

No. 31671 - John Boyd, Markus Spear, Jason Brown, and Rich Fadse v. Tom Goffoli, Falcon Transport Company, a corporation; John Magliocca, dba J.J. Trucking Consultants, and John Magliocca, dba Training Alternatives Falcon Transport Company, a corporation

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Davis, J., concurring:

In this well written decision the majority opinion has affirmed a punitive damage award. I concur in the conclusion reached on this issue. I have chosen to write separately to underscore what I perceive to be limitations on the reach of the majority decision as it concerns punitive damages and evidence of unlawful out-of-state conduct by a defendant.

Campbell Revisited

The defendant in the instant case argued that the decision in *State Farm Mutual Insurance v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003), was violated because the trial court allowed the introduction of evidence of unlawful out-of-state conduct by the defendant against nonlitigants. The majority opinion rejected this argument after finding that “in this case, unlike *Campbell*, there was no evidence presented regarding specific unlawful acts against others perpetrated by Appellant.” Majority slip op. at 13.¹

¹To be clear, the sole evidence concerning other out-of-state illegal conduct by the defendant was presented in the context of a statement made to the plaintiffs by Mr. Goffoli

Because the jury was never presented with evidence of specific unlawful conduct committed by the defendant against nonlitigants, the majority correctly found that *Campbell* was not violated.

1. Application of *Campbell* to out-of-state conduct against nonlitigants.

The decision in *Campbell* involved a first-party bad faith action brought against an insurer in the state of Utah. During the course of the trial, the plaintiff sought to establish that the insurer had a nationwide policy of engaging in bad faith conduct in settling claims. To prove their theory, the plaintiff introduced evidence of “all types” of lawful out-of-state conduct that was committed by the insurer. The jury eventually returned a verdict awarding the plaintiff \$1 million in compensatory damages and \$145 million in punitive damages. The Utah Supreme Court affirmed the judgment. Subsequently, 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 against *persons other than the plaintiff* for the purpose of assessing punitive damages.

that the proposed licensing scheme was something the defendants did “all the time.” This evidence was admissible as a party admission notwithstanding *Campbell*. See *Board of Educ. of McDowell County v. Zando, Martin & Milstead, Inc.*, 182 W. Va. 597, 614, 390 S.E.2d 796, 813 (1990) (“Both Rule 801(d)(2)(D) of the West Virginia Rules of Evidence and our prior law recognize that statements made by an agent or employee within the scope of his agency or employment and during the existence of the agency or employment relationship are not hearsay and are admissible against a principal or employer who is a party to the litigation.”).

The Supreme Court made two dispositive rulings on the issue of out-of-state conduct perpetrated against nonlitigants as it relates to punitive damages. First, *Campbell* held that,

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.

538 U.S. at 421, 123 S.Ct. at 1522, 155 L.Ed.2d at 603 (citations omitted). Second, the decision carved out an exception to the general rule regarding the use of evidence of a defendant's "lawful" out-of-state conduct against nonlitigants:

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.

Campbell, 538 U.S. at 422, 123 S.Ct. at 1522-1523, 155 L.Ed.2d at 604 (citation omitted).

On a previous occasion I have pointed out that "[s]ince the facts in *Campbell* involved only *lawful* out-of-state conduct [against nonlitigants], the opinion did not expressly state that its exception applied to *unlawful* out-of-state conduct [against nonlitigants]." *Jackson v. State Farm Mut. Auto. Ins. Co.*, ___ W. Va. ___, ___ n.3, 600 S.E.2d 346, 361 n.3 (2004) (Davis, J., concurring) (emphasis in original). Accordingly, I believe that the question of whether or to what extent *unlawful* out-of-state conduct against non-litigants may be used

remains unanswered by *Campbell*.

2. Application of *Campbell* to unlawful out-of-state conduct against nonlitigants. The decision in *Campbell* made clear that, as a general matter, “a plaintiff cannot introduce evidence of . . . unlawful out-of-state conduct by a defendant, *for the sole purpose* of punishing the defendant.” *Jackson*, ___ W. Va. at ___, 600 S.E.2d at 361 (Davis, J., concurring) (emphasis in original). Insofar as *Campbell* was concerned with “lawful” out-of-state conduct, it did not reach the question of whether an exception exists that would allow the introduction of evidence of “unlawful” out-of-state conduct against nonlitigants.

In the instant case, the defendant argued that the trial court allowed the introduction of evidence of unlawful out-of-state conduct by the defendant against nonlitigants. The defendant further contended that the introduction of such evidence violated *Campbell*. The majority opinion correctly found that the issue did not have to be reached, because plaintiffs did not introduce evidence of specific unlawful out-of-state conduct by the defendant against nonlitigants. Instead, the opinion correctly addressed the more narrow issue of unlawful out-of-state conduct committed against the plaintiffs.

Campbell clearly does not prohibit or impose limitations on the use of evidence that shows a defendant’s tortious conduct against a litigant involved unlawful out-of-state conduct. Indeed, *Campbell* held that “[a] defendant should be punished for the conduct that

harmed the plaintiff[.]” *Campbell*, 538 U.S. at 423, 123 S.Ct. at 1523, 155 L.Ed.2d at 604.

Under *Campbell*,

Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other [nonparties’] hypothetical claims against a defendant. . . . 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.

538 U.S. at 423, 123 S.Ct. at 1523, 155 L.Ed.2d at 604 (citation omitted).

In the final analysis, the new syllabus point created in the majority opinion stands for the sole proposition that West Virginia “has a legitimate interest in imposing damages to punish a defendant for unlawful acts committed outside th[e] State’s jurisdiction where . . . the plaintiffs’ claims . . . arise from the unlawful out-of-state conduct.” Nothing in the new syllabus point or the majority opinion should be interpreted to mean that the Court has carved out an exception to *Campbell’s* general prohibition on the use of evidence of unlawful out-of-state conduct by a defendant against nonlitigants. Whether or not an exception exists still remains to be decided.

In view of the foregoing, I concur.