTICE BREYER: No, but I've asked the
15 question. I haven't -- I mean, which side?

16 MR. EGBERT: I stand on the -- the side that
17 says that it does have to be compensatory. Simply
18 cannot say, well, this was very bad.

19 JUSTICE BREYER: Okay.

20 MR. EGBERT: There has to be causation. And
21 our position had -- I think we read both the district
22 court decision and the Ninth Circuit decision as a
23 whole. Admittedly, there -- there are lines that one
24 can pull out that create confusion, particularly in the
25 district court decision, because she was looking at some

1 Ninth Circuit decisions that created confusion for her.

2 But at the end, both of them acknowledged
3 that there's a causation requirement, and we do not shy
4 from that. We -- because you would then be in the realm
5 of having to use criminal -- the heightened criminal due
6 process protections. But that -- that is not our
7 situation.

8 We believe that the two alternative findings
9 of fact are sufficient for the award of all of the fees
10 and costs that were incurred. And, again, when I say
11 all of them, I'm talking about from a -- a point early
12 on in the litigation, not from the very beginning, but
13 early on throughout the end because the Court and the
14 Ninth Circuit agreed that the entirety of the litigation
15 was a sham.

16 Yes, there -- there were other things that
17 were done in terms of medical depositions, but they were
18 all done in the context of an empty charade. And when
19 you do things in the context of an empty charade,
20 they're still empty. And so we would -- we believe that
21 the district court did not abuse her discretion in
22 making those findings and that they should be affirmed.
23 Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 Mr. Bergeron, you have four minutes

1 remaining.

2 REBUTTAL ARGUMENT OF PIERRE H. BERGERON

3 ON BEHALF OF THE PETITIONER

4 MR. BERGERON: Thank you.

5 The district court did not apply the result
6 of or cause by test that Mr. Egbert just articulated.
7 It never went down that path, and the -- what they seem
8 to be arguing in their brief was that there is a
9 distinction between, as Justice Breyer was noting, the
10 truly egregious from the less egregious, which was how
11 the district court tried to draw the line.

12 As we pointed out, that's not an effective
13 way of drawing the line. You could never have a test
14 where you would say, well, this is truly egregious; so
15 we obviate the need for causation. This is less
16 egregious, so we have to have more tailoring. And they
17 don't provide a satisfactory response to that.

18 On the point about what we argued at the
19 Ninth Circuit, we did make the point -- we argued that
20 the district court's entire determination was not based
21 on the correct legal standards, so we asked the whole
22 thing to be remanded to the district court.

23 JUSTICE SOTOMAYOR: There is something --
24 I -- I do understand that. But one argument they have
25 made that -- that I had not thought of the case in,

1 Justice Breyer said, we don't know what would have
2 happened. That's what the district court said. Could
3 have settled right away. It could have gone to trial
4 for more money.

5 His argument that -- which he was really
6 saying was this was a sham litigation, because with the
7 proper information, everything related to your client,
8 at least, would not have happened the way it did.
9 Things would have been a very different litigation.
10 From that moment on, whether through settlement or not,
11 you wasted their time and the court's time, because
12 everything was infected by the failure to give the Heat
13 Rise test.

14 Why isn't that put forth, if you --

15 MR. BERGERON: Well --

16 JUSTICE SOTOMAYOR: He used the analogy of
17 you derailed the train to take another route it didn't
18 have to travel.

19 MR. BERGERON: Right. Well, the --

20 JUSTICE SOTOMAYOR: So why isn't the travel
21 on that route compensable?

22 MR. BERGERON: Well, the problem with that,
23 Your Honor, is that was the Ninth Circuit's gloss on
24 what the district court did. The district court never
25 made any finding that there was sham litigation here.

1 In fact, the district court expressly declined to
2 resolve, you know, how significant this test was at the
3 end of the day. And if you look at the district court's
4 findings about this misconduct, they are all related to
5 this test. And this test is one component of the design
6 defect claim. There were other claims that did not
7 survive summary judgment, failure to warn, manufacturing
8 defect. Those were all unrelated to this test.

9 So there is a lot of stuff in the
10 litigation. Choice of law debates. I mean, pursuit of
11 other defendants. There are so many things that
12 happened independent of this Heat Rise test that were
13 not a waste and would not need to be redone if you
14 presumed that the case -- you know, the test came out on
15 the day before trial and you had to figure out well,
16 what would you need to redo at that point.

17 And I think this gets back to --

18 JUSTICE BREYER: She did say more than not.
19 She did say more -- this case, more likely than not,
20 would have settled much earlier. And you'll be arguing
21 about she used the wrong word earlier. They are not
22 arguing about that apparently.

23 So more likely than not, it would have
24 settled. Therefore costs that do, in fact, flow from
25 the fact that it didn't settle are costs that you have

1 to pay. It sounds like a causation standard.

2 MR. BERGERON: But, Justice Breyer, we
3 disagree that it is a causation standard. In fact, for
4 a lot of the reasons the Chief Justice raised earlier.

5 I mean, there is so many issues that go into
6 whether or not you have a settlement and just because
7 there was -- the district court believed that they may
8 have settled earlier, but, again, the court didn't say
9 when we would have settled earlier and --

10 JUSTICE BREYER: You make that an issue
11 below?

12 MR. BERGERON: Yes, we did. I mean -- and
13 obviously Judge Watford agreed with us in the Ninth
14 Circuit because we made that point -- made that point
15 there, as well.

16 One of the other things I want to emphasize
17 is that the -- part of the reason we need a meaningful
18 causation test is to bring this in line with -- the
19 inherent authority in line with the other sanction
20 regimes so that courts cannot basically avoid the
21 requirements of the other statutory and rule-based
22 sanction regimes by a liberalization of the causation
23 requirement under inherent authority.

24 A good example of this is Rule 37. Rule 37
25 governs production of documents and the failure to

1 produce documents. That could have been something the
2 district court relied on here, and there is a causation
3 requirement. So the district court should not be able
4 to avoid Rule 37, go to inherent authority and get a
5 broader sanctioning power.

6 So for all those reasons, Your Honors, we
7 respectfully request reversal.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.

9 The case is submitted.

10 (Whereupon, at 12:06 p.m., the case in the
11 above-entitled matter was submitted.)

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