No. 31539 - *Kocher v. Oxford Life Insurance*

FILED
July 2, 2004
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

McGraw, Justice, dissenting:

As usual, the story of this case is going to be that the Court has overturned a "monestrous" or "outrageous" verdict, and as usual, few will notice the monestrous and outrageous conduct on the part of Oxford that produced that verdict. Moreover, reversing the judgment in this case suggests to large, wealthy defendants that we do not have the courage to affirm large punitive awards against them.

The majority opinion does convey the tenor of Oxford's conduct, but a few details provide additional illumination. Mr. Kocher bought a truck, like thousands of West Virginians do every year. As part of that purchase, he paid a premium to Oxford for disability insurance. In return, Oxford promised to pay off his truck in the unlikely event Mr. Kocher became disabled. Unfortunately, only one payment into his ownership of the truck, Mr. Kocher had his foot crushed while he was clearing some land with a brush hog. Doctors immediately cut off most of his foot, but sadly, not quite enough of the foot to suit Oxford.

Unable to walk, much less work, Mr. Kocher made a claim on his policy with Oxford. Amazingly, according to the appellee's brief, Oxford's initial reaction was to accuse him of cutting off his foot to have the truck paid off. Oxford's conduct went downhill from there.

Oxford created one bureaucratic hurdle after another, all in an effort to avoid paying less than $12,000. According to the appellee's brief, Oxford required Mr. Kocher to fill out "continuing claim forms" that required him to travel over 100 miles to obtain the medical information requested in the form. Of course, with only one foot and a stump wrapped in bandages, it was a little hard for him to get there on his own, and he had to have other people drive him.

Eventually Mr. Kocher lost all of his leg below the knee. During the time that Mr. Kocher was dealing with the amputation of his limb, he also had to contend with multiple letters and phone calls from the company that had financed his truck, all because Oxford had refused to live up to its end of the bargain.

Oxford's horrendous conduct continued after suit was filed, with multiple discovery violations and an ever-changing parade of legal counsel.[1] The *coup de grace*, of course, was the covert mission by Oxford's senior vice president to visit Mr. Kocher's home, complete with the secretary fraudulently posing as a Federal Express agent to get directions.

---

[1]I note that able appellate counsel did not represent Oxford until after the trial, and that Oxford's trial counsel was not retained until shortly before the trial, and had nothing to do with the pattern of discovery violations. Indeed, both trial and appellate counsel faced a significant challenge in representing a client as appealing and cooperative as Oxford.

Short of requesting Mr. Kocher's amputated foot as proof of loss, it is hard to imagine what else Oxford could have done to act in bad faith in this case.

As part of the punitive damages portion of the trial, the jury heard evidence that Oxford had 770 million dollars in assets, and was owned by a larger company with over three *billion* dollars in assets. In light of this near-incomprehensible wealth and Oxford's reprehensible conduct, the jury came back with a punitive damage award of $34 million dollars. This is only 5% of Oxford's assets, and a little more than 1% of the parent company's assets. Unfortunately for Mr. Kocher, most people can't count that high.

Too often the general public, and even lawyers, judges, and law professors, fall into the trap of looking at a large verdict and opining "Aw, that's just too much money." But this is a fallacious argument for several reasons. The record indicates that the jury in this case heard evidence regarding the size of Oxford's parent company, and just what dollar figure would trigger an investigation of that company by the proper authorities. The jury then issued a verdict very close to that amount. This was no accident, and this is not outrageous or unjust. It is only because we have trouble comprehending the numbers that the verdict seems improper.

Punitive damages exist not only to punish, but to deter as well. "Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him [or her] for his outrageous conduct and to deter him and others like him from similar conduct in the future." Restatement (Second) of Torts § 908(1) (1979). Often, when very large companies with very large profits are considered, we foolishly we abandon the second purpose. My fear is that the majority was seduced by the simplistic notion that some damage awards are "just too big." Along these lines, Oxford calls our attention to the U.S. Supreme Court case of *State Farm v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L Ed. 2d 585 (2003) and its discussion of ratios between compensatory and punitive damages.

More interesting than the majority opinion, which has adopted this overt fear of large numbers, is the dissent of Justice Scalia. Rarely described as a friend of the plaintiffs' bar, Scalia said in *Campbell*:

> I adhere to the view expressed in my dissenting opinion in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 598-99, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), that the Due Process Clause provides no substantive protections against "excessive" or "‹unreasonable'" awards of punitive damages. I am also of the view that the punitive damages jurisprudence which has sprung forth from *BMW v. Gore* is *insusceptible of principled application*; accordingly, I do not feel justified in giving the case *stare decisis* effect.

Campbell, 538 U.S. at 429,123 S.Ct. at 1526, 155 L Ed. 2d at 608 (2003) (Scalia J., dissenting) (emphasis added). In *Gore*, the Court overturned a large punitive verdict in favor of an Alabama man who discovered that the "new" BMW he purchased had been repainted by the company and then sold as "brand new," and BMW had done this more than 900 times to other consumers over a period of several years. In his dissent to that case, Scalia blasts the entire notion of applying a substantive due process guarantee to punitive damages and explains that the majority was really just substituting its view of "fairness" for the jury's:

> Today's decision, though dressed up as a legal opinion, is really no more than a disagreement with the community's sense of indignation or outrage expressed in the punitive award of the Alabama jury, as reduced by the State Supreme Court.

Gore 517 U.S. at 600, 116 S.Ct. at 1611, 155 L. Ed.2d at 842 (Scalia J., dissenting). With all due respect to the other members of this Court, much the same could be said about the majority opinion in Mr. Kocher's case.

Speaking of the three "guideposts" erected by the majority in *Gore*, Scalia notes that they are of little help, and actually highlight the arbitrary nature of the majority opinion in *Gore*:

> Of course it will not be easy for the States to comply with this new federal law of damages, no matter how willing they are to do so. In truth, the "guideposts" mark a road to nowhere; they provide no real guidance at all. . . .
>
> The Court has constructed a framework that does not genuinely constrain, that does not inform state legislatures and lower courts--that does nothing at all except confer an artificial air of doctrinal analysis upon its essentially ad hoc determination that this particular award of punitive damages was not "fair."

Gore 517 U.S. at 605-06, 116 S.Ct. at 1613-14, 155 L. Ed.2d at 845-46 (Scalia J., dissenting). This is the logical conundrum the high Court and this Court find themselves in when trying to prove that a punitive award is too big - simply because it looks or feels that way to a human mind that does not easily digest large numbers.

Resorting to the sort of examples teachers use with children, a million seconds is over 11 days, but a billion is almost 32 years. The mind rebels at such numbers. The majority noted that Oxford's parent company was worth $3,100,000,000 and that the jury awarded $34,000,000. The award still appears enormous. However, if with some zeros removed we learned that Oxford's parent company was worth $310,000 and the jury awarded punitive damages of $3,400, nobody would bat an eye, or even "raise a suspicious judicial eyebrow," *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 481, 113 S.Ct. 2711, 2732, 125 L.Ed.2d 366, 394 (1993) (O'Connor J., dissenting).

The majority opinion deserves credit for not openly embracing the seductively simple arguments of *Campbell* and *Gore*, but I fear some of that logic has affected the decision to reverse this case. A blind adherence to an arbitrary upper limit or the application of any ratio to a punitive damage award means that, we, as a country, will punish the corner gas station more than a world-wide giant, or the local coffee shop more than some national chain, simply because the giant companies are too wealthy for us to understand. The message we send is, if you are big enough, you can pretty much do what you want.

Because I think the majority opinion sends just this message to Oxford and companies similarly situated, I must respectfully dissent.