No. 31372 – David M. Jackson v. State Farm Mutual Automobile Insurance Company

No. 31643 – David M. Jackson v. State Farm Mutual Automobile Insurance Company

Maynard, Chief Justice, concurring, in part, and dissenting, in part:

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I concur in the ultimate disposition of these combined cases. I also concur with the new law articulated in the majority opinion in Syllabus Points 3, 4, and 5. However, I dissent to the law on when liability is "reasonably clear" as set forth in Syllabus Point 2, and I strongly dissent to the majority opinion's treatment of the punitive damages issue.

First, I do not agree with the majority opinion's definition of "reasonably clear." As noted by the majority opinion, the usual definition of clear is "evident" or "plain." In addition, other courts have construed the words "reasonably clear" to demand a significant degree of certainty. As quoted, but subsequently ignored, by the majority opinion, *American Universal Ins. Co. v. Medical Malpractice Joint Underwriting Ass'n of Mass.*, 1993 WL 818614 *22 (Mass.Super.), provides:

> "Reasonably *clear*" seems also to call for a higher level of certainty than "reasonably *likely*" would. The legislative choice of the word "clear" seems to suggest that the matter has reached a point where reasonable minds could not honestly differ. Liability need not be absolutely certain, or beyond reasonable doubt, but it must be "clear" enough that reasonable people would agree about it. Put conversely, if there is room for objectively reasonable debate about whether liability exists,

then it is not "reasonably clear."

During this Court's consideration of the instant cases, I proposed a new syllabus point on the definition of "reasonably clear" as follows:

> "Reasonably clear" as stated in W.Va. Code § 33-11-4(9)(f) (2002), means that liability is so plain that reasonable people, with knowledge of the relevant facts and law, could not honestly differ on the conclusion that the defendant-insured is liable to the plaintiff.

I believe that this definition accords with the usual meaning of "clear." In contrast, there is little or no difference between the majority opinion's definition of "reasonably clear" and the common definition of "preponderance of the evidence" which the circuit court used in improperly granting partial summary judgment to Mr. Jackson. In light of the majority opinion's definition, it is likely that the circuit court judge below will wonder why his summary judgment order is reversed.

In addition, I strongly disagree with the majority opinion's cursory treatment of the punitive damages issue. Although we reverse and remand on other grounds, the propriety of the punitive damages award below was briefed and argued before this Court. In addition, the briefs of both parties cite the United States Supreme Court case of *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003), which was decided since the trial below. *Campbell* is highly relevant to both the type of evidence which may be admitted to prove the appropriateness of punitive damages as well

as whether a punitive damages award is excessive, both of which are issues in this case. Nevertheless, the majority opinion merely refers this landmark case to the circuit court without further comment and without giving him a clear roadmap.

In *Campbell*, the insureds brought an action against their insurer, State Farm, to recover for bad-faith failure to settle within the policy limits and damages for fraud and intentional infliction of emotional distress. A jury awarded the insureds $2.6 million in compensatory damages and $145 million in punitive damages, which the trial court reduced to $1 million and $25 million respectively. On appeal, the Utah Supreme Court reinstated the $145 million punitive damages award. The United States Supreme Court subsequently reversed the punitive damages award because it found it to be "neither reasonable nor proportionate to the wrong committed," and "an irrational and arbitrary deprivation of the property of the defendant" in violation of the Fourteenth Amendment. *State Farm v. Campbell*, 538 U.S. at 429, 123 S.Ct. at 1526. In reaching this conclusion, the Supreme Court discussed the type of evidence that may be admitted in proving the appropriateness of punitive damages.

The insureds in *Campbell* sought to show the reprehensible conduct of State Farm by introducing evidence of State Farm's business practices for over 20 years in numerous states. The Court found this evidence to be improper. First, the Court said that "[a] State cannot punish a defendant for conduct that may have been lawful where it

occurred." 538 U.S. at 421, 123 S.Ct. at 1522 (citations omitted). The Court explained, however, that

> 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.

538 U.S. at 422, 123 S.Ct. at 1522-23 (citation omitted). Second, the Court expounded that, as a general rule, a State has no legitimate concern "in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction. Any proper adjudication of conduct that occurred outside Utah to other persons would require their inclusion, and, to those parties, the Utah courts, in the usual case, would need to apply the laws of their relevant jurisdiction." 538 U.S. at 421-22, 123 S.Ct. at 1522 (citation omitted).

The Court's conclusion that improper evidence was admitted in *Campbell* specifically was based on its finding that,

> The courts awarded punitive damages to punish and deter conduct that bore no relation to the [insureds'] harm. A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.

538 U.S. at 422-23, 123 S.Ct. at 1523. The Court further explained:

> The [insureds] have identified scant evidence of repeated misconduct of the sort that injured them. Nor does our review of the Utah courts' decisions convince us that State Farm was only punished for its actions toward the [insureds]. 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[1] 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 corrupted its employees. The [insureds'] attempt to justify the court's reliance upon this unrelated testimony on the theory that

[1]The insureds' action against their insurer, State Farm, was what we call an excess verdict bad faith claim. The facts were that the driver insured by State Farm attempted to pass six vans traveling on a two-lane highway when his vehicle was involved in a three-vehicle accident in which the driver of one of the other vehicles was killed and the driver of the remaining vehicle was permanently disabled. In the ensuing wrongful death and tort action, the insured driver insisted that he was not at fault. State Farm contested liability and declined offers to settle for the policy limit of $50,000 ($25,000 per claimant). A jury determined that the insured driver was 100 percent at fault, and a judgment was returned for $185,849. At first, State Farm refused to cover the $135,849 in excess liability. Its counsel remarked to the insureds, "You may want to put for sale signs on your property to get things moving." Moreover, State Farm refused to post a supersedeas bond to allow the insured driver to appeal the judgment against him. As a result, the insured driver obtained his own counsel to appeal the verdict. While the appeal was pending, the insured driver reached an agreement with the plaintiffs whereby the plaintiffs agreed not to seek satisfaction of their claims against the insureds. In exchange, the insureds agreed to pursue a bad faith action against State Farm and to be represented by the plaintiffs' attorneys.

> each dollar of profit made by underpaying a third-party claimant is the same as a dollar made by underpaying a first-party one. For the reasons already stated, this argument is unconvincing. The reprehensibility guidepost does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance, which in this case extended for a 20-year period. In this case, because the [insureds] 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. at 423-24, 123 S.Ct. at 1523-24 (citation omitted).

The Court in *Campbell* further discussed constitutional limits on the ratio between the amount of the compensatory damages award and the punitive damages award. While the Court declined to impose a bright-line ratio which a punitive damages award cannot exceed, it opined that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." 538 U.S. at 425, 123 S.Ct. at 1524. The Court explained that "[s]ingle-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of . . . 145 to 1." *Id.* However,

> ratios greater than those we have previously upheld may comport with due process where "a particularly egregious act has resulted in only a small amount of economic damages." [*BMW of North America, Inc. v. Gore,* 517 U.S. 559, 582, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). . . . The converse is also true, however. When

> compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.

538 U.S. at 425, 123 S.Ct. at 1524. The Court concluded that "courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." 538 U.S. at 426, 1235 S.Ct. at 1524.

Based on the Supreme Court's analysis in *Campbell*, I proposed three new syllabus points, all of which are taken verbatim from *Campbell*. These proposed syllabus points, which were rejected by the majority, are as follows:

> ! In a claim for unfair settlement practices under W.Va. Code § 33-11-4(9) (2002), a State cannot punish a defendant for conduct that may have been unlawful 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.
>
> ! In a claim for unfair settlement practices under W.Va. Code § 33-11-4(9) (2002), 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.
>
> ! In assessing the constitutionality of a

> punitive damages award under the due process clause, single-digit multipliers are more likely to comport with due process, while still achieving the State's goal of deterrence and retribution, than awards with greater ratios. However, greater ratios may comport with due process where a particularly egregious act results in only a small amount of damages. The converse is also true. When compensatory damages are substantial, a lesser ratio, perhaps equal only to compensatory damages, may reach the outermost limit of the due process guarantee.

On remand, if called upon to assess the appropriateness of a punitive damages award, the trial court is bound to follow the rules above which are taken straight from *Campbell.* Significantly, *Campbell* is based on the Due Process Clause of the Federal Constitution and applies to all of the states. Unfortunately, although I do not know for certain, I fear that the majority of this Court rejected these proposed syllabus points because it does not like *Campbell.* I fervently hope that the next time a punitive damages award is reviewed by this Court, the majority will abide by the United States Supreme Court's decision in *Campbell,* even if it does not like or agree with *Campbell's* holdings. The rule of law demands that ordinary citizens follow laws with which they do not agree. Likewise, we as judges are bound by controlling legal precedent. *Campbell* is the law of the land, and it must be applied everywhere in the United States, including in West Virginia.

For the reasons set forth above, I concur, in part, and dissent, in part.