No. 31372 - David M. Jackson v. State Farm Mutual Automobile Insurance Policy

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OF WEST VIRGINIA

Davis, J., concurring:

In this proceeding the majority opinion has granted State Farm a new trial, reversed the circuit court's summary judgment ruling on an issue in favor of Mr. Jackson, and affirmed the circuit court's denial of summary judgment to State Farm. I concur in the resolution of each of these issues. I have chosen to write separately to address two issues which I believe to be useful to the resolution of this case.

A. *Using Evidence of an Insurer's Out-of-State Conduct in a Bad Faith Action*

In this proceeding Mr. Jackson introduced evidence of bad faith conduct by State Farm that was litigated in a case filed in the state of Utah. Although the trial court permitted the evidence, it instructed the jury that the Utah case was being reviewed by the United States Supreme Court. Here, State Farm assigned error to the admission of this evidence. The majority opinion glossed over the issue in a footnote without resolving the matter. I believe this is an important federal constitutional issue, because in *State Farm Mutual Insurance v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed.2d 585 (2003) the United States Supreme Court instructed all courts in the nation on how they are to treat such

evidence, when it involves lawful out-of-state conduct by an insurer.[1]

1. Factual background of Campbell. *Campbell* was a first-party bad faith action against an insurer that was filed in Utah. The plaintiff had previously been sued as a result of an automobile accident. The verdict exceeded his liability policy coverage. The insurer refused to pay the excess judgment. The plaintiff thereafter instituted a bad faith claim against his insurer. During the course of the *Campbell* trial, the plaintiff sought to prove that the insurer had a nationwide policy of engaging in bad faith conduct. To prove this contention, the plaintiff was allowed to introduce evidence of "all types" of lawful out-of-state conduct that was committed by the insurer. The jury eventually returned a verdict in favor of the plaintiff. The plaintiff was awarded $1 million in compensatory damages and $145 million in punitive damages. After the Utah supreme court affirmed the judgment, the United States Supreme Court granted certiorari. One of the issues addressed by the Supreme Court involved the use of an insurer's lawful out-of-state conduct.

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[1]The Supreme Court's decision binds us not only as a matter of federal supremacy under the United States Constitution, *see Cooper v. Aaron*, 358 U.S. 1, 18, 78 S. Ct. 1401, 1409, 3 L. Ed. 2d 5, 16 (1958), but as a matter of State Constitutional law as well. W. Va. Const. Art. I, § 1 (. . ."The State of West Virginia is, and shall remain, one of the United States of America. The Constitution of the United States of America . . . Shall be the supreme law of the land.")

2. Guidelines for using evidence of an insurer's out-of-state conduct.

Justice Kennedy, writing for the majority in *Campbell*,[2] indicated that as a general rule, a plaintiff cannot introduce evidence of lawful or unlawful out-of-state conduct by a defendant, *for the sole purpose* of punishing the defendant. The court stated:

> A State cannot punish a defendant for conduct that may have been lawful where it occurred. Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction.

Campbell, 538 U.S. at 421, 123 S.Ct. at 1522, 155 L. Ed. 2d at 603 (citations omitted).

Later, however, in the *Campbell* opinion, the Court carved out an exception to the general rule regarding the introduction of evidence of "lawful" out-of-state conduct by a defendant.[3] The opinion held:

> Lawful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff. A jury must be instructed, furthermore, that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.

. . .

> A defendant should be punished for the conduct that

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[2]Three justices dissented in the case.

[3]Since the facts in *Campbell* involved only *lawful* out-of-state conduct, the opinion did not expressly state that its exception applied to *unlawful* out-of-state conduct.

> harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis.... Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains.

Campbell, 538 U.S. at 422-423, 123 S. Ct. at 1522-1523, 155 L. Ed. 2d at 604 (citations omitted). In essence, Justice Kennedy concluded that there was no nexus between the lawful out-of-state conduct of the insurer and the conduct complained of by the plaintiff. *Campbell*, 538 U.S. at 424, 123 S. Ct. at 1524, 155 L. Ed. 2d at 605.[4]

Before the Utah court, the plaintiffs were permitted to introduce evidence pertaining to State Farm's performance, planning and review or PP&R policy. The PP&R policy pertained to State Farm's business practices for over twenty years in numerous states. In fact, these practices bore no relation to a third-party automobile insurance claim, the type of claim underlying the Campbell's complaint against the company. In determining, that the evidence was inadmissible, the Campbell court held:

> The Campbells have identified scant evidence of repeated misconduct of the sort that injured them. Nor does our review of the Utah court's decisions convince us that State Farm was

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[4]Although the opinion was not explicit, it appears that the Court did not find reversible error in the admission of the improper evidence because other admissible evidence was sufficient to warrant punishment.

> only punished for its actions toward the Campbells. Although evidence of other acts need not be identical to have relevance in the calculation of punitive damages, the Utah court erred here because evidence pertaining to claims that had nothing to do with a third-party lawsuit was introduced at length. Other evidence concerning reprehensibility was even more tangential. For example, the Utah Supreme Court criticized State Farm's investigation into the personal life of one of its employees and, in a broader approach, the manner in which State Farm's policies corrected its employees.

538 U.S. 408 at 423-424, 123 S. Ct. at 1523, 155 L. Ed. 2d at 605.

In concluding the Court held:

> In this case, because the Campbells have shown no conduct by State Farm similar to that which harmed them, the conduct that harmed them is the only conduct relevant to the reprehensibility analysis.

538 U.S. 408 at 424,123 S. Ct. at 1524, 155 L. Ed. 2d at 605.

In summary, the ruling in *Campbell* on the use of a defendant's lawful out-of-state is binding on the courts of West Virginia. *Campbell* based its ruling on the requirements of the Due Process Clause of the Fourteenth Amendment.[5] Insofar as *Campbell's* ruling is constitutionally based, I believe the majority opinion should have addressed this matter.

B. The Standard for Assessing Whether Punitive Damages Are Excessive

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[5]*See supra* fn.1.

In the instant case, State Farm also assigned error on the issue of the amount of punitive damages awarded by the jury. The majority opinion declined to address the issue because a new trial was being granted. I believe the majority opinion should have addressed the issue in light of principles set out by the Supreme Court in *Campbell*.

As I previously indicated, in *Campbell* the jury awarded the plaintiff one-million dollars in compensatory damages and one hundred forty five million dollars in punitive damages. In its appeal to the United States Supreme Court, the insurer argued that the amount of punitive damages violated due process. The Supreme Court agreed with the insurer. In doing so, the opinion indicated the following:

> We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. . . . While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with [greater] ratios. . . .

Campbell 538 U.S. at 425, 123 S.Ct. at 1524, 155 L. Ed. 2d at 605-606 (citations and internal quotation marks omitted).

Campbell reversed the punitive damages award and remanded the case to the

Utah supreme court for reconsideration of the award. On remand, the Utah supreme court reduced the punitive damages award and held that the "insurer's conduct warranted punitive damages of $9,018,780.75, nine times the compensatory and special damages for emotional distress[."] *Campbell v. State Farm Mut. Auto. Ins. Co.*, 2004 WL 869188 (Utah Apr. 23, 2004). *See Bardis v. Oates*, 119 Cal. App. 4th 1, (2004), 14 Cal. Rptr.3d 89, 92 (2004) ("[I]n light of recent due process constraints laid down by the United States Supreme Court in *State Farm Mutual Insurance v. Campbell*, we shall modify the punitive damages award from $7 million to $1.5 million, and affirm the judgment as modified."). *But see Reatta Resources, Inc. v. Kraft*, 2004 WL 423144, at *2 (Tex.App.-Dallas Mar. 9, 2004) ("Reatta has not shown error apparent on the face of the record merely by pointing to a 33 to 1 ratio of punitive damages to compensatory damages. Therefore, we are unable to conclude from the ratio alone that the punitive damage award is excessive.").

In view of the foregoing, I concur.