



























































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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