No. 31372 - *Jackson v. State Farm Insurance*

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McGraw, Justice, concurring:

I write separately to note that I would have voted to affirm the lower court, but lacking sufficient company to embark upon that course, I find it necessary to concur with the decision of the majority. Morever, I write because the parties and the majority have made mention of the U.S. Supreme Court's opinion in *State Farm v. Campbell*,[1] as a case that the lower court should consider upon remand. The defendant in that case, State Farm, like the defendant in the instant case, State Farm,[2] was accused of what we call "bad faith." In order to view that decision in its proper context, it may be informative for all to be aware of the underlying conduct in that case.

The U.S. Supreme Court has stated that "the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575, 116 S.Ct. 1589, 1599, 134 L.Ed.2d 809, 826 (1996). With that thought in mind, a review of State Farm's breathtaking reprehensibility in the *Campbell* case is worthy of note. In the words, of the six justice majority opinion, that in the end granted a huge victory to State Farm:

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[1]538 U.S. 408, 123 S.Ct. 1513, 155 L Ed. 2d 585 (2003).

[2]No assertion is made in this separate opinion that the two defendants are necessarily the same entity.

> [W]e must acknowledge that State Farm's handling of the claims against the Campbells merits no praise. The trial court found that State Farm's employees altered the company's records to make Campbell appear less culpable. State Farm disregarded the overwhelming likelihood of liability and the near-certain probability that, by taking the case to trial, a judgment in excess of the policy limits would be awarded. State Farm amplified the harm by at first assuring the Campbells their assets would be safe from any verdict and by later telling them, postjudgment, to put a for-sale sign on their house.

State Farm v. Campbell, 538 U.S. 408, 419, 123 S.Ct. 1513, 1521, 155 L Ed. 2d 585, 602 (2003). And this is the description given to us by the majority of the Court that was *favorable* to State Farm.

Justice Ginsburg, who dissented along with Justices Scalia and Thomas, filled in the details of the plaintiffs' case, which was based upon State Farm's alleged nationwide scheme called the "Performance, Planning & Review" program. As Justice Ginsburg explains, the Campbells proved to the satisfaction of the Utah Court that State Farm had:

> demonstrated that the PP & R program regularly and adversely affected Utah residents. Ray Summers, the adjuster who handled the Campbell case and who was a State Farm employee in Utah for almost twenty years, described several methods used by State Farm to deny claimants fair benefits, for example, falsifying or withholding of evidence in claim files. A common tactic, Summers recounted, was "to unjustly attac[k] the character, reputation and credibility of a claimant and mak[e] notations to that effect in the claim file to create prejudice in the event the claim ever came before a jury." State Farm manager Bob Noxon, Summers testified, resorted to a tactic of this order in the Campbell case when he "instruct[ed] Summers to write in the file that Todd Ospital (who was killed in the accident) was

> speeding because he was on his way to see a pregnant girlfriend." In truth, "[t]here was no pregnant girlfriend."

Campbell, 538 U.S. at 432,123 S.Ct. at 1528, 155 L Ed. 2d at ___ (2003) (Ginsburg, J., dissenting) (some internal quotations and citations omitted). As if besmirching the reputation of a dead man before the jury were not enough, the plan also involved destroying key documents, padding files, and "has functioned, and continues to function, as an unlawful scheme ... to deny benefits owed consumers by paying out less than fair value in order to meet preset, arbitrary payout targets designed to enhance corporate profits." *Id.* (internal quotations and citations omitted). Finally, and most damning, Justice Ginsburg remarked:

> The trial court further determined that the jury could find State Farm's policy "deliberately crafted" to prey on consumers who would be unlikely to defend themselves. In this regard, the trial court noted the testimony of several former State Farm employees affirming that they were trained to target "the weakest of the herd"--the elderly, the poor, and other consumers who are least knowledgeable about their rights and thus most vulnerable to trickery or deceit, or who have little money and hence have no real alternative but to accept an inadequate offer to settle a claim at much less than fair value.

Campbell, 538 U.S. at 433,123 S.Ct. at 1528-29, 155 L Ed. 2d at 610 (2003) (Ginsburg, J., dissenting) (internal citations and quotations omitted). Furthermore, the Campbells introduced evidence that local State Farm managers were under instructions to not report any judgment against them less than *100 million dollars*, and that only an award of this magnitude could discourage State Farm from its unlawful activity.

It is in the context of this heinous conduct that one should pass judgment on the size of the punitive award. Unfortunately, the majority of the nine justices did not focus on "the degree of reprehensibility of the defendant's conduct," *Gore*, *supra*, but instead chose to substitute the jury's judgment with their own. *Campbell*, 538 U.S. at 431,123 S.Ct. at 1527, 155 L Ed. 2d at 610 (2003) (Ginsburg, J., dissenting). Nonetheless, it is worth noting these facts because the truth is too often lost in the excitement that surrounds a large award. The media is quick to report a multi-million dollar award, but often slow to report the conduct giving rise to that award, if at all. Opinion pages are quick to parrot the defense lawyer's comment that the verdict is "outrageous" or "excessive," but usually silent when it comes to explaining the facts behind the headline.[3]

It is not ours to judge whether the high Court did the right thing in reducing the 145 million dollar award in *Campbell*, but it is vital that we not be blinded by the sheer size of an award when considering its validity. As noted in my dissent in *Kocher v. Oxford Life Insurance Company*, ___ W. Va. ___, ___ S.E.2d ___ (No. 31539, July ___, 2004), courts should not shy away from a large punishment, if the defendant received all the procedural protections our law requires, just because the number is hard for us to conceptualize. Sometimes very wealthy defendants must be subject to very large damage awards, if that is

[3]*See*, Ned Miltenberg, Erwin Chemerinsky, *Punitive Damages After Campbell, Smith, and Romo*, 39 Aug Trial 18 (2003).

what it will take to deter future antisocial conduct. Simple ratios are unlikely to produce justice in complex, real world cases.

I echo the majority's recommendation that the retrial in this case be conducted in accord with our longstanding damages jurisprudence found in *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991), *TXO Production Corp. v. Alliance Resources Corp.*, 187 W. Va. 457, 419 S.E.2d 870 (1992), *aff'd*, 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993), and their progeny.[4]

[4]The United States Supreme Court's decisions in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993), and *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991) are also relevant to the extent they have not been expressly overruled by *Campbell.*