IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2005 Term

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 32552

IN RE: TOBACCO LITIGATION
(PERSONAL INJURY CASES)

Certified Question from the Circuit Court of Ohio County
Honorable Arthur M. Recht, Judge
Civil Action No. 00-C-5000

CERTIFIED QUESTION ANSWERED

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JUSTICE MAYNARD delivered the Opinion of the Court.
JUSTICE STARCHER concurs and reserves the right to file a concurring opinion.
JUSTICE BENJAMIN concurs and reserves the right to file a concurring opinion.

SYLLABUS

The United States Supreme Court's decision in *State Farm v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003), does not preclude the bifurcation of a trial into two phases wherein certain elements of liability and a punitive damages multiplier are determined in the first phase and compensatory damages and punitive damages, based on the punitive damages multiplier, are determined for each individual plaintiff in the second phase.

Maynard, Justice:

This case concerns the following certified question from the Circuit Court of Ohio County:

> Does the Due Process Clause of the Fourteenth Amendment to the Federal Constitution, as interpreted by State Farm v. Campbell, preclude a bifurcated trial plan in a consolidated action consisting of personal injury claims of approximately 1,000 individual smokers, wherein Phase I of the trial would decide certain elements of liability and a punitive damages multiplier and Phase II of the trial would decide for each plaintiff compensatory damages and punitive damages based upon the punitive damages multiplier determined in Phase I?

For the reasons that follow, we answer the certified question in the negative.

I.

FACTS

On September 28, 1999, then Chief Justice Larry Starcher entered an administrative order, pursuant to Rule 26 of the West Virginia Trial Court Rules for Trial Courts of Record, consolidating and transferring all similar tobacco litigation pending at that time to the Circuit Court of Ohio County with Judge Arthur M. Recht, a member of the Mass Litigation Panel, presiding. According to the parties, the litigation now includes approximately 1,100 individual plaintiffs' claims.

On January 11, 2000, the circuit court entered a "Case Management Order/Trial

Plan"[1] that ordered the consolidation of all pending personal injury tobacco cases in a single consolidated trial, with the trial issues to be bifurcated as follows:

> (a) Phase I - General liability issues common to all defendants including, if appropriate, defective product theory; negligence theory; warranty theory; and any other theories supported by pretrial development.
>
> Also to be tried in Phase I will be entitlement to punitive damages[.]
>
> (b) Phase II - Individual claims of the plaintiffs whose cases have been consolidated. Either separate individual juries, judge or judges will independently address issues unique to each plaintiff's compensatory damages and any other individual issues in reasonably sized trial groups or on an individual basis.

The defendant tobacco companies ultimately moved to revise this trial plan by removing the issue of the entitlement to and, if appropriate, the amount of punitive damages from the jury's consideration in Phase I of the trial based on the U.S. Supreme Court case of *State Farm v. Campbell,* 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003). By order of June 16, 2004, the circuit court vacated and set aside the January 11, 2000, trial plan order.

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[1]This Court has recognized that trial courts have significant leeway in implementing a mass trial format. *State ex rel. Mobil Corp. v. Gaughan,* 211 W.Va. 106, 563 S.E.2d 419 (2002), *cert denied, Mobil Corp. v. Adkins,* 537 U.S. 944, 123 S.Ct. 346, 154 L.Ed.2d 252 (2002). In Syllabus Point 3 of *State ex rel. Appalachian Power Co. v. MacQueen,* 198 W.Va. 1, 479 S.E.2d 300 (1996), we held:

> A creative, innovative trial management plan developed by a trial court which is designed to achieve an orderly, reasonably swift and efficient disposition of mass liability cases will be approved so long as the plan does not trespass upon the procedural due process rights of the parties.

The circuit court found that *Campbell* stands for the principle that the conduct of a party against whom punitive damages are sought must have a direct nexus to a specific person who claims to have been damaged by that conduct. The circuit court further found that "[t]he emphasis upon a subjective analysis of the defendant's conduct vis-a-vis a specific plaintiff requires that the defendant's conduct be tailored to each plaintiff[,]" and concluded that this could not be accomplished under the existing trial plan order. The circuit court certified the question set forth above to this Court in a September 24, 2004, order and answered the question in the affirmative.

II.

STANDARD OF REVIEW

"The appellate standard of review of questions of law answered and certified by a circuit court is *de novo.*" Syllabus Point 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W.Va. 172, 475 S.E.2d 172 (1996).

III.

DISCUSSION

The issue before is whether the United States Supreme Court's decision in *State Farm v. Campbell,* 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003) precludes bifurcation as originally ordered by the circuit court wherein the punitive damages multiplier would be determined prior to the assessment of compensatory damages for each plaintiff.

The plaintiffs below support the circuit court's vacated trial plan. They assert that the plan did not violate *Campbell,* which, they allege, is not a fundamental change of long-standing punitive damages law but rather is perfectly consistent with such law. The defendant tobacco companies, on the other hand, challenge the circuit court's trial plan essentially on the basis that it violates *Campbell* by permitting the plaintiffs to show the reprehensibility of the defendants' conduct,[2] for the purpose of proving the appropriateness of punitive damages, by admitting evidence of conduct that was dissimilar to the conduct that injured particular plaintiffs. The defendants assert that evidence of prior bad conduct must be related to the defendant's actions toward individual plaintiffs in order to be relevant to the punitive damages analysis.

In *Campbell,* the insureds brought an action against their insurer, State Farm,

[2]In *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991), this Court held that the jury may consider the reprehensibility of the defendant's conduct including whether and how often the defendant engaged in similar conduct in the past. We believe that *Campbell* does not materially alter this holding. Rather, *Campbell* generally addresses the requirement that evidence of prior bad conduct must be "similar."

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. *Campbell*, 538 U.S. at 429, 123 S.Ct. at 1526. The Court explained that the insureds' attempt to show the reprehensible conduct of State Farm by introducing evidence of State Farm's business practices for over 20 years in numerous states was constitutionally improper. According to the Court:

> 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 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 courts' reliance upon this unrelated testimony on the theory that 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 (citations omitted).

After carefully considering the parties' arguments and the Supreme Court's decision in *Campbell,* this Court finds that *Campbell,* which did not involve mass tort litigation, does not per se preclude the circuit court's original trial plan. We emphasize that the question before this Court is a narrow one. Accordingly, our answer is strictly limited to this narrow question. Our response is limited to the issue of whether *State Farm v. Campbell* precludes a bifurcated trial plan like the one below. Further, we do not address whether there may be other legal reasons to question the circuit court's bifurcated trial plan. Nor do we, or indeed can we, address in the abstract the specific evidence that may be presented on the issue of reprehensibility. Our conclusion in this case simply is, first, we find nothing in *Campbell* that mandates a reexamination of our existing system of mass tort litigation. Second, we find nothing in *Campbell* that per se precludes a bifurcated trial plan in which a punitive damages multiplier is established prior to the determination of individual compensatory damages. Beyond this, we leave more specific issues for another day. As this Court stated in *State ex rel. Mobil Corp. v. Gaughan*, 211 W.Va. 106, 563 S.E.2d 419 (2002),

> we cannot substantively address Mobil's concerns regarding the

> potential use of a matrix, or a punitive damage multiplier, because the trial court has not yet definitively ruled upon the use of either of these mechanisms. Accordingly, any consideration of these issues at this time would be clearly premature. The trial court's announcement to postpone for the time being, any decision regarding the potential use of a matrix underscores the precipitous nature of ruling on this issue at this juncture. Matters such as a matrix and the use of a punitive damage multiplier, given the unresolved nature of the use of such mechanisms, can be better addressed by this Court upon appeals taken from final orders.

Gaughan, 211 W.Va. at 216, 563 S.E.2d at 426. Similarly, in the instant case, any issue beyond that set forth in the certified question is one that this Court will only consider on appeal with the benefit of a fully developed record and a final order. To reiterate, it is clear to this Court that *Campbell* does not eliminate mass tort litigation as provided for in our Trial Court Rule 26. Further, it is significant to us that bifurcated trial plans structured like the one at issue are common in West Virginia as well as other jurisdictions. In sum, absent a clear indication to the contrary, we believe that *Campbell* does not preclude the bifurcated trial plan at issue.

The circuit court found in its order setting aside its original trial plan, and the defendants agree, that "the conduct of a party against whom punitive damages are sought must have a direct nexus to a specific person who claims to have been damaged by that conduct." Further, "[t]he emphasis upon a subjective analysis of the defendant's conduct vis-a-vis a specific plaintiff requires that the defendant's conduct be tailored to each plaintiff. That cannot be accomplished under the existing Case Management Order." We reject the

circuit court's application of *Campbell.*

Campbell stands for the principle, among others, that "[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. Notably, the facts in *Campbell* were quite extreme. As noted above, the plaintiffs in *Campbell* brought what the Supreme Court characterized as a third-party bad faith claim against their insurer. In order to show the reprehensibility of the insurer's conduct, the plaintiffs were permitted to introduce evidence of insurer misconduct that had nothing to do with the type of misconduct that injured them. "For example, the Utah Supreme Court [in upholding the verdict in *Campbell*] 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." *Campbell*, 538 U.S. at 424, 123 S.Ct. at 1523.

In application of this principle to the instant case, it is the role of the circuit court to ensure that the plaintiffs' evidence is relevant, reasonably related to the acts upon which liability is premised, and supports their claim for punitive damages. Therefore, we find nothing in the circuit court's original trial plan that prevents the admission of evidence that is proper under *Campbell.*

Another concern raised by the defendants is that the circuit court's original trial plan would not ensure that punitive damages are proportionate to the injury caused to individual plaintiffs. Again, we disagree. As noted above, the circuit court's original trial plan anticipates that the defendants' general liability and a punitive damages multiplier would be determined in the first trial phase. In the second phase, compensatory damages would be determined for each individual plaintiff after individual evidence is presented. Finally, the punitive damages multiplier determined in the first phase would be applied to each plaintiff's compensatory damages award in order to reach the proper amount of punitive damages for each plaintiff.

Concerning the proper ratio of punitive damages to compensatory damages, the Court in *Campbell* opined,

> we have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. 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. In [*Pacific Mut. Life Ins. Co.* v.] Haslip, [499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991)] in upholding a punitive damages award, we concluded that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. We cited that 4-to-1 ratio again in [*BMW of North America, Inc.* v.] Gore [517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996)]. The Court further referenced a long legislative history, dating back over 700 years and going forward to today, providing that sanctions of double, treble, or

> quadruple damages to deter and punish. 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 goal of deterrence and retribution, than awards with ratios in range of 500 to 1, or, in this case, 145 to 1.

Campbell, 538 U.S. at 424-425, 123 S.Ct. at 1524 (citations omitted). The defendants below contend that by determining the punitive damages multiplier prior to determining individual compensatory damages, there is no way to ensure the proper ratio between the two. We disagree.

This Court has recognized the duty of trial courts to review punitive damage awards. *See Bowyer v. Hi-Lad, Inc.* 216 W.Va. 634, 49, 609 S.E.2d 895, 910 (2004) (stating that "[i]f a jury awards punitive damages to a litigant, a circuit court must carefully review the jury's verdict"); *Garnes v. Fleming Landfill, Inc.,* 186 W.Va. 656, 413 S.E.2d 897 (1991) (setting forth the factors for trial courts to consider when reviewing awards of punitive damages). In cases like the instant one, we are confident that once individual compensatory and punitive damages awards are determined, the trial court can review each of the awards to ensure that it comports with the principles articulated in *Campbell* and other applicable cases.[3]

[3]Punitive damages awards should also be assessed by the trial court in light of this Court's holdings in *TXO Production Corp. v. Alliance Resources Corp.,* 187 W.Va. 457, 419 S.E.2d 870 (1992), *affirmed,* 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993), and *Garnes, supra,* and the holding of the United States Supreme Court in *BMW of North American, Inc. v. Gore, supra.*

Therefore, we now hold that the United States Supreme Court's decision in *State Farm v. Campbell,* 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003), does not preclude the bifurcation of a trial into two phases wherein certain elements of liability and a punitive damages multiplier are determined in the first phase and compensatory damages and punitive damages, based on the punitive damages multiplier, are determined for each individual plaintiff in the second phase.

Again, in answering the question certified to us, we have determined merely that the trial court's original trial plan is not violative of *Campbell.* Beyond this, we make no judgment on whether the trial court's original plan is the best method for trying the instant tobacco litigation. Further, we decline to tell the circuit court how to proceed. This Court has recognized that,

> management of [mass tort] cases cannot be accomplished without granting the trial courts assigned to these matters significant flexibility and leeway with regard to their handling of these cases. A critical component of that required flexibility is the opportunity for the trial court to continually reassess and evaluate what is required to advance the needs and rights of the parties within the constraints of the judicial system. Out of this need to deal with "mass litigation" cases in non-traditional and often innovative ways, TCR 26.01 was drafted and adopted.

State ex rel. Mobil Corp. v. Gaughan, 211 W.Va. 106, 111, 563 S.E.2d 419, 424 (2002). Thus, absolutely nothing in this opinion should be read to limit a trial court's significant leeway in fashioning a trial plan appropriate to the specific circumstances of the mass tort case at issue.

IV.

CONCLUSION

For the reasons set forth above, we answer the certified question as follows:

> Does the Due Process Clause of the Fourteenth Amendment to the Federal Constitution, as interpreted by State Farm v. Campbell, preclude a bifurcated trial plan in a consolidated action consisting of personal injury claims of approximately 1,000 individual smokers, wherein Phase I of the trial would decide certain elements of liability and a punitive damages multiplier and Phase II of the trial would decide for each plaintiff compensatory damages and punitive damages based upon the punitive damages multiplier determined in Phase I?

Answer: No.

Certified question answered.