

No. 99-15185

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

GINNY V. WHITE and JIMMY D. WHITE,

Plaintiffs-Appellees,

v.

FORD MOTOR COMPANY, a Delaware corporation,

Defendant-Appellant,

and

ORSCHELN COMPANY, a Missouri corporation,

Defendant.

**Appeal from the U.S. District Court
for the District of Nevada**

**REPLY BRIEF OF DEFENDANT-APPELLANT
FORD MOTOR CO.**

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**REPLY BRIEF OF DEFENDANT-APPELLANT
FORD MOTOR CO.**

Plaintiffs' entire claim for punitive damages, like their entire presentation at trial, is predicated on two fundamental distortions of the evidence. First, the evidence is uncontroverted that Ford was aware of reports of rollaways in 1992 F-Series trucks and of a handful of injuries resulting from these reported rollaways. On appeal, as at trial, Plaintiffs point to this evidence as proof that Ford knew of accidents and injuries caused by spontaneous disengagement of the parking brake. Second, the evidence is uncontroverted that Ford developed and implemented a solution for a problem with the parking brake known as "skip through on apply"; on appeal, as at trial, Plaintiffs point to this as evidence that Ford knew of and delayed implementing a solution to the problem of spontaneous disengagement.

These distortions of the uncontroverted evidence are an unacceptable basis for sustaining liability. Ford's knowledge of reported rollaways cannot be equated with knowledge of spontaneous disengagement because the uncontroverted evidence shows that Ford identified numerous other potential causes of rollaways that were at least as likely, including driver error and misinstalled release rods. Indeed, there is no evidence that spontaneous disengagement due to a design defect had ever occurred (other than Laird's invalid opinion that it occurred in this case), had ever caused a rollaway, or had ever caused an injury, let alone evidence that Ford knew of any of

these things. Finally, there is no evidence that Ford ever knew or believed that the solution for “skip through on apply” would also solve the problem of rollaways and the perhaps non-existent problem of spontaneous disengagement. In fact, the extra-record evidence that Plaintiffs now proffer, if probative at all, strongly suggests that the solution for skip-through was not a solution to the rollaway problem.

REPLY STATEMENT OF FACTS

Plaintiffs loudly accuse Ford of misrepresenting the record and proffering a skewed interpretation of the evidence that disregards the verdicts. We stand by our description of the evidence, which we presented in a light most favorable to *each* of the jury’s verdicts. Indeed, it is Plaintiffs who provide a “jury-rejected” account by ignoring the jury’s findings that spontaneous disengagement did not proximately cause the accident and that they bore 40% of the fault for Walter’s death. (847; 849).¹

1. *Ford’s Knowledge of Rollaways and Their Cause.* Plaintiffs’ allegation (Br. 4) that Ford knew of the possibility of rollaway as early as 1989 is a gross distortion. The 1989 FMEA report prepared by Orscheln refers only to a pre-production design (336); moreover, as Plaintiffs conceded (Tr. 190), the report was

¹ That contributory negligence is not a *legal* defense to strict liability in Nevada does not undermine the jury’s *factual* finding that Plaintiffs were negligent in allowing Walter to play without supervision and that such negligence contributed significantly to Walter’s death.

not sent to Ford. The other internal Orscheln documents (344-348) referenced by Plaintiffs (Br. 4) relate not to spontaneous disengagement but rather to the distinct problem of “skip out,” also referred to as “skip-through.” (1008-1011).² And while the reports of rollaway vehicles indicated that Ford’s customers were experiencing unexpected vehicle movement, they simply do not support Plaintiffs’ inference that Ford therefore knew that spontaneous disengagement was their cause. Rather, there were numerous possible causes of rollaway vehicles, only one of which was spontaneous disengagement. (439).

Plaintiffs also mistakenly assert (Br. 4) that Ford had “isolated the mechanism of failure” for rollaways by November 1992. Once again, Plaintiffs conflate skip-through and spontaneous disengagement, citing (350) evidence regarding the former as proof of the latter. The related allegation (Br. 5) that testing by Orscheln in February 1993 “confirmed” the existence of spontaneous disengagement is based on a selective, distorted view of the evidence: Plaintiffs omit that (i) it required extraordinary abuse of the vehicle to produce the sole instance of disengagement; (ii) every engineer involved in the test concluded that it did not “confirm[]” the existence of spontaneous disengagement, and (iii) numerous subsequent tests failed to replicate

² Similarly, the design defect that Orscheln believed “all ratchet and pawl mechanisms are prone to” was “skip-out” (1365; 1367), not spontaneous disengagement as Plaintiffs claim (Br. 4).

even one instance of spontaneous disengagement. Ford Br. 11-12; Tr. 526, 541. Indeed, Plaintiffs offer no meaningful response to the point that no one — not Ford, not Orscheln, not NHTSA — was ever able to link rollaways with spontaneous disengagement. Ford Br. 12-15.

2. Ford's Reaction to Reports of Rollaways. Plaintiffs claim (Br. 6) that Ford ignored Rakowicz's February 1993 recall recommendation because of the "serious financial ramifications" of a recall. The "white paper" to which they point, however, was a "rough draft" that Rakowicz showed only to his supervisor; it was never distributed. (472; 1068). Moreover, after discussing the Orscheln test with the supervisor (167-174), Rakowicz concluded that the test was invalid and that the tentative conclusions outlined in his draft were incorrect (95; 97-98; 112). There is no evidence that Rakowicz was pressured to alter his conclusions because of concerns about the financial repercussions of a recall (or for any other reason). Indeed, far from being the "smoking gun" that plaintiffs depict it to be, Rakowicz's speculation and its rejection upon further reflection simply show Ford's engineers doing their job by pursuing every possible lead no matter how farfetched. It is absurd (and ultimately counterproductive to the goal of safety) to translate this into corporate knowledge of a dangerous defect justifying huge punitive damages.

Similarly unsupported is Plaintiffs' allegation (Br. 6) that, after February 1993, Ford "sat silent while additional 'roll-away' evidence mounted." The "additional 'roll-away' evidence" (Br. 6-7) is simply reports by vehicle owners of unexpected vehicle movement. Because there were multiple possible causes of rollaway (439; Tr. 520), the reports did not reveal the existence of tip-on-tip spontaneous disengagement, no matter how often Plaintiffs repeat that assertion. Moreover, Ford did not "sit silent" during this time; rather, it was uncontradicted that Ford continued to investigate reports of rollaways and pressured Orscheln to do the same. See Ford Br. 12-13.³

Plaintiffs' related claim (Br. 8) that, during this time, Ford began "a deliberately-deceptive corporate 'spin campaign'" is equally unsubstantiated. Ford never "directed in July 1993 that all references to roll-away be avoided;" rather, Ford asked that correspondence regarding problems with the parking brake distinguish between "skip-through" and spontaneous disengagement by adding the descriptive phrase "during apply" to the former to distinguish it from the latter, which (by definition) would occur only "after apply." (1111; 1376; Tr. 533-534). Indeed, the confusion

³ Plaintiffs dismiss (Br. 9 n.5) Rakowicz's investigatory effort because he did not examine the parking brakes involved in three rollaways. Rakowicz did not examine the brake from the Pittsburgh truck because (i) its prior removal from the vehicle "destroy[ed]" its utility in disclosing the accident's cause and (ii) others at Ford were addressing that particular vehicle (Tr. 867-871). As for the White and Bobb parking brakes, neither rollaway was reported to Ford (except, eventually, by lawsuits).

successfully sown by Plaintiffs' conflation of these distinct concepts confirms the need for such measures. As for the TSB, it did not mention rollaways because it was issued to address "skip-through," not spontaneous disengagement. Finally, Plaintiffs' claim (Br. 8-9) that Ford's February 1994 response to NHTSA and Rakowicz's July 1994 revised "white paper" were drafted as part of a ploy to "minimize" the dangers of rollaways is utterly unsubstantiated.

3. NHTSA's Involvement and Findings. Plaintiffs also grossly mischaracterize NHTSA's findings. NHTSA did not distinguish between "skip-through" and spontaneous disengagement but rather repeatedly referred to both concerns, in the singular, as the "problem" or the "defect." (494).⁴ And, contrary to Plaintiffs' assertion (Br. 11), NHTSA never found that spontaneous disengagement existed. In fact, the two-page September 1994 ODI resume — all that Plaintiffs point to — refers to spontaneous disengagement as an "alleged defect." (494). Lastly,

⁴ Continuing the verbal shell game, Plaintiffs argue (Br. 10 n.7) that Ford conceded to NHTSA that spontaneous disengagement occurs. But the line from NHTSA's ODI resume to which they point — "Ford recognized the problem and issued a service bulletin (93-23-23) on November 10, 1993" — refers to "skip-through," not spontaneous disengagement, which the TSB did not address and the occurrence of which Ford did not accept. (464-477; 491-492).

Nor did Ford concede the existence of spontaneous disengagement in closing argument (White Br. 12 n.9). Rather, Ford's counsel pointed to the numerous possible causes of rollaway, arguing that "nobody" had ever shown that any rollaway, including the one at issue here, resulted from spontaneous disengagement. (1343).

Plaintiffs ignore that NHTSA's own testing failed to replicate spontaneous disengagement, leading NHTSA's final report, like the ODI resume, to state only that it had been "alleged" that spontaneous disengagement could occur. (718; 740).⁵

Plaintiffs also misleadingly suggest (Br. 10 n.7) that Ford's November 1994 recall was a "camouflaged roll-away recall" and (Br. 11) that Ford acted improperly in failing to warn of the rollaway danger in the recall notices. They omit that (i) Ford informed NHTSA that the recall was being done to correct "skip-through" in manual transmission vehicles (491-491), and (ii) NHTSA was satisfied by the recall, closing its investigation (493).⁶

⁵ Plaintiffs introduced the NHTSA final report (Tr. 1299) but now disparage its conclusions because NHTSA tested "only nine vehicles, only one of which had experienced roll-away" (Br. 11 n.8). This argument is remarkable, given Plaintiffs' heavy reliance on the February 1993 Orscheln test, which produced disengagement in only one abused vehicle. Plaintiffs' disdain for NHTSA's testing further undermines their claim that NHTSA found that spontaneous disengagement existed.

⁶ Plaintiffs contend (Br. 11-12 n.9) that NHTSA has reopened its investigation because of dissatisfaction with the recall. Ford has moved to strike references to that investigation because the NHTSA ODI resume and related materials were not before the jury or district court and are therefore not part of the record on appeal. Nor should this Court take judicial notice of such materials on appeal; indeed, were the Court inclined to do so, fairness would require it likewise to consider the literally thousands of pages amassed by NHTSA as part of its investigation (but omitted by Plaintiffs), which paint a very different picture from that drawn by Plaintiffs. In any event, NHTSA's investigation is in its preliminary stages and, contrary to Plaintiffs' insinuation, NHTSA has not found that the recall was ineffective or deceptive.

4. *Plaintiffs' Responsibility for Walter's Death.* Plaintiffs dispute (Br. 3 n.1) that they allowed Walter to play “unsupervised” in the truck. Neither parent, however, accompanied Walter outside. (149; 156). Moreover, Jimmy White conceded that he did not watch Walter (155), while Ginny White acknowledged checking through the window only “every once in awhile” (156). Plaintiffs also dispute that Walter “played with the controls” of the truck, but this is merely a semantic quibble, for they themselves state (Br. 3 n.1) that Walter entered the vehicle and “somehow dislodged the stick shift.”⁷ And as for their denial of “parental neglect” and responsibility for Walter’s death, the jury’s finding that Plaintiffs’ negligence was 40% responsible speaks for itself.

⁷ Walter’s movement of the gear shift is critical to Plaintiffs’ case because otherwise the transmission, which Jimmy White put into gear when he parked the truck, would have held the vehicle in place. (Tr. 2094-2095).

ARGUMENT

I. THE SPECIAL VERDICT RESPONSES

A. The Only Plausible Interpretation Of The Response To Question 2 Is That Plaintiffs' Brake Did Not Spontaneously Disengage.

When a jury gives arguably inconsistent responses or verdicts, the court must determine whether the jury's findings can be reliably ascertained; if so, the responses should be reconciled accordingly. Here, the proper reconciliation is clear and precludes liability.

The jury answered the first two questions on the verdict form by finding that, although the brake suffered from a design defect, that defect did *not* cause Walter's death — *i.e.*, no spontaneous disengagement occurred. As we have argued (Br. 20-29), this finding exonerated Ford even if it was technically inconsistent with the response regarding warning causation. The latter is readily explained: the jury accepted Jimmy White's testimony that, had Ford warned him that the brake might unexpectedly disengage, he would have taken precautions to avoid the risk of rollaway, which precautions would have saved Walter regardless of the spontaneous release of the brake. Because such fortuitous "but for" causation does not establish liability under Nevada law, the jury's responses do not preclude giving full legal effect to the finding that no spontaneous disengagement actually occurred.

Plaintiffs do not dispute that a finding of no spontaneous disengagement would completely exonerate Ford. They nonetheless expend little effort proffering an alternative interpretation of the verdict, relying principally on formalistic or procedural bases for upholding the judgment. Their arguments do not save the judgment.

1. Plaintiffs repeatedly insist (*e.g.*, Br. 17) that the district court had broad discretion to determine the meaning of the verdict and that its decision must be reviewed deferentially. They are mistaken. See, *e.g.*, *Norris v. Sysco Corp.*, 1999 WL 710354 (9th Cir. Sept. 14, 1999) (appellate court “must decide for [itself] whether the jury’s responses to special interrogatories can be harmonized or whether they are so inconsistent that the verdict should be disregarded and the case remanded for a new trial”); *Wilks v. Reyes*, 5 F.3d 412, 414 (9th Cir. 1993) (same).

2. Because a factual finding of no spontaneous disengagement would be fatal, Plaintiffs struggle to characterize the jury’s responses to questions 1 and 2 as a general verdict. That strategy is of questionable value to them; even when faced with arguably inconsistent *general* verdicts, the court in appropriate circumstances “can reconcile the verdicts without intruding upon the jury’s fact-finding role.” *Westinghouse Elec. Corp. v. General Circuit Breaker & Elec. Supply Inc.*, 106 F.3d 894, 902 (9th Cir. 1997).

In any event, none of the questions on the verdict form — and certainly not these questions — were general verdicts. The verdict form was entitled “Special Verdict,” and introduced its 15 questions with the phrase: “We, the jury * * * find as follows on *particular questions of fact.*” (847 (emphasis added)).⁸ But even if some part of the verdict could be read as a general verdict against Ford — which we believe it cannot⁹ — the law’s “sensible preference for specific over general findings” (*Los Angeles Nut House*, 825 F.2d at 1354) precludes the entry of judgment consistent with the general verdict but in conflict with responses to special interrogatories. Cf. *Floyd*, 929 F.2d at 1396 (Seventh Amendment would be violated if court disregarded jury’s factual finding).

Plaintiffs argue that the questions at issue *must* be general verdicts because they involve the application of law to fact. Although grudgingly acknowledging the many cases that have deemed such questions to be special verdicts, they claim that, after

⁸ The trial court viewed questions one and two as “*interrogatories*,” regarding only the questions concerning damages as general verdicts. See 896 (“The court agrees with the plaintiffs that the answer to Question No. 2, the answers to *the other interrogatories*, and the general verdicts (as reflected in Questions 12, 13, and 14) can be reasonably interpreted as consistent”) (emphasis added).

⁹ The question whether the verdict was a special verdict subject to Rule 49(a) rather than a Rule 49(b) general verdict with interrogatories determines only which line of waiver cases is applicable. See Ford Br. 25-29. Neither subsection permits entry of judgment for the plaintiff despite a factual finding by the jury that exonerates the defendant.

Floyd, it is “settled and crystal clear” in this Circuit that “a fact/law verdict is a general verdict under Rule 49(b).” Br. 30 nn.15-16. But the snippet of *dictum* in *Floyd* that they invoke — misleadingly paraphrased but never quoted (Br. 22) — says nothing about special verdicts, stating merely that juries “must reach a general verdict by applying the law to their finding of fact.” 929 F.2d at 1395. Indeed, the holding of *Floyd* itself cannot be squared with Plaintiffs’ “crystal clear” rule: nearly all of the questions on the *Floyd* verdict form, which the Court described as “14 clear and concise interrogatories * * * sufficient to elicit those facts necessary to deciding this case” (929 F.2d at 1395), were mixed fact/law questions, much like those here. See *id.* at 1402.¹⁰

3. Plaintiffs next struggle to explain how the jury could have answered questions 1 and 2 as it did yet believe that spontaneous disengagement occurred here. They barely defend the district court’s proposed reconciliation, asserting only (Br. 23)

¹⁰ In a tortured effort to avoid *Floyd*’s clear holding, Plaintiffs assert (Br. 30 n.16) that *Floyd* “merely held that because a specific fact question was answered in violation of the court’s specific jury-form instructions it was not a legal part of the verdict.” That statement is pure invention. The Court held that the *entire* verdict constituted a special verdict and that *all* of the questions were “clear and concise interrogatories * * * sufficient to elicit those facts necessary to deciding” the case. Indeed, Plaintiffs’ insistence (*id.*) that the “factual ‘damage-causation’ question” deemed surplusage in *Floyd* was the *only* “specific fact question” on that form is ironic in light of Judge Hagen’s holding that the analogous damages questions on the verdict form here — and *only* those questions — constituted *general* verdicts.

that it “falls squarely within the court’s broad discretion.” As discussed above, however, determining the meaning of a jury verdict is not an exercise of discretion, and this Court must “decide for [itself]” the meaning of the verdict. And, as we demonstrated (Br. 24-25), the trial court’s attempted reconciliation ignored the jury instructions and the verdict’s language and assumed that the jury acted illogically.

Evidently uneasy with the trial court’s effort to reconcile the jury’s answers, Plaintiffs offer a different “reconciliation.” They argue (Br. 25) that “[t]he jury may readily have determined that White’s 1994 death was not a ‘natural consequence’ of Orscheln’s 1991 design” because Ford’s failure to change the design, recall the car, or warn Plaintiffs — as opposed to Orscheln’s conduct in designing the brake — broke the chain of causation between the design and the accident. That attempted resolution again ignores the verdict form and the jury instructions.

The form asked whether the brake was “defective in design” and whether “*this defect*” proximately caused the injury. The instructions stated that a manufacturer is strictly liable for a design defect if (among other things) the product was “unreasonably dangerous” due to its design, “*the defect* existed when the product left the defendant’s possession,” and “*the defect* was a proximate cause” of the injury. (Tr. 2051-2052 (emphasis added)). Because, if the brake spontaneously disengaged, *the defect* would have been the link *closest* in the chain of causation to the injury, a

finding that *the defect* did not proximately cause the injury can mean only that no spontaneous disengagement occurred.

In contrast, Plaintiffs' proposed harmonization would be plausible only if the form and the instructions focused on whether *the act of designing the defective brake*, and not *the defect itself*, caused the injury. Because the Court may not assume such a manifest misreading of the verdict form, Plaintiffs' proposed reconciliation must be rejected. *Floyd*, 929 F.2d at 1390 (“[t]he court must assume that the jury consciously and correctly responded to each question and instruction”).

Finally, even if Plaintiffs' (or the court's) attempted reconciliation of the verdict were tenable, that would not support affirmance of the judgment. At best, Plaintiffs have identified an alternative possible reading of the verdicts, but certainly not one that is so distinctly preferable to Ford's reading that the Court may say with confidence that the jury did find spontaneous disengagement of the Whites' parking brake. Thus, even if Plaintiffs' proposed harmonization were sufficiently credible to compete with Ford's, a new trial would be necessary.

B. There Was No Waiver.

Plaintiffs argue that Ford waived its right to object to the entry of judgment against it by agreeing to the form of the verdict and by failing to object before the jury was discharged. These arguments fail.

1. We know of no authority, and Plaintiffs cite none, suggesting that a party waives its right to object to inconsistency in a verdict by failing to request instructions that, if followed, would foreclose the risk of inconsistency. Indeed, most cases of verdict inconsistency do not involve violation of express instructions on the verdict form. See, e.g., *Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108 (1963).

Even if the failure to object to a verdict form could in some instances constitute waiver, Ford cannot be faulted for failing to anticipate the particular constellation of answers here. Plaintiffs argue (Br. 28) that, by agreeing to “the disjunctive nature of the verdict form instruction,” Ford agreed that the jury might find for it on certain causes of action and against it on others. True enough. Ford would have no objection if (for example) the brakes were found not defective in design but defective for failure to warn; the verdict form plainly contemplates such a result, which entails no inconsistency at all. The instant situation is hardly parallel.

2. Plaintiffs’ second waiver argument is similarly unconvincing.¹¹ Acknowledging grudgingly that a party “generally” does not waive an objection to inconsistency in special verdicts by failing to object before discharge of the jury, Plaintiffs insist (Br. 30) that the verdict here was “a Rule 49(b) general verdict.” As

¹¹ Contrary to Plaintiffs’ assertion (Br. 29), waiver determinations are mixed fact/law questions that this Court reviews *de novo*. See, e.g., *Tennenbaum v. Deloitte & Touche*, 77 F.3d 337 (9th Cir. 1996).

discussed above and in our opening brief, however, the verdict was a special verdict and was plainly designated as such when the waiver supposedly occurred. To avoid gross unfairness to Ford, that designation must govern the waiver inquiry.

Additionally, Plaintiffs offer no effective response to the point that, even under Rule 49(b), the party against which a general verdict runs does not by silence waive its right to benefit from specific favorable findings. See *Los Angeles Nut House*, 825 F.2d at 1354. They claim (Br. 31) that *Los Angeles Nut House* endorses waiver where “counsel affirmatively misled the judge in order to get the jury dismissed prior to objecting to the inconsistency.” No doubt, but the Court was discussing a situation where “the judge expressly noted the discrepancy in the jury’s results and asked counsel whether either wanted the jury to reconsider its answers.” 825 F.2d at 1354. It expressly *dis*approved a rule “that permits the party in whose favor the general verdict runs to prevail merely by remaining silent.” *Ibid.*¹² Ford and Plaintiffs were

¹² Plaintiffs falsely accuse (Br. 29 n.14) Ford’s counsel of “blithely” repudiating the obligation of candor to the court. At oral argument, counsel stated that he did not “have any doubt that counsel should be candid” (1472) but contended, reasonably enough, that the duty of candor did not require Ford to volunteer its interpretation of the verdict when this Court’s waiver doctrine did not require that.

equally silent, and Ford did not waive its right to benefit from the jury's findings in its favor.¹³

Finally, even if the Court finds a waiver, it should nevertheless consider the issue under the plain error doctrine. It would be a gross miscarriage of justice to let such massive liability stand if the jury in fact did, or very probably did, find a fact that would exonerate Ford and preclude liability. *E.g., Oja v. Howmedica, Inc.*, 111 F.3d 782, 790-792 (10th Cir. 1997) (failure to grant new trial where verdict is facially inconsistent is plain error).

II. EVIDENTIARY ERRORS NECESSITATE A NEW TRIAL.

A. The Testimony Of Campbell Laird

Plaintiffs defend the district court's decision to admit Laird's testimony, claiming (Br. 36-37) that Judge Hagen "presciently anticipated" *Kumho* and properly performed its gatekeeping obligation. That is revisionist history. Judge Hagen did *not* "anticipate" *Kumho*; rather, he simply rested on *McKendall* (49), which he believed made *Daubert* inapplicable to expert engineering testimony (12). Indeed, he made no

¹³ Any obligation to object before the jury was discharged could arise only if it were proper to resubmit the questions to the jury for clarification. That would not have been appropriate here. The verdict revealed both a factual finding that completely exonerated Ford and an inclination by the jury to compensate Plaintiffs. Under these circumstances, resubmission would have been "an invitation to the jurors to provide legal rationalization for an outcome that their findings of fact had already precluded." *Floyd*, 929 F.2d at 1398.

finding regarding any of the *Daubert* factors. (49). *Kumho*, of course, rejected precisely this course of action. 119 S.Ct. at 1176.

Nor can the district court's refusal to apply *Daubert* be justified on the dubious ground, proffered by Plaintiffs (Br. 35 n.20, 36), that some of the factors are inapplicable here. Although *Kumho* acknowledges that *some* of the *Daubert* factors may not apply to particular testimony, the district court refused to apply *any* of them, ruling that engineering testimony was outside *Daubert*'s domain. Even Plaintiffs implicitly concede that at least *some* *Daubert* factors apply to Laird's testimony. See Br. 35 n.20 (disputing applicability of "peer review" and "known rate of error" but not "testing methodology" and "general acceptance" factors).¹⁴ Moreover, even if particular *Daubert* factors are inapplicable, the district court is still obligated to confirm the reliability of the expert's testimony by applying whatever considerations those in the field apply (*Kumho*, 119 S.Ct. at 1176) — a task that Judge Hagen did not begin to undertake.

Finally, Plaintiffs fail to identify any basis for Laird's testimony regarding the cause of this particular accident or to explain how a metallurgist who never examined

¹⁴ Plaintiffs offer no persuasive reason why the "peer review" and "known rate of error" factors should be regarded as pertinent to the tire-failure analysis at issue in *Kumho* but inapplicable to Laird's testimony.

the accident scene could offer an expert opinion that spontaneous disengagement, and not Walter, caused this accident.

B. Evidence Of Prior Incidents

Plaintiffs' defense of the admission of the Bobb testimony is utterly unpersuasive. They claim (Br. 38-39) that "a design defect in this braking system" caused the Bobb rollaway. Laird testified, however, that there was no manufacturing defect in Plaintiffs' brake (134) but that "[t]here were manufacturing defects in association with the Bobb lever *which contributed to the problem in that case.*" (126; emphasis added). Significantly, there was no testimony that the Bobb rollaway would have occurred absent the manufacturing defect; therefore, Plaintiffs failed to carry their burden (as proponents of this evidence) of proving that a design defect was the "but for" cause of both incidents. *E.g., Gumbs*, 718 F.2d at 98 (no "substantial similarity" where prior accidents were caused by different defect).

Plaintiffs' defense of the admission of the MORS reports is similarly unavailing.¹⁵ Their assertion (Br. 40) that Judge Hagen "specifically found" that the reports satisfied the "substantial similarity" test is patently false: the passage they cite

¹⁵ Plaintiffs advert (Br. 40) to unadmitted material that is not before the Court but that was mistakenly included in an initial, promptly-withdrawn record-excerpts submission. This is wholly irrelevant to our challenge to the MORS reports that were admitted.

demonstrates unequivocally that Judge Hagen refused to make any finding of substantial similarity. (1333-1334).¹⁶ Moreover, while Plaintiffs conclusorily declare (Br. 41) that Judge Hagen’s decision to admit the MORS reports is “entitled to appellate deference,” they tellingly offer no defense of his reasoning or decision. Ford Br. 33-35.

III. THE EVIDENCE DOES NOT SUPPORT PUNITIVE LIABILITY.¹⁷

1. Citing *Bartgis*, Plaintiffs first claim (Br. 42) that the intentional misrepresentation verdict suffices to uphold punitive liability. Nevada law, however, requires clear and convincing proof of “oppression, fraud, or malice” for punitive liability. N.R.S. § 42.005(1). Significantly, the district court refused to charge the jury on “fraud” and submitted only “oppression or malice” as bases for punitive liability (315; Tr. 2060); thus, the jury never found fraud at all, let alone that fraud was shown clearly and convincingly. (850).¹⁸

¹⁶ Plaintiffs claim (Br. 41 n.29) that the cited passage concerned only the limiting instruction requested by Orscheln. Ford remained silent during the discussion of that instruction, which was for Orscheln’s, not Ford’s, benefit. (1330-1333). It was *after* this colloquy that Ford objected to admission of the MORS reports, to which the court responded that “I’m not ruling that they’re substantially similar.” (1333).

¹⁷ This Court reviews claims of evidentiary insufficiency *de novo*. *EEOC v. Pape Lift, Inc.*, 115 F.3d 676, 680 (9th Cir. 1997).

¹⁸ In *Bartgis*, fraud was submitted to the jury as a basis for punitive damages. Moreover, *Bartgis* did not hold that a finding of intentional misrepresentation suffices to

Moreover, not all intentional misrepresentations constitute “fraud.” “Fraud” requires an “intent to deprive another person of his rights or property or to otherwise injure another person.” N.R.S. § 42.001(2). In contrast, “intentional misrepresentation” requires only the intent “to induce the plaintiff to act or to refrain from acting in reliance upon the misrepresentation” (Tr. 2053-2054). Thus, the jury’s intentional misrepresentation verdict is not equivalent to a verdict of “fraud” for purposes of imposing punitive liability. See *Village Dev.*, 526 P.2d at 89 (vacating punitive damages yet upholding compensatory liability for intentional misrepresentation).

2. Plaintiffs next offer (Br. 42-44) a grossly distorted recitation of the evidence. To begin with, Ford did not have an “early and keen awareness” of rollaway and “its obvious harmful consequences” (Br. 43). Once again, Plaintiffs base their claim upon evidence involving skip-through, not spontaneous disengagement. As for the rollaway reports received by Ford, they were insufficient to give Ford knowledge that spontaneous disengagement was a reality. As noted above, there were numerous possible causes of rollaways (439), and, despite diligent efforts to do so, Ford never succeeded in identifying spontaneous disengagement as a cause of such rollaways.

support punitive liability, but rather that, on the facts there, the evidence was sufficient to support a punitive award. 969 P.2d at 961.

Moreover, such reports certainly did not apprise Ford of a substantial danger to the safety of its customers.¹⁹

Nor can a “willful and deliberate failure to act” be found from the evidence. Ford vigorously investigated the cause of rollaways and pressured Orscheln to do the same. And far from attempting to “impede NHTSA’s investigation” as Plaintiffs assert (Br. 44), Ford fully cooperated with NHTSA, responding to its inquiries (464-477) and ultimately agreeing to a recall (491-492), with which NHTSA was fully satisfied (493-494).

IV. FORD SHOULD RECEIVE A NEW TRIAL ON PUNITIVE DAMAGES.

A. The Jury Instruction

The Supreme Court has emphasized the need for clear, detailed jury instructions to guide the jury in assessing punitive damages. See *Oberg*, 512 U.S. at 433 (proper jury instructions are “important check against excessive awards”); *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 88 (1988) (O’Connor, J., concurring in part and concurring in the judgment). The absence of such instructions invites arbitrary,

¹⁹ Fewer than 200 owners complained of unspecified brake failures; of those, only three alleged any injury. Although Plaintiffs claim (Br. 45 n.33) that Ford “currently admits” 54 injuries and one fatality, that figure is drawn from the extra-record materials that Ford has moved to strike. In any event, the full text of Ford’s letter to NHTSA makes clear that Ford did not “admit” those injuries but rather disclosed receipt of “allegations of 54 injuries and one fatality” resulting from unspecified brake failures (1487).

capricious, and excessive awards set by juries whose members possess no prior experience or knowledge regarding the nature of the task before them. See *BMW*, 517 U.S. at 596 (Breyer, J., concurring) (setting punitive amount is outside jury’s normal function).

In this case, the district court (over Ford’s objection) gave a vague, out-dated Nevada pattern instruction that provided no meaningful guidance to the jury.²⁰ The staggering size of the verdict reflects how much in need of guidance this jury was.

Extraterritoriality. Plaintiffs defend (Br. 49) the refusal of Ford’s requested extraterritoriality instruction on the ground that *BMW* permits juries to consider out-of-state transactions. But the problem is the *purpose* for which it may be considered. As this Court has expressly noted, *BMW* establishes that “a State ‘does not have the power * * * to punish [a defendant] for conduct that was lawful where it occurred and that had no impact on [the State] or its residents.’” *Neibel*, 108 F.3d at 1131 (quoting *BMW*, 517 U.S. at 572-573). Indeed, *BMW* held that it was improper to base the punitive award on BMW’s out-of-state conduct and that the jury should have instead

²⁰ Contrary to Plaintiffs’ assertion (Br. 47), the instruction’s directive regarding the *purpose* of punitive damages — “you may, in your discretion, award punitive or exemplary damages against defendant Ford for sake of example and by way of punishment” (322) — was of little use in setting the *amount* of the punishment. Individual jurors may have grossly disparate notions of what amount is necessary to vindicate the State’s interest in retribution and deterrence.

based its award “solely on conduct that occurred within Alabama” (*id.* at 573-574). It was that mistake that Ford’s proposed instruction was intended to prevent.

The footnote *dictum* quoted by Plaintiffs (Br. 49) — which suggests that *evidence* of out-of-state conduct may be admitted to show reprehensibility — is beside the point. Our complaint is not about the admission of evidence of nationwide sales, but rather about the lack of guidance given to the jury regarding the permissible (and impermissible) uses of such evidence. Indeed, the introduction of that evidence, proper as it may have been, made the requested instruction all the more imperative because, without it, the jury could believe erroneously (as this one did) that it should impose a nationwide punishment.

Reasonable Relationship. Plaintiffs do not contend that Ford’s requested instruction misstates *BMW*’s “reasonable relationship” requirement, is misleading, or was otherwise covered in the district court’s instructions. Instead, they assert (Br. 50-51) both that N.R.S. § 42.005 forbids giving a “reasonable relationship” instruction and that due process does not require it. But while due process and Nevada law govern the *substantive* issues in this diversity case, Plaintiffs never come to grips with our argument that it is *federal common law* that governs the instructing of juries in federal cases. That law entitles parties to instructions that correctly state material legal points and are not misleading or covered by other instructions. *Chuman v. Wright*,

76 F.3d 292, 294 (9th Cir. 1996). Indeed, the Third Circuit has already held that federal common law requires a “reasonable relationship” instruction. *Levinson v. Prentice-Hall, Inc.*, 868 F.2d 558 (3d Cir. 1989).

N.R.S. § 42.005(3) does not change matters. That section prohibits the trial court only from instructing the jury about Nevada’s statutory cap; the statute has nothing to do with the constitutional and common law principle that punitive damages must bear a “reasonable relationship” to compensatory damages.

Likewise, the observation (Br. 50-51) that *BMW* did not involve the failure to give a “reasonable relationship” instruction is irrelevant. That the district court must apply the “reasonable relationship” requirement as part of its post-verdict excessiveness analysis under *BMW* does not relieve it of the obligation to charge the jury on the applicable law, of which the “reasonable relationship” requirement indisputably is a part. Indeed, to permit the jury to remain ignorant of the “reasonable relationship” requirement in assessing punitive damages while requiring the district court to remit the resulting punitive award when (unsurprisingly) it is not reasonably related to the compensatory award would make no sense and would unfairly deprive the defendant on the benefit of the possibility that the jury would have chosen a lower ratio.

Plaintiffs also err in contending (Br. 46-47 & n.34) that the outdated Nevada pattern jury instruction given here comports with due process because it “contains each of the elements” and is “identical in content to” the *Hilao* jury instruction, as even a cursory comparison of the two instructions reveals (compare ER 322 with 103 F.3d at 781 n.7). Moreover, contrary to their argument, *Hilao*’s due process discussion was *dictum*; given the 3:2 punitive-to-compensatory ratio (103 F.3d at 781), the failure to give a “reasonable relationship” instruction in that case was harmless, so any further discussion of the instructional issue was not outcome-affecting.

B. Plaintiff’s Punitive Rebuttal Argument.²¹

Plaintiffs’ argument (Br. 52-53) that “each” of Mr. Nomura’s inflammatory statements was “directly responsive to Ford’s own punitive arguments” is belied by juxtaposing those statements with the statements to which they allegedly respond. For example, Plaintiffs fail to specify how Mr. Nomura’s repeated, incendiary statements regarding Ford’s knowledge that its victims would be children and that Ford treats children as “an item on a ledger sheet” — all without the slightest evidentiary support — were responsive to Ford’s statements that it had taken care of the problem and “had already got the message.” Nor do Plaintiffs identify any statement by Ford that

²¹ This Court reviews the district court’s denial of a new trial on this ground for abuse of discretion.

would warrant either Mr. Nomura’s suggestion that Ford had engaged in criminal conduct or his repeated references to Ford’s out-of-state residency and corporate status.

As for Plaintiffs’ preservation claim (Br. 53-54), Ford’s counsel objected **5 times** during the rebuttal to various inflammatory and misleading statements. (327; 329; 331-332; 334; 335). Having made clear the scope and foundation for his objections,²² counsel was not required to interrupt each inflammatory statement to object. See *Anheuser-Busch, Inc. v. Natural Beverage Distributors*, 69 F.3d 337, 346 (9th Cir. 1995) (“Constant objections are certainly not required, as they could antagonize the jury.”) (citation omitted); *Biundo v. Old Equity Life Ins. Co.*, 662 F.2d 1297, 1300 (9th Cir. 1981) (single objection sufficient to preserve challenge to numerous comments). Indeed, Judge Hagen noted Ford’s objections (905) and never suggested that Ford waived this point.

Lastly, Plaintiffs appeal (Br. 54) for “appellate deference” to Judge Hagen’s decision that Mr. Nomura’s misconduct did not “so permeate[] the trial” as to warrant a new trial. They do not respond, however, to our arguments (Ford Br. 51-53) that Judge Hagen’s decision was based on an error of law and that the denial of a new trial

²² Counsel objected that the rebuttal went beyond the scope of Ford’s argument (327; 329, 332; 335) and was an overt appeal to the jury’s “passion and prejudice” (329; 334).

therefore constitutes an abuse of discretion. Moreover, given the limited guidance provided to juries in setting judicial punishment, it is especially important to protect against such unfounded and improper appeals to emotion and bias.

V. THE PUNITIVE DAMAGES MUST BE REMITTED.²³

A. Extraterritoriality.

Plaintiffs deny (Br. 56-59) that *BMW* forbids extraterritorial punishment, contending that it simply requires Nevada to respect other States' policy choices out of comity. But *BMW* clearly prohibits extraterritorial punishment. See 517 U.S. at 573-574 (punitive award must be based “solely on conduct that occurred within [the State]” and “with consideration given only to the interests of [in-state] consumers, rather than those of the entire Nation”); see also *id.* at 572 (punitive award must be tied

²³ This Court reviews the district court's remittitur for abuse of discretion. *Pavon v. Swift Transp. Co.*, 1999 WL 729132, at *5 (9th Cir. Sept. 20, 1999). That standard accords deference to factual findings but requires *de novo* review of the ultimate legal question whether the award is excessive when measured under the relevant guideposts. See, e.g., *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1335 (11th Cir.), cert. denied, 1999 WL 618501 (Oct. 12, 1999).

Plaintiffs argue (Br. 55-56, 66) that *BMW* establishes that punitive awards are entitled to a “strong presumption of validity.” The Court, however, made no such statement; rather, that phrase comes from Justice Breyer's concurrence, in which he made clear that punitive awards are entitled to no “presumption of validity” when the State's punitive damage procedures fail to cabin the jury's discretion. 517 U.S. at 587. Significantly, Nevada shares *all five defects* identified by Justice Breyer in Alabama's punitive damage scheme. *Id.* at 588-596. Thus, as in *BMW*, no “presumption of validity” applies.

to “the State’s interest in protecting *its own* consumers and *its own* economy”) (emphasis added).

Plaintiffs next contend (Br. 57-58) that this award *is* tied to Nevada’s state interest in protecting its citizens because every vehicle, wherever sold, may end up in Nevada and harm Nevada citizens.²⁴ On that rationale, however, every State could punish Ford based on its nationwide sales, which would (1) expose Ford to 50 times greater punishment because it operates in nationwide interstate commerce, the epitome of excessive punishment and a manifest violation of the Commerce Clause; and (2) project Nevada’s policies on other States, in violation of their sovereignty and regardless of whether or not those States agree with such harsh punitive sanctions for actions such as those at issue here. As the Supreme Court has noted in a related context, “[a] State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State.” *Bigelow v. Virginia*, 421 U.S. 809, 824 (1975).

²⁴ There is no evidence regarding how many F-Series trucks sold outside Nevada have entered Nevada.

Nor is there any merit to Plaintiffs' alternative claim (Br. 58) that Nevada may impose nationwide punishment on the theory that Ford's conduct is "unlawful in every jurisdiction." Putting aside questions about the constitutional reach of Nevada's punitive powers,²⁵ due process requires that both the legality of Ford's extraterritorial conduct and the propriety and extent of the punishment for that conduct be resolved under the laws of the respective States where the conduct occurred. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818-23 (1985); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 310-11 (1981) (plurality opinion); *Home Ins. Co. v. Dick*, 281 U.S. 397, 407-10 (1930). Needless to say, the law regarding product liability, fraud, and punitive damages varies dramatically from state to state.²⁶ Judge Hagen did not even attempt

²⁵ *BMW* left that question open. See *BMW*, 517 U.S. 573 n.20. The Tenth Circuit, however, has concluded that States lack such power. *Continental Trend*, 101 F.3d at 637.

²⁶ As the district court recognized (907), Ford's conduct is not necessarily actionable in other States, many of which do not recognize a post-sale duty to recall or warn. RESTATEMENT 3D, TORTS: PRODUCT LIABILITY § 10 reporter's note, at 198 (1998). Moreover, even if actionable, Ford's conduct is not punishable in at least five States. See 1 J. GHIARDI & J. KIRCHER, PUNITIVE DAMAGES: LAW AND PRACTICE §§ 4.06-4.11 (1995 & Supp. 1997). And among the other States, the definitions of punishable conduct vary widely, as do the elements to be considered in setting the amount of punitive damages. Some States do not permit the jury to consider the defendant's wealth (*e.g.*, *Haslip*, 499 U.S. at 19 (Alabama); *Fowler v. Mantooth*, 683 S.W.2d 250, 253 n.1 (Ky. 1984)), and many States impose caps that sharply limit punitive amounts (*e.g.*, Colo.Rev.Stat. § 13-21-102(1)(a); Conn.Gen.Stat. § 52-240b; Fla.Stat. Ann. § 768.73(1)(a); Kan.Stat. Ann. § 60-3701(e),(f)).

the herculean task of instructing the jury on the law of the other 49 States, nor, correspondingly, did the jury find that Ford's conduct was tortious, much less punishable, elsewhere (cf. *BMW*, 517 U.S. at 573).

B. Excessiveness.

This punishment is grossly excessive under both Nevada and federal constitutional standards.

1. Reprehensibility/Blameworthiness Of The Misconduct.

Although Plaintiffs allege (Br. 61) that Ford's conduct "contains all of the 'aggravating factors associated with particularly reprehensible conduct,'" they offer in support (Br. 60-61, 72) only the same misleading factual recitation — rife with sinister speculation but devoid of record citations — that they invoked to support the finding of punitive liability (discussed at pp. 21-22, *supra*). For all their rhetoric, they entirely disregard the fact that during the time leading up to the recall, Ford had no evidence that the alleged rollaway problem was caused by spontaneous disengagement or that it was resulting in substantial numbers of injuries.

2. The Relationship Of Punitive Damages To The Harm Caused.

Purporting to address the "ratio" guidepost, Plaintiffs simply declare (Br. 62-63) the punishment reasonable in light of the reprehensibility of Ford's conduct. That

guidepost, however, requires a careful comparison of the size of the punitive award to the harm caused, not hyperbolic allegations of “reprehensible” conduct. *BMW*, 517 U.S. at 580-583. The reprehensibility factor does not displace the reasonable-relationship requirement, but merely influences how close to the presumptive limit of 4:1 (or perhaps, for extreme cases, 10:1) the punishment may reasonably come.

In asserting that the ratio here is 30:1 (Br. 3 n.1, 55 & n.4), Plaintiffs do not address our contention (Ford Br. 59-60) that the ratio analysis must take into account the jury’s allocation of 40% of the fault to Plaintiffs, which produces a ratio of 50:1. In any event, whether the correct ratio is 50:1 or 30:1, the award is grossly disproportionate to the harm caused. Revealingly, Plaintiffs wholly ignore the cases (see Ford Br. 60-61) in which courts have remitted punitive awards with ratios far smaller than 30:1; rather, they cite just one case (*Ainsworth*) to support a 30:1 ratio. But *Ainsworth* did not address the due process limit on punitive awards, much less did it purport to bless a 30:1 ratio when compensatory damages are in the seven figures. The Supreme Court’s post-*Ainsworth* decisions in *Haslip* and *BMW* clarify that ratios far smaller than 30:1 violate due process, and, in the wake of those decisions, Nevada itself has subsequently rejected ratios approaching 30:1. See Ford Br. 61.

Mystifyingly, Plaintiffs chide us (Br. 63 n.50) for not addressing *Barnett v. La Societe Anonyme Turbomeca France*, 963 S.W.2d 639 (Mo. Ct. App. 1997). But

Barnett, whose holding they misquote (the punitive award was remitted to \$26.5 million, not \$87.5 million (*id.* at 667)), supports a substantial remittitur here. *Barnett* involved overwhelming evidence that the manufacturer knew that its helicopter was dangerously defective but failed to inform the FAA or aircraft owners and refused to conduct a recall, electing to await regularly scheduled maintenance to replace the part (which, unlike a recall, would be at the owner's expense). *Id.* at 663-666. That is conduct far more egregious than anything remotely indicated by the evidence here, Plaintiffs' creative record-reading notwithstanding. Even then, the remitted punitive award was only 7.5 times the \$3.5 million compensatory award. *Id.* at 667.

3. Sanctions For Comparable Misconduct.

Plaintiffs conclusorily assert (Br. 64) that the \$800,000 maximum Motor Vehicle Safety Act penalty may be disregarded because that statute preserves state common law liability. But this ignores our argument (Br. 62-63) that the general MVSA savings clause, which was designed to ensure that actions for compensatory damages would not be preempted, has nothing to do with the third *BMW* guidepost.

Plaintiffs also err in arguing (Br. 64-65 & n.51) that punitive awards in other common law tort suits gave Ford fair notice of the magnitude of the award here. This guidepost concerns comparison to legislatively-prescribed statutory penalties, but even if judicially approved punishments are also appropriate benchmarks, nothing in Nevada

jurisprudence gave Ford notice of the possibility of punishment remotely approaching the magnitude of that here. The largest punitive amount ever upheld in Nevada, \$5.9 million in *Ainsworth*, is \$63 million less than (or 8.5% the size of) the punitive judgment here.

4. Other *Ace Truck* Factors.

a. *The defendant's finances.* Plaintiffs agree (Br. 69 n.55) that Ford's net worth is irrelevant to the federal due process inquiry under *BMW* but contend (Br. 68) that, under Nevada law, punitive damages may be linked to a defendant's wealth so long as they are not "so high as to annihilate the financial well-being of the tortfeasor." This is no answer to our argument that *due process* does not permit sustaining an otherwise excessive punishment on the basis of corporate finances; Nevada law cannot trump federal constitutional requirements. Moreover, Plaintiffs grossly mischaracterize *Ace Truck*, which rejected the "financial annihilation" rule as providing inadequate protection of defendants. 746 P.2d at 135. Rather, *Ace Truck* lists the financial condition of the defendant as one of several *limits* on the amount of an award and expressly recognizes that a punishment "far below the point of financial annihilation" may nevertheless be excessive. *Ibid.*

Nor do the other sources cited by Plaintiffs (Br. 69-71) justify according wealth controlling weight. N.R.S. § 42.005(4) simply states that evidence of net worth may

not be admitted before the punitive phase; *TXO* and *Haslip*, neither of which involved Nevada law, are relevant only to the different question whether due process permits Nevada to allow juries to consider a defendant’s wealth in determining the amount of punitive damages;²⁷ and, *Hilao*, which involved Philippine law, did not even address the role of wealth (103 F.3d at 781-782). As for *Ainsworth*, it did not give wealth the emphatic role described by Plaintiffs, much less indicate that a gargantuan punitive award could be sustained simply because the defendant could afford it.

Lastly, the fact that other defendants have paid punitive awards greater than .22% of their net worth is beside the point. *Ace Truck* rejected the notion that an award could be sustained simply because it constituted a small proportion of the defendant’s net worth. 746 P.2d at 135. Indeed, *Bartgis* noted (969 P.2d at 962) that the \$7.5 million award constituted “merely” 2.5% of the defendant’s net worth but nevertheless remitted it.

b. *Victim vulnerability*. Although this point was stressed in their inflammatory closing, Plaintiffs now agree (Br. 73) that this factor does not “come into play.”²⁸

²⁷ Those decisions did not “approve[] of ‘financial condition’ as a proper factor” (White Br. 69 n.55) but rather suggested that undue reliance on a defendant’s net worth in assessing punitive damages would violate due process. *Haslip*, 499 U.S. at 19, 22; *TXO*, 509 U.S. at 464 (plurality opinion), 489-495 (O’Connor, J., dissenting)).

²⁸ Plaintiffs criticize (Br. 72 n.58) us for omitting discussion of the injury they suffered, but their injury has already been taken into consideration in the ratio discussion, *supra*, which focuses on the harm caused by the defendant’s conduct. Considering it here adds

c. *The public's sense of justice and propriety.* Plaintiffs retreat from the district court's categorical declaration that the breach of the duty to manufacture a safe product is *per se* "offensive to society"; rather, they claim (Br. 73 n.59) that Ford's actions were worse than those of a "good faith" product liability defendant. But the latter would not be subject to punitive damages at all, so the comparison is wholly inapt.

d. *The need to deter future misconduct.* Plaintiffs contend (Br. 74) that "effective deterrence" requires focusing on the defendant's financial resources and that an award must be "substantial enough to catch the attention" of the particular defendant." Effective deterrence, however, is not served by the crude instrument employed here of tying punitive damages to corporate net worth. Indeed, Justice Breyer's *BMW* concurrence — which Plaintiffs cite approvingly — explained that deterrence is not served by linking punishment size to wealth because of the "distant relation between a defendant's wealth and its responses to economic incentives." 517 U.S. at 591. Anticipated profits from the misconduct, set against anticipated liability (compensatory as well as punitive), are far more relevant to deterrence.²⁹

nothing.

²⁹ The contention (Br. 75) that Ford's "estimated profit exceeds \$2 billion for sales of defective F-series trucks" is pure fabrication: there is absolutely no evidence regarding Ford's profit, if any, from sale of the trucks. It is also entirely irrelevant, since it absurdly attributes all (nationwide) "profits" entirely to the failure to correct — or correct more

Moreover, Plaintiffs' claim (Br. 76) that Ford "remains arrogantly undeterred to this day" is empty rhetoric. Their hyperbolic, unsubstantiated accusations aside, the undisputed facts are that Ford issued a recall applicable to all trucks with the self-adjusting brake, that Ford's decision came in response to an informal request from NHTSA, that NHTSA was satisfied with Ford's efforts, closing its investigation, and that beginning in 1994 Ford replaced the self-adjusting brake with a totally different design. According to plaintiffs' own expert, these actions should have eliminated the risk of rollaways caused by a tip-on-tip design defect in repaired or new vehicles. Indeed, Plaintiffs conspicuously fail to identify any additional action Ford is "arrogantly" refusing to take.

They do argue (Br. 77) that spontaneous disengagement "remains unsolved by Ford to this day." Not only is that accusation unsupported by record evidence, but the extra-record materials relied upon by Plaintiffs actually tend to negate the theory that a tip-on-tip condition causes spontaneous disengagement. NHTSA reopened its investigation in response to post-recall reports of rollaways. Continuation of rollaways even in repaired vehicles suggests that the self-adjusting brake is not and never has been prone to rollaway *because of a tip-on-tip design defect*: if such a defect existed, insertion of the wedge should (as Plaintiffs' own expert testified (Tr. 745))

rapidly — the alleged defect. The latter "profits" (let alone Nevada's proportionate share of them) seem unlikely to begin to approach the \$69 million punishment here.

have remedied it. These reports suggest that the rollaway phenomenon was not abated by the repair that Ford was punished for delaying, and that rollaways likely were caused by something else, such as driver error. Thus, far from justifying heavy punishment, the evidence (if it may be considered at all) undermines the foundations of Plaintiffs' case and casts grave doubt on the propriety of punitive damages in any amount.

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