No. 32552 *In Re: Tobacco Litigation (Personal Injury Cases)*

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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Benjamin, J., concurring:

I write separately to emphasize not only what the Court's opinion does, but also what it does not do. This unanimous opinion answers a narrow question in a narrow manner. It does no more. It does no less.

I think it important to underscore the essence of the Court's opinion:

> 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.[1] 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. . . .

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[1] The certified question from the Circuit Court of Ohio County being:

> 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?

In this passage, the Court emphasizes the narrowness with which it approached and answered the certified question. In addition to twice stating that *Campbell* does not "*per se*"(by or in itself) preclude the circuit court's original trial plan, the Court twice specifically restricts its answer to the certified question, stating that we are ". . . not address[ing] whether there may be other legal reasons to question the circuit court's bifurcated trial plan" and "[n]or do we, or indeed can we, address in the abstract the specific evidence that may be presented on the issue of reprehensibility." These limitations merit attention.

Plaintiffs and defendants differ greatly herein on their views of the scope and commonality of the evidence of reprehensible conduct which may warrant consideration of punitive damages. Plaintiffs appear to contend that the evidence of reprehensible conduct is the same and applicable to all plaintiffs. In their amended brief, plaintiffs claim that all 1,000 of them "were harmed, not just by similar conduct, but by the exact same conduct – namely, defendants' fraudulent concealment of the known hazards of smoking." Thus, plaintiffs argue that this evidence is suitable for determining a single punitive damage multiplier for all of them. Since plaintiffs were all harmed by the same alleged conduct of defendants, plaintiffs contend that the trial court need not be concerned with similar and dissimilar conduct and that the jury, on the basis of this common reprehensible conduct, may apply one punitive damage multiplier to whatever compensatory damages may be subsequently awarded.

Defendants, on the other hand, contend that the evidence is diverse with no sameness applicable to all plaintiffs. Defendants therefore contend that such evidence is unsuitable for determining a single punitive damage multiplier fitting to all claimants. They claim in their response that plaintiffs have not limited their damages claim to recovery for fraudulent concealment, but also that plaintiffs seek recovery "for negligence and strict liability in the design, manufacture, and warning labels of cigarettes; strict liability in selling an unreasonably dangerous product; negligence in testing and researching; and negligence in their advertising and in the sale of cigarettes to minors." Among other arguments, defendants contend that (1) evidence of concealment or failure to warn cannot be a basis of punitive damages for individual plaintiffs who were fully aware of the risks of smoking or of the facts supposedly concealed; (2) evidence relating to addiction cannot be

a basis of punitive damages for individual plaintiffs who are not addicted; (3) evidence of misconduct in the 1950s or 1960s cannot be a basis of punitive damages for individual plaintiffs who didn't start smoking until the 1970s or 1980s; (4) evidence relating to light cigarettes cannot be a basis of punitive damages for smokers of unfiltered cigarettes; and (5) evidence relating to a particular defendant against whom a plaintiff is pursuing no claim should not be a basis for that individual plaintiff's punitive damages. Thus, defendants claim, a plaintiff could obtain (and some defendants could pay) punitive damages set by the application of a multiplier that was based on the misconduct of companies that those plaintiffs did not sue or on alleged reprehensible conduct of a defendant which is not even applicable to the specific plaintiff.

In responding to certified questions rather than in considering issues raised on properly perfected appeals, this Court necessarily lacks the intimate knowledge which the trial level circuit court has of all facets of the litigation below. We do not have a full and complete record before us in a consideration of a certified question. We therefore cannot, and indeed should not, in my opinion, determine whether all plaintiffs were harmed by the exact same conduct, as the plaintiffs contend, or, if harmed at all, whether plaintiffs were harmed by diverse conducts of different defendants, the products of which all plaintiffs did not smoke, as the tobacco companies claim. Nor has the Court done so in its answer to the certified question. The Court's opinion does not discuss the divergent views of the parties with respect to the evidence of reprehensible conduct. Nor has the Court expressed a view on which conducts on the part of the defendants are similar and which are dissimilar. Without such factual determinations having first been made, daunting and complex as that process may ultimately prove to be, this Court is in no position, in my opinion, to say ultimately whether *Campbell*'s restricted view on evidence of reprehensibility, and the constitutional considerations which underlie such a view, would sanction a punitive damages multiplier as the circuit court's original two-phase trial plan envisioned. Judge Recht apparently thinks not, and I, for one, am in no position to disagree with him. Nor, as I read it, does the Court's opinion. In limiting its answer herein, the Court states that "[b]eyond [our limited response], we leave more specific issues for another day"; that "[m]atters such as a matrix and the use of a punitive damages multiplier, given the unresolved nature of the use of such mechanisms, can be better addressed by this Court upon appeals taken from final orders" (quoting *State ex rel. Mobil Corp. v.*

Gaughan, 211 W. Va. 106, 113, 563, S.E.2d 419, 426 (2002); and, most importantly, that "we decline to tell the circuit court how to proceed".[2]

There is yet another significant sentence in the Court's opinion which I believe needs emphasis: "[W]e do not address whether there may be other legal reasons to question the circuit court's bifurcated trial plan." Although not recently, this Court has said on many occasions that:

> Punitive damages should not be awarded in any case where the amount of compensatory damages is adequate to punish the defendant; and, in a case where such compensatory damages are not adequate for the purpose of punishment, only such additional amount should be awarded as, taken together with the compensatory damages, will sufficiently punish the defendant.

Syl. *Hess v. Marinari*, 81 W. Va. 500, 94 S.E. 968 (1918). *Accord, Mayer v. Frobe*, 40 W. Va. 246, 22 S.E. 58, 63 (1895), *Fisher v. Fisher*, 89 W. Va. 199, 108 S.E. 872, 874 (1921); and *Raines v. Faulkner*, 131 W. Va. 10, 48 S.E.2d 393, 399 (1948).

The principle of *stare decisis* is a fundamental foundation of our system of jurisprudence. It is the source of the predictability, balance and stability in the legal system necessary to permit individuals and companies to structure their affairs and have confidence in the surety of their rights. It is, by any other consideration, a necessary aspect of the "fairness" which litigants should rightfully expect they will have in our courts and for which confidence in the judicial system will be advanced. The United States Supreme Court has spoken on the duty of courts to follow precedent on many occasions. In *Rodriquez de Quijas v. Shearson/American Exp.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 1921-22, 104 L.Ed. 2d 526 (1989), the court admonished lower courts that "[i]f [its] precedent has direct application in a case, yet appears to rest on reasons rejected in some

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[2] West Virginia is not alone in its concerns regarding the need for an efficient, yet procedurally proper, litigation of mass and complex civil cases. There may well be no "best" procedure for dealing with such cases in view of the differing nature of such cases. From my albeit limited research, I find that a number of jurisdictions have moved away from the type of trial plan originally proposed below, and I find no jurisdictions which have recently embraced such a plan. *See, e.g., Liggett Group Inc. v. Engle*, 853 So.2d 434, 451-2 (Fla. Ct. App. 2003), *appeal granted*, 873 So.2d 1222 (Fla. 2004); *Philip Morris, Inc. v. Angeletti*, 752 A.2d 200, 249 (Md. 2000); *Southwestern Ref. Co. v. Bernal*, 22 S.W.3d 425 (Tex 2000); *Smith v. Brown & Williamson Tobacco Corp.* 174 F.R.D. 90, 97 (W.D. Mo. 1997). Whether this points to the presence of a trend that such a type of trial plan is now generally disfavored in the United States is not currently before this Court.

other line of decisions, [the lower court] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." I am not aware of any case of this Court which disturbs our holding in *Marinari*.

The lower court should, in my opinion, consider whether the principles repeated in *Marinari* and its progeny, as well as the constitutional principles and protections applicable herein, present "other legal reasons to question the circuit court's bifurcated trial plan." It could be that a jury given the opportunity to consider the assessment of punitive damages after having awarded compensatory damages may conclude that the magnitude of the compensatory damages awarded does not warrant the assessment of further damages to punish the defendants. Likewise, such a jury may conclude that the magnitude of the compensatory damages when considered with the defendant's proven reprehensible conduct could require punitive damages in excess of what a uniform multiplier would otherwise provide.[3]

It is the circuit court's decision how to proceed. It is hoped that counsel for the parties will endeavor to provide the circuit court with such support, suggestions, and recommendations as the circuit court may request to best determine the proper trial plan to utilize in this litigation.

[3] The Supreme Court in *Campbell* appears to have said as much when it stated that "[i]t should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, *after having paid compensatory damages,* is so reprehensible as to warrant the imposition of *further* sanctions to achieve punishment or deterrence." 538 U.S. at 419. (Emphasis added.) The quoted statement from *Campbell* is consistent with *Molinari* and its progeny.