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*

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Starcher, J., concurring:

In this case, the defendants essentially contended that this Court should give an expansive reading to *State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). The well-written majority opinion rightly opted to give *Campbell* a narrow interpretation in deciding to uphold the jury's punitive damage verdict.

I write separately to make clear that, when examined objectively, *Campbell* was not a significant decision by the U.S. Supreme Court. It did not dramatically alter the punitive damage landscape, and actually did little more than reiterate the standards of review established in prior cases. As one court has noted:

> *State Farm*[*v. Campbell*] adds no new, free-standing factor to the constitutional analysis of punitive damages. . . . It is the court's view that *State Farm*[*v. Campbell*], while bringing the *BMW* [*of North America, Inc. v. Gore*, 517 U.S. 559 (1996)] guideposts into sharper focus, does not change the analysis. In fact, there are aspects of the due process evaluation of punitive damage awards which have not changed at all as a result of *State Farm*[*v. Campbell*].

In re the Exxon Valdez, 296 F.Supp.2d 1071, 1076 (D. Alaska 2004).

A.
Out-of-State Conduct is Admissible Under Campbell

The defendants in this case loosely argued that because the plaintiffs were injured by "out-of-state conduct," *Campbell* prevented the jury from awarding punitive damages. *Campbell* did no such thing.

The *Campbell* Court made clear that only two types of out-of-state conduct cannot be constitutionally considered by a judge or jury in making a punitive damage award. First, out-of-state conduct, even unlawful out-of-state conduct, that has no nexus to the conduct at issue in the case is inadmissible. Frankly, I am not sure why this rule rises to a constitutional level because such evidence should usually be excluded as irrelevant under our *Rules of Evidence*, but there it is. Second, the *Campbell* Court concluded that out-of-state conduct that is lawful where it occurs would generally not be admissible. However, the Court expressly stated that some lawful out-of-state conduct may still be considered:

> Lawful out-of-state conduct may be probative in a civil action 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.

Campbell, 538 U.S. at 422.

The unlawful conduct in the instant case – the defendant's actions in assisting and encouraging the plaintiffs to violate Pennsylvania law – clearly had a nexus to the plaintiffs' injuries. Further, the statement by Tom Goffoli to the plaintiffs that the out-of-state licensing scheme was something the defendants did "all the time" was probative evidence because it demonstrated the deliberateness and culpability of the defendants'

actions. There is simply no procedural or constitutional prohibition that would prevent this evidence from being used to support a punitive damage award.

B.
Campbell *Allows Punitive Damages to be Related to the Degree of Reprehensibility of the Defendant's Conduct*

As the majority opinion notes, the *Campbell* Court reiterated: "The most important indicium of reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." 538 U.S. at 418 (*quoting BMW*, 517 U.S. at 575).

The *Campbell* Court – relying upon its prior opinion in *BMW* – laid out five sub-factors for determining the degree of a defendant's reprehensibility: (1) whether "the harm caused was physical as opposed to economic"; (2) whether "the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others"; (3) whether "the target of the conduct had financial vulnerability"; (4) whether "the conduct involved repeated actions or was an isolated incident"; and (5) whether "the harm was the result of intentional malice, trickery, or deceit, or mere accident." *Id*.

There is absolutely nothing in *Campbell* to suggest that all or most of these sub-factors must be present to support a punitive damage award. Instead, the threshold for supporting a punitive damage verdict seems to hover at, or just above, the presence of just one of the reprehensibility sub-factors. As the Court suggested, the "existence of any one

of these [reprehensibility] factors . . . may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." *Id*.

Furthermore, the Court has repeatedly recognized that when the defendant is a repeat offender, strong medicine is needed to get the defendant's attention regardless of the existence of any other factor delineated by the Court.

> Certainly, evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that *strong medicine* is required to cure the defendant's disrespect for the law. Our holdings that a recidivist may be punished more severely that a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance.

BMW, 517 U.S. at 576-77 (citations omitted, emphasis added). *See also TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 462 n.28 (1993).

In this case, the jury properly assessed the defendants' conduct, and their punitive damage verdict encompassed the reprehensibility of that conduct.

C.
Campbell *Did Not Limit Punitive Damages to a Single Digit Ratio*

The defendants in this case creatively interpreted the jury's $300,000.00 compensatory damage verdict as consisting of only $118,992.00 in "real" damages. The defendants then argued that the true ratio of compensatory damages to the $1,000,000.00 in

punitive damages was not 3.3 to 1, but rather 8.4 to 1, a ratio the defendants asserted was unconstitutional under *Campbell*.

What the defendants overlooked in their argument is that nowhere in *Campbell* did the U.S. Supreme Court impose an exact mathematical formula for constitutionally permissible and impermissible punitive damages. There is no constitutionally-created limit upon the ratio between compensatory and punitive damages. The *Campbell* Court explicitly reaffirmed that there is no "bright-line" rule, stating: "We decline again to impose a bright-line ratio which a punitive damages award cannot exceed." 538 U.S. at 425.

Instead, the Court noted that "[o]ur jurisprudence" demonstrates that "in practice," "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id*. Thus, under *Campbell* only punitive damages in a "few" cases will permissibly exceed a single-digit ratio to compensatory damages "to a significant degree." Rather than rule that punitive damages can never exceed single digit ratios, the *Campbell* Court recognized just the opposite. While ratios closer to single digits are more likely to be constitutionally appropriate, there is nothing preventing a higher ratio when the circumstances warrant.

Nowhere does the Court discuss the constitutional basis or meaning of punitive damages that exceed a single digit ratio by "a significant degree," but the Court continues to stand by its prior opinions upholding ratios of punitive damages far in excess of single digits. For instance, in *TXO*, the U.S. Supreme Court affirmed a West Virginia jury's

punitive damage verdict that was 526 times greater than the compensatory damages.[1] In a concurring opinion to *TXO*, Justice Kennedy – who later authored *Campbell* – stated unequivocally that the *TXO* award would still be permissible under the standards enunciated in *Campbell*:

> The Constitution identifies no particular multiple of compensatory damages as an acceptable limit for punitive awards; it does not concern itself with dollar amounts, ratios, or the quirks of juries in specific jurisdictions . . . I do not agree that [the punitive to compensatory ratio relied upon by the majority] provides a constitutionally adequate foundation for concluding that the punitive damage verdict against TXO was rational.

TXO, 509 U.S. at 467-68. Justice Kennedy went on to state that he found the award in *TXO* appropriate because of the evidence that the defendant had acted with malice as part of a "pattern and practice of fraud, trickery and deceit" and "unsavory and malicious practices." He also found the award supported by TXO's "vast financial resources," and the fact that "TXO would suffer only as a result of a large judgment. 509 U.S. at 469.

The only conclusion to take away is that the defendants' argument in this case was balderdash. *Campbell* did not prescribe a mathematical, bright-line rule of ratios between punitive and compensatory damages. The jury in the instant case properly

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[1]In *TXO*, a West Virginia jury determined that the defendant TXO, a large oil company, intentionally sought to cloud the plaintiff's title to oil and gas rights which TXO desired to purchase. TXO's actions were found to be malicious and part of a broad practice of fraud. The jury awarded the plaintiff $19,000.00 in compensatory damages to clear the title to the oil and gas rights, and $10,000,000 in punitive damages. *See TXO Production Corp. v. Alliance Resources Corp.*, 187 W.Va. 457, 419 S.E.2d 870 (1992), *aff'd* 509 U.S. 443 (1993).

exercised its judgment and discretion, and related its punitive damage verdict to the reprehensibility of the defendants' conduct, and there was no constitutional requirement that they limit their assessment of the defendants' reprehensibility by some mathematical ratio.

I therefore respectfully concur with the majority's opinion.