IN THE SUPREME COURT OF FLORIDA

CASE NUMBER: SC06-779
L.T. CASE NO.: 05-10559-BB

AUTO-OWNERS INSURANCE COMPANY,

Appellant,

vs.

POZZI WINDOW COMPANY,

Appellee.

AMENDED ANSWER BRIEF OF APPELLEE POZZI WINDOW COMPANY

ON A QUESTION CERTIFIED
FROM THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Edmund M. Kneisel, Esq.
Admitted Pro Hac Vice
Richard E. Dolder, Esq.
Florida Bar No.: 162647
Kilpatrick Stockton LLP
1100 Peachtree Street
Suite 2800
Atlanta, Georgia 30309-4530
(404) 815-6500

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I. STATEMENT OF THE CASE

A. PREVIOUS PROCEEDINGS AND DISPOSITION.

This action arises out of a lawsuit, filed in 1997 by Mr. Jorge Perez, to recover for water damage that occurred when the windows installed in his multi-million dollar home constructed in the Coconut Grove area of Miami leaked. Mr. Perez sued Appellee, Pozzi Window Company ("Pozzi"), the manufacturer of the windows, and Brian Scott Builders, Inc. ("Brian Scott"), who had installed the windows. He eventually amended his complaint to include Coral Construction of South Florida, Inc. ("Coral"), the general contractor. (Doc 1 - Exhibit A).[1] Pozzi filed cross-claims for indemnity against Brian Scott and Coral. See Perez v. Pozzi Window Co., et al., Case No. 97-23145 CA21 (11th Judicial Circuit, Miami)(the "Underlying Lawsuit"). Pozzi entered into an agreement with Mr. Perez to rectify the water intrusion problem by repairing and/or replacing the windows, while preserving its right to continue to pursue its third-party claims, which Pozzi amended to include claims for equitable subrogation against Coral and claims against James J. Irby, Coral's owner and president. (Doc 1 - Exhibit B – Pgs. 2-5).

Appellant/Cross-Appellee, Auto-Owners Insurance Company ("Auto-Owners") insured Coral and Mr. Irby. Auto-Owners defended Coral under a

[1] The citations to the record (Doc) are those to the Record and Docket Entries in the District Court for the Southern District of Florida. The Eleventh Circuit has transmitted that record to this Court.

reservation of rights, but failed to defend Mr. Irby after he was added to the lawsuit. After significant discovery, Auto-Owners, Pozzi, Coral and Mr. Irby, represented by his individual counsel, attended a court-ordered mediation. When Auto-Owners persisted in denying all coverage and refused to settle Pozzi's claims, Pozzi, Coral and Mr. Irby entered into negotiations to resolve the Underlying Lawsuit without Auto-Owners' participation. Coral and Mr. Irby agreed to assign all their rights under the Auto-Owners' Policy to Pozzi; and Pozzi agreed to look to Auto-Owners as the exclusive source of its monetary recovery for the damages it incurred in settling the Underlying Lawsuit (i.e., the cost of repairing and replacing the damaged windows). (Doc 1 - Exhibit E). Thereafter, Pozzi filed this lawsuit against Auto-Owners, alleging, inter alia, breach of contract and common law bad faith. (Doc 1). In its amended complaint, Pozzi sought a monetary recovery measured, in part, by the stipulated consent judgment entered in the Underlying Lawsuit; unreimbursed attorneys' fees incurred by Mr. Irby in the Underlying Lawsuit; and punitive damages. (Doc 124).

Following discovery, the parties filed cross-motions for summary judgment on the issues of insurance coverage and the duty to defend. The Honorable José E. Martinez, United States District Court Judge, denied Auto-Owners' motion and granted Pozzi's cross-motion, finding as a matter of law and undisputed fact that the liability Coral and Mr. Irby had faced, arising from the negligent work of

subcontractor Brian Scott, was insured under the Auto-Owners Policy and that Auto-Owners had breached its duty to defend Mr. Irby individually.[2] (Doc 91). Thereafter, the parties stipulated that questions of damages and bad faith would be tried before United States Magistrate Judge Theodore H. Klein. (Doc 97).

Following denial of Auto-Owners' motion for judgment as a matter of law at the close of the evidence, the jury returned a special verdict, finding that neither Pozzi, Mr. Irby nor Coral had acted fraudulently or collusively in settling the Underlying Lawsuit; that having breached its Policy, Auto-Owners should pay Pozzi $300,000 in compensatory damages; that Auto-Owners had acted in bad faith; and, after applying the standards of a jury instruction proposed by Auto-Owners, that Auto-Owners had acted willfully or with conscious disregard of its policyholder's rights and should pay Pozzi $500,000 in punitive damages to deter such conduct. (Docs 146 and 147).

In a post-trial order, Judge Klein denied in part and granted in part Auto-Owners' renewed motion for judgment as a matter of law, rejecting the jury's

[2] In its initial brief to this Court, Auto-Owners represents that it defended both Coral and Mr. Irby under the same reservation of rights. (Auto-Owners' Brief, Pg. 5). Judge Martinez ruled otherwise as the Eleventh Circuit's ruling confirms. Pozzi Window Co. v. Auto-Owners Ins. Co., 446 F.3d 1178, 1180-81 (11th Cir. 2006) (noting that Auto-Owners "refused to pay for Irby's defense" and that the trial court had concluded "that Auto-Owners had breached its duty to defend Irby."). Mr. Irby incurred more than $11,000 in unreimbursed legal fees for his own defense counsel. (Doc 214 – Pgs. 48-50; Doc 202 – Trial Ex. 9).

findings of bad faith and vacating the jury's award of punitive damages, but otherwise affirming the judgment in accordance with the jury's verdict. (Doc 180). In the same Order, Judge Klein denied Auto-Owners' motion to reconsider Judge Martinez's ruling granting partial summary judgment regarding insurance coverage.[3] (Id.) Auto-Owners appealed the rulings on insurance coverage (Doc 196), but not the jury's award of compensatory damages. Pozzi cross-appealed the ruling granting Auto-Owners' motion for judgment as a matter of law and rejecting the jury's verdict on Pozzi's claims for bad faith and punitive damages. (Doc 201).[4]

In its certification order, the Eleventh Circuit noted that "the district court's conclusion that coverage exists arguably would seem to be proper" but concluded, in view of perceived uncertainties in Florida law, that the following question should be certified to this Court:

> DOES A STANDARD FORM COMPREHENSIVE GENERAL LIABILITY POLICY WITH PRODUCT COMPLETED OPERATIONS HAZARD COVERAGE, SUCH AS THE POLICIES DESCRIBED HERE, ISSUED TO A GENERAL CONTRACTOR, COVER THE GENERAL CONTRACTOR'S LIABILITY TO A

[3] Judge Klein had denied Auto-Owners' previous motion to reconsider Judge Martinez's partial summary judgment ruling during the trial. (Doc. 215 – Pg. 170).

[4] The parties agreed to stay the determination of Pozzi's claims for reasonable attorneys' fees under Fla. Stat. § 627.428. (Doc 213). Pozzi has filed herewith its motion for attorneys' fees in connection with proceedings in this Court.

THIRD PARTY FOR THE COSTS OF REPAIR OR REPLACEMENT OF DEFECTIVE WORK BY ITS SUBCONTRACTOR?[5]

The Eleventh Circuit otherwise affirmed the trial court's grant of Auto-Owners' motion for judgment as a matter of law overturning the jury's verdict finding bad faith and awarding punitive damages.

B. SUMMARY OF THE EVIDENCE.

1. The "Underlying Lawsuit" To Recover Damages Due To Negligent Window Installation.

Coral is a small, family-owned construction business run by Mr. Irby, its owner. (Doc 214 – Pgs. 35-36). Mr. Perez retained them to build a large home on Biscayne Bay in the Coconut Grove area of Miami, Florida. (Id. – Pgs. 37-38). Pozzi manufactured the custom windows for the home, which were installed by Brian Scott, a subcontractor. (Id. – Pgs. 38-39, 57). Although Coral and Mr. Irby

[5] Without quarreling with the precise language of the certified question, there is no reference in the Eleventh Circuit's statement to "property damage," which was, of course, the basis for the homeowner's claim in the Underlying Lawsuit. There is no dispute that "property damage" occurred, as acknowledged by Auto-Owners' corporate representative during his pre-trial deposition. (Doc 132 – Pgs. 69-70) (testimony of Auto-Owners under Fed. R. Civ. P. 30(b)(6)). As a result, the suggestion at the conclusion of Auto-Owners Brief, Pgs. 40-41) that there was no "occurrence" of property damage that would trigger coverage under its Policy is not before this Court. See Dober v. Worrell, 401 So. 2d 1322, 1323-24 (Fla. 1981)(inappropriate for party to raise an issue for first time on appeal from summary judgment, final judgment, or order of dismissal); Acton v. Ft. Lauderdale Hosp., 418 So. 2d 1099, 1100-01 (1st Dist. App. 1982)(neither appellee nor amicus may raise issues on appeal that were not litigated below).

supervised and coordinated Brian Scott's work, they did not physically install the windows. (Id. – Pg. 38). Pozzi had no involvement in the construction of the home.

In 1997, after Mr. Perez moved into the house, the windows began to leak, damaging his house and the windows themselves. (Id.; Doc 75 - ¶4). Discovery in the Underlying Lawsuit (Doc 75-¶¶ 15-17) and Pozzi's review and analysis of the situation, which eventually included careful destructive testing, confirmed that the water intrusion and resulting damage had been caused by the negligence of the window installer, subcontractor Brian Scott. (Doc 215 – Pgs. 117-36). Examples of negligent work by Brian Scott included lack of proper shims, failure to install window bucks, and failure to install fasteners in accordance with Pozzi's published installation guidelines. (Id.). Without proper shimming, bucking and fastening, the windows leaked and were ruined (rendered "useless") by water, which also damaged the interior of Mr. Perez's home. (Id. at Pgs. 127-35; see also Doc. 1, Ex. A, First Am. Comp., ¶ 36). Auto-Owners has never disputed that the subcontractor's negligent installation caused the water damage at issue. (Doc 75-¶ 6).

Pozzi settled with Mr. Perez, agreeing to fix the water intrusion problem and to repair the damaged windows. To do so, Pozzi tore out the water-damaged windows and reinstalled new windows that were plumb, level and square. (Doc

215 – Pgs. 119-21). Pozzi continued to pursue its claims for indemnity and equitable subrogation against Auto-Owners' insureds, Coral and Mr. Irby, who faced significant legal liability as a result of the Brian Scott's negligent installation work.

2. The Claims for Insurance Coverage.

Auto-Owners insured Coral and Mr. Irby under a series of Commercial General Liability ("CGL") policies since 1985, without ever being requested to defend or pay a claim. (Doc 214 Pg. 40; Doc. 202 - Trial Exhibit 1). The Policy's Declarations Page confirms the purchase of additional products-completed operations hazard ("PCOH") coverage (Id. – Pg. 2), which is referenced on the "Limits of Insurance" page as "Products-Completed Operations Aggregate Limit - $1,000,000." (Id.). PCOH coverage is intended to protect general contractors, such as Coral, from liability for certain post-completion property damage claims.

At trial, Pozzi's expert witness explained that the Insurance Services Offices ("ISO"), which is an association of insurance companies, prepares CGL policy forms, seeks approval from state insurance departments for the policy forms, and establishes suggested premiums. (Doc 215 – Pgs. 92-94). The Auto-Owners Policy is an ISO form and includes the separate PCOH coverage. (Doc 215 – Pgs. 93-95). A general contractor "buys completed operations coverage to take care of the exposure that exists after he is finished with that work." (Id. – Pg. 96).

Because PCOH coverage provides additional protection to general contractors, the policyholder pays an extra premium for it. (Id. – Pgs. 98-101). Pozzi's uncontradicted expert testimony confirmed that in 1986, the ISO, in conjunction with its insurance-industry members, made significant changes to the CGL form and the PCOH coverage. (Id. – Pgs. 99-101). Notably, while the policy (exclusion l in the Auto-Owners Policy) bars coverage for '[p]roperty damage' to 'your work' arising out of it or any part of it…," ISO added a "subcontractor exception" to this exclusion to restore PCOH coverage when the insured general contractor's property damage liability arises out of the negligent work of a subcontractor. (Id.) The "subcontractor exception" to exclusion l reads as follows:

> This exclusion [for your work] does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

(Doc 202 - Trial Exhibit 1 - Section I, Coverage A, ¶ l – Pg. 3 of 10).

In response to Coral's notice of the Underlying lawsuit, Auto-Owners issued a "reservation of rights" letter, agreeing to defend Coral but incorrectly asserting that the "policy will not extend coverage for the damages consisting of the defective construction performed by you or by your subcontractors." (Doc 202 - Trial Exhibit 2) (emphasis added). This letter ignored the plain language of "subcontractor exception" quoted above. Mr. Irby understood that Auto-Owners was "saying that there was no coverage" for any liability that would result from

Pozzi's claims, whether or not arising from the work of a negligent subcontractor. (Doc 214 – Pg. 43). Indeed, after Mr. Irby was added as a defendant on Pozzi's indemnity claim, Auto-Owners ignored its obligation to defend him, forcing Mr. Irby to incur more than $11,000 in legal fees for his own defense counsel, Mr. Stanley Klett. (Id. – Pgs. 49-50; Doc 202 - Trial Exhibit 9).

After reviewing the facts compiled during discovery, Mr. Klett correctly concluded that Mr. Irby and Coral faced significant liability exposure in the Underlying Lawsuit that would have "put [Mr. Irby] out of business" and bankrupted both Coral and Mr. Irby individually. (Doc 214 – Pgs. 97-98). Realizing that he must "get my client out of this," Mr. Klett explored the possibility of mediation (Id. – Pg. 101). As soon as the mediation was scheduled (Doc. 202, Trial Exhibit 4), Auto-Owners filed a declaratory judgment action against Coral. (Doc 214 – Pg. 103; Doc 202 - Trial Exhibit 3). These events caused Mr. Irby to conclude that he was caught between the proverbial rock (Pozzi's liability claim) and a hard place (Auto Owner's denial of coverage for that claim). (Id. – Pgs. 50-51). Indeed, at time of the scheduled mediation, Auto-Owners' had not agreed to assume Mr. Irby's defense, despite the fact that he was an insured under the CGL policy. (Id. – Pgs. 100-04)

3. The Mediation and Pozzi's Settlement with Coral and Mr. Irby.

At the mediation, Auto-Owners continued to assert that there was absolutely no coverage for Pozzi's claims. (Doc 215 – Pgs. 33-36). Spurned by the insurer and knowing that Coral and Mr. Irby lacked the financial resources to pay, Pozzi initiated separate settlement discussions with Coral and Mr. Irby, (Doc 215 – Pgs. 34-36), which resulted in an "agreement in principle" during the mediation. (Doc 214 – Pg. 106; Doc 215 – Pg. 36). In relevant part, the proposed agreement required Coral and Mr. Irby to assign their rights against Auto-Owners to Pozzi and required Pozzi to agree to seek monetary recovery solely from the assigned claims against Auto-Owners and not from Coral or Mr. Irby. (Doc 214 – Pgs. 114-15).

After being advised of these separate settlement discussions (Doc 214 – Pg. 107; Doc 215 – Pgs. 35-36), Auto-Owners attempted to prevent its insureds from consummating the proposed agreement. First, only one day after the mediation, and without advising Mr. Irby or Mr. Klett, Auto-Owners instructed the attorney who had been defending Coral to file a notice of appearance on behalf of Mr. Irby. (Doc 214 – Pgs. 108-09). Pozzi submits that this belated appearance was a sham, as Auto-Owners continued to refuse to reimburse Mr. Irby for the defense costs he had incurred during the preceding seven months. (Id.). Indeed, on June 10, 2002, Auto-Owners' sent a letter to Mr. Klett proposing that if, and only if, Coral and

Mr. Irby refused Pozzi's offer of settlement, Auto-Owners would (a) pay Mr. Klett's fees and (b) would not add Mr. Irby as a co-defendant in the pending declaratory judgment case. (Doc 202 - Trial Exhibit 32; Doc 214 – Pgs. 109-10, 121). Because Auto-Owners continued to deny all coverage for the substantial liability Coral and Mr. Irby faced, they rejected Auto-Owners' offer. Auto-Owners immediately named Mr. Irby as a defendant in the declaratory judgment action, thereby exposing him to further costs and expenses. (Doc 214 – Pg. 110; Doc 202 - Trial Exhibit 34).

The assignment-of-rights settlement Pozzi had proposed at the mediation was formally consummated several months later. As part of the settlement, Coral and Mr. Irby assigned to Pozzi their rights to sue Auto-Owners for coverage under the Policy and for bad faith. Coral and Mr. Irby also agreed to entry of a Consent Judgment for the damages that Pozzi had incurred in repairing and/or replacing the damaged windows. In turn, Pozzi agreed not to enforce the Consent Judgment against Coral and Mr. Irby, to release Coral and Mr. Irby from further liability, and to reimburse Mr. Irby's attorney's fees from the proceeds of the Auto-Owners litigation. The documents memorializing the settlement include an Assignment of Cause of Action; a Consent Judgment; and a Settlement Agreement, Release and Assignment of Claims. (Doc 202 – Trial Exhibits 6, 7 and 31, respectively).

This lawsuit ensued.

II. STANDARD OF REVIEW

The standard of review on interpretation of an insurance policy is de novo. Coleman v. Florida Ins. Guar. Ass'n, Inc., 517 So. 2d 686, 690 (Fla. 1988).

III. SUMMARY OF THE ARGUMENT

A. INSURANCE COVERAGE FOR LIABILITY ARISING OUT OF THE NEGLIGENT WORK OF A SUBCONTRACTOR.

The plain language of the PCOH coverage that Auto-Owners sold its insureds protects them against legal liability for post-completion property damage caused by a negligent subcontractor. As ruled by federal Judge Martinez, this Court has consistently applied "the guiding principle that insurance contracts are construed in accordance with 'the plain language of the policy.'" Fayad v. Clarendon Nat'l Ins. Co., 899 So. 2d 1082, 1086 (Fla. 2005) (citation omitted). Five federal judges, beginning with Judge Martinez, continuing with Judge Klein, and including the three members of the Eleventh Circuit Panel who certified the case to this Court, have concluded that the protections afforded by Auto-Owners' Policy are triggered when the negligent work of a subcontractor causes property damage after completion of the work. The eight members of the jury obviously agreed, by awarding compensatory damages and also by deciding that Auto-Owners' decision to ignore the plain language of its policy and its other actions before and during the trial warranted the sanction of punitive damages. Auto-Owners' position that the federal court's judgment should be set aside disregards

every canon of insurance policy construction previously applied by this Court (not only the "plain language" rule) and would effectively nullify coverage for the specific PCOH risk that the policyholder paid an additional premium to insure. The certified question should be answered in the affirmative..

B. BAD FAITH.

This Court has jurisdiction to consider issues not included in a certified question. Warner v. Boca Raton, 887 So. 2d 1023 (Fla. 2004); Savona v. Prudential Ins. Co. of Am., 648 So. 2d 705 (Fla. 1995). Pozzi respectfully suggests that this Court consider the issue of Auto-Owners' bad faith and provide guidance regarding the circumstances under which a jury's verdict awarding punitive damages for an insurer's bad faith conduct should be allowed to stand.

In this case, the evidence at trial established that Auto-Owners wrongfully misrepresented the terms of its policy by denying all coverage for its insureds' liability attributable to subcontractor work. After liability became reasonably clear, leading to separate settlement discussions between Pozzi and the insureds, Auto-Owners offered Mr. Irby and his attorney money (reimbursement of defense costs Auto-Owners already had an obligation to pay) if, but only if, Mr. Irby refused to settle with Pozzi. Unlike Pozzi, Mr. Irby did not have the financial resources required to pursue the coverage claim now before this Court. Following the close of the evidence, the jury was properly instructed to consider "all the

circumstances" in deciding bad faith. See State Farm Mut. Auto. Ins. Co. v. LaForet, 658 So. 2d 55, 62-63 (Fla. 1995). Using language proposed by Auto-Owners, the trial judge instructed the jury regarding the standards for awarding punitive damages when the "clear and convincing" evidence warrants such damages. The jury correctly applied those standards, awarding $500,000 in punitive damages to deter what the jurors obviously concluded was Auto-Owners' pattern and practice of ignoring its policyholders' rights. Pozzi respectfully submits that it is not the function of the federal courts to set aside a rational verdict when a jury has been properly instructed regarding Florida law. See Home Ins. Co. v. Owens, 573 So. 2d 343, 345-46 (Fla. 4th DCA 1991).

IV. ARGUMENT

A. INSURANCE COVERAGE.

1. The Trial Court Correctly Found Coverage For Property Damage Caused By The Work Of A Negligent Subcontractor.

Auto-Owners cites four policy exclusions, suggesting that all four may be relevant; however, Auto-Owners argues only one, exclusion l (the "your work" exclusion). Auto-Owners focuses on the first sentence of the exclusion, which bars coverage for "'Property damage' to 'your work' arising out of it or any part of it

and including [sic] in the 'products-completed operations hazard.'"[6] Incorrectly asserting that the trial court's underlying order "makes no reference to any case law," Auto-Owners contends that the district court judge committed error in ruling that the Policy "provided coverage for the repair and replacement damages sought…." (Auto-Owners' Brief, pg. 9). Auto-Owners is wrong.

First, Judge Martinez did cite controlling authority, State Farm Fire & Cas. Co. v. CTC Dev. Corp., 720 So. 2d 1072, 1075 (Fla. 1998) and Fla. Stat. § 627.419(1), applying the principle that in determining coverage under Florida law, "the language of the Policy controls." (Doc 91 – Pg. 5). This Court recently reiterated that this rule is the "guiding principle" of Florida insurance law: "We begin with the guiding principle that insurance contracts are construed in accordance with the plain language of the policy as bargained for by the parties." Fayad v. Clarendon Nat'l Ins. Co., 899 So. 2d 1082, 1086 (Fla. 2005) (finding coverage in ambiguous exclusion); accord, Travelers Indem. Co. v. PCR, Inc., 889 So. 2d 779, 785 (Fla. 2004) ("If the language used in an insurance policy is plain and unambiguous, a court must interpret the policy in accordance with the plain meaning of the language used so as to give effect to the policy as it was written").

[6] Because the entire project (in this case the Perez home) is the "work" of a general contractor, Auto-Owners' argument would improperly nullify the PCOH coverage that its insureds purchased. See note 17, supra.

Second, unlike Auto-Owners, the trial court read and applied the entire Policy language, including the outcome-determinative exception to exclusion l (the "subcontractor exception" to the "your work" exclusion), which reads as follows: "This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor." (Doc 202 - Trial Exhibit 1 – Pg. 3 of 10) (emphasis added). Auto-Owners cannot explain why this language does not restore coverage by eliminating the "your work" exclusion, where, as here, it is undisputed that the damage in question was caused by the negligent work of subcontractor Brian Scott. Instead, Auto-Owners argues that an exception to an exclusion cannot "create" coverage where no coverage otherwise exists. (Auto-Owners' Brief, Pg. 26 et seq).

Auto-Owners' argument that District Judge Martinez and Magistrate Judge Klein somehow "created" coverage where none exists is wrong. Pozzi has never argued that the subcontractor exception to the exclusion "creates" coverage. Rather, the policy itself clearly insures against property damage that occurs within the policy term, subject to various exclusions, including the "your work" exclusion. This exclusion would bar all coverage for damage to the "work" of the insured general contractor if the subcontractor exception language did not exist. However, Auto-Owners cannot now eliminate that language from its policy. Here, a general contractor purchased PCOH coverage, which plainly insures against

property damage claims when the damage occurs[7] after completion (here, occupancy of the home) and is caused by a negligent subcontractor. After quoting the PCOH coverage language, Judge Martinez correctly ruled that the "your work exclusion does not include work performed by subcontractors…[and that] insurance coverage exists for the repair or replacement of the windows under the PCOH provision, since such work was completed by a subcontractor." (Doc 91 – Pgs. 3-5). This ruling correctly applies the plain language of the Policy to the undisputed facts in accordance with this Court's previous guidance regarding policy interpretation.[8]

[7] As note above, Auto-Owners conceded during pre-trial discovery that the claims at issue were based on an "occurrence," that caused "property damage" within the meaning of the Policy. (Doc 132 – Pgs. 69-70) (testimony of Auto-Owners' corporate designee under Fed. R. Civ. P. 30(b)(6)). Auto-Owners did not contend otherwise at trial, and this issue is not presented in this appeal. See note 5, supra.

[8] While Pozzi submits that the plain language of the policy compels the outcome of this case, other, basic rules of policy construction also support the judgment. Thus, as recognized in Fayad, it is well settled that "[a]mbiguous coverage provisions are construed strictly against Campbell the insurer that drafted the policy and liberally in favor of the insured [citations omitted]" and "ambiguous 'exclusionary clauses are construed even more strictly against the insurer than coverage clauses' [citations omitted]." 899 So. 2d at 1086. See also Demshar v. AAACon Auto Transp., Inc., 337 So. 2d 963, 965 (Fla. 1976). ("Exclusionary clauses in liability insurance policies are always strictly construed.").

a. The PCOH coverage applies to the claims alleged against Coral and Mr. Irby in the Underlying Lawsuit.

The PCOH coverage insures against liability for damage to a "completed" project, such as the Perez home, resulting from negligent work by a subcontractor. (Doc 215 – Pgs. 96-98). Auto-Owners' arguments to the contrary would nullify this coverage. If the PCOH coverage with the subcontractor language does not apply to the undisputed facts of this case, it would never apply to a claim against a general contractor (such as Coral) because the entire home, as the "work" of the insured general contractor, would be subject to the "your work" exclusion. A policy should not be interpreted to nullify its coverage terms, especially where, as confirmed by the declarations page of this Policy, the policyholder specifically purchased the type of coverage at issue in this case. See note 17, infra.

The Policy defines the Products-Completed Operations Hazard as follows:

> a. "Products-completed operations hazard" includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:
>
> (1) Products that are still in your physical possession; or
>
> (2) Work that has not yet been completed or abandoned.
>
> b. "Your work" will be deemed completed at the earliest of the following times:
>
> (1) When all of the work called for in your contract has been completed.
>
> ***

> (3) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.
>
> Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

(Doc 202 - Trial Exhibit 1 - Section V, ¶11, Pg. 10 of 10) (emphasis added).

It is undisputed that Coral's work on Mr. Perez's home had been completed and the home occupied before the damage occurred, thereby putting the home to its "intended use" and triggering the PCOH coverage Coral purchased. Cases involving pre-completion damages while construction work is in progress, such as Lassiter Constr. Co., Inc. v. American State Ins. Co., 699 So. 2d 768 (Fla. 4th DCA 1997), do not apply because only post-completion property damage triggers the PCOH coverage provisions. Here, it is undisputed that post-construction water intrusion damaged the Perez home. Unless an exclusion applies, the insureds' liability for this post-completion damage was covered.

When a subcontractor is not involved, exclusion l would bar coverage for "'[p]roperty damage' to '[the insured's] work' arising out of it or any part of it" that is included within the PCOH coverage. However, the "your work" exclusion does not apply "if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor." (Doc - 202 - Trial Exhibit 1 – Pg. 3 of 10) (emphasis added). This controlling provision eliminates the exclusion

and restores coverage for damage to the "work" performed by the subcontractor and for consequential damage arising out of that work. Here, Brian Scott's negligent work in installing the windows caused post-completion property damage to the Perez home, including the Pozzi windows[9] (Coral's "work") and to the installation "work" of the subcontractor. Cases such as Lassiter, that do not address PCOH coverage, and cases that do not consider the subcontractor exception to the "your work" exclusion, simply do not control the outcome of this case.

As Auto-Owners implicitly acknowledges by its failure to argue them, the other exclusions cited in its brief do not apply. Exclusion j(5) only applies when there is damage to the "part of real property on which you or any… subcontractors working… on your behalf are performing operations…." (emphasis added). Similarly, exclusion j(6) does not apply to "'property damage' included in the 'products completed operations hazard.'" These "course of construction" exclusions do not apply in a PCOH case. See American States Ins. Co. v. Powers, 262 F. Supp. 2d 1245, 1251 (D. Kan. 2003) (holding that exclusion j(6) did not

[9] Even when the PCOH coverage does not apply or is not available, courts have found CGL coverage for consequential damage to "other property" caused by negligent construction. Pinkerton & Laws v. Royal Ins. Co., 227 F. Supp. 2d 1348, 1355-56 (N.D. Ga. 2002)(finding coverage for the cost of replacing the negligently installed windows, but not for the cost of "redoing" the negligent installer's flashing and sealing work)(applying Florida law). There is no discussion of PCOH coverage or the subcontractor exception in this case.

apply because "[t]here is no evidence before the court suggesting that [the insured's] work on the building was incomplete at the time the [claimants] discovered the allegedly defective work"). Similarly, exclusion k does not apply because this is not a "products liability" matter, but a negligent construction case; and the definition of "your product" only includes "goods or products other than real property." (Doc 202 – Pg. 10 of 10) (emphasis added). Wanzek Constr., Inc. v. Employers Ins. of Wausau, 679 N.W.2d 322, 327 (Minn. 2004) (holding that general contractor's work was not "product" within meaning of "your product" exclusion).

The Florida cases that Auto-Owners relies upon do not address the coverage at issue in this case. For instance, in Sekura v. Granada Ins. Co., 896 So. 2d 861 (Fla. 3d DCA 2005), the court considered a claim seeking coverage for the negligent work of the insured general contractor, not the negligent work of a third-party subcontractor. Similarly, in Home Owners Warranty Corp. v. Hanover Ins. Co., 683 So. 2d 527 (Fla. 3d DCA 1996), the court denied coverage for claims by the assignee/subrogee of the insured developer for reimbursement of a settlement paid as damages for faulty work; however, there is no mention in the reported opinion of whether the faulty work was the result of the negligence of a

subcontractor.[10] The Hanover court relied exclusively on the ruling in LaMarche v. Shelby Mut. Ins. Co., 390 So. 2d 325 (Fla. 1980) and authority cited therein; however, LaMarche was decided in 1980, six years before the ISO modified the standard form of CGL policy to broaden PCOH protections for general contractors. The ISO revisions, which Auto-Owners incorporated in its policy form and sold to its insureds, expressly insure against liability for damages to the work or arising out of the work of a subcontractor. (Doc 215 – Pgs. 99-101).[11] LaMarche did not address the issue of whether there was coverage for property damage caused by the work of a subcontractor because the policy form at issue in that case did not contain the "subcontractor exception" language at issue in this case.

Similarly, the decision in Auto-Owners Ins. Co. v. Tripp Constr. Inc., 737 So. 2d 600 (Fla. 3d DCA 1999) contains no mention of a claim for the negligence of a subcontractor. Citing the trial testimony of its in-house counsel, Mr. Scott Norris, Auto-Owners argues that Tripp did include subcontractors. Mr. Norris

[10] On rehearing, the Hanover court cited the subcontractor exception, without discussing why that exception would or would not apply to the facts of the case, noting simply that it "eliminates subcontractors from this particular exclusion…." 683 So. 2d at 530. This comment is too indefinite to determine whether or not subcontractor negligence might have triggered PCOH coverage in that case.

[11] The history of the 1986 ISO changes broadening coverage for the negligent work of a subcontractor was explained at trial by Pozzi's expert witness, Phillip Gallagher. (Doc 215 – Pgs. 92-101). Auto-Owners did not attempt to contradict his testimony.

testified that subcontractors were involved in the project, but he did not testify that the insured general contractor faced legal liability for property damage caused by the negligent work of subcontractors. (Doc 216 – Pgs. 96-98). Subcontractor negligence is not mentioned in the appellate court's opinion. [12]

Attempting to bring Pozzi's claims within the scope of those inapplicable cases, Auto-Owners implies that the issue in this lawsuit is whether the Policy provides coverage for an insured's negligent or defective construction. (Auto-Owners' Brief, Pgs. 16, 18 and 20). This assertion ignores the undisputed fact that the claims at issue arose out of the negligent work of subcontractor Brian Scott, who is not an insured under the Policy. Furthermore, Coral and Mr. Irby were subject to legal liability for the repair and replacement of damaged windows caused by the work of Brian Scott, not merely for the cost of redoing that work (replacing shims, bucks and re-sizing window openings, for example). As noted above, courts have ruled that such damage is insured under a CGL policy, even if PCOH coverage is not provided. See note 9, supra. However, in this case, the PCOH coverage language does apply and covers damage to the work of the subcontractor, as well as damage arising out of that work.

[12] To rebut Pozzi's claims (and evidence) of bad faith, Auto-Owners asked Mr. Norris to explain to the jury the key cases he relied upon in denying coverage; and Auto Owner tendered copies of the reported decisions into evidence. As discussed below, however, when asked on cross-examination to find the word "subcontractor" in the cases he had just discussed, Mr. Norris could not do so.

With all due respect to the decision of the United States Magistrate Judge in Auto-Owners Ins. Co. v. Travelers Cas. & Sur. Co., 227 F. Supp. 2d 1248 (M.D. Fla. 2002), Pozzi submits that her opinion misconstrues the subcontractor exception and the rules of insurance-policy construction applied by this Court. At trial, Mr. Norris testified about this case (and Auto-Owners' other, principal cases), stating that the Travelers decision was "consistent" with the Florida state court cases that he claimed should govern the jury's deliberations. (Doc 216 – Pg. 107). However, on cross-examination (see id. at 111-26), he acknowledged that none of the Florida appellate court rulings that Auto-Owners tendered into evidence (Tripp and Hanover, for example) address negligent work by a subcontractor that is within the PCOH coverage. He admitted that Lassiter "would appear to be an operations rather than completed operations case." (Id. – Pg. 120). With refreshing candor, Mr. Norris also acknowledged that LaMarche was decided in 1980, before the 1986 subcontractor exception to the your work exclusion was added to the CGL form, and that it involved "different exclusions" than the exclusion at issue in this case. (Id. – Pg. 115). All of Auto-Owners' Florida cases are distinguishable on one or more of these grounds.

In contrast, a very recent Florida Court of Appeals decision, JSUB, Inc. v. United States Fire Ins. Co., 906 So. 2d 303 (Fla. 2d DCA 2005), rev. granted, 925 So. 2d 1032 (2006), correctly applies the plain language of the PCOH coverage at

issue here. In JSUB, a general contractor was subject to liability as a result of the allegedly negligent work of subcontractors that caused property damage after completion of a home. Id. at 304-05. The trial court determined that because the property damage had been caused by faulty workmanship, the policy did not cover the claim. Id. The appeals court reversed. Examining the same exclusions that are at issue in this case, the JSUB court concluded that "the policies contain significantly different exclusions than those that were addressed in LaMarche," and that "it is now common for such policies to include products/completed operations hazard coverage." Id. at 308 (citations and internal quotations omitted). The JSUB court acknowledged that an exception to an exclusion cannot create coverage, but also noted, applying canons of policy construction adopted by this Court, "that reading a policy's coverage provisions together with its exclusions may provide support for a conclusion that the policy provides coverage for a given occurrence." Id. at 310 (citing State Farm Fire & Cas. Co. v. CTC Dev. Corp., 720 So. 2d 1072, 1075 (Fla. 1998)). The JSUB court correctly concluded that the "subcontractor exception" to the "your work" exclusion applied to restore (not create) coverage, because the damage that had occurred was the result of the negligence of a subcontractor. Id. at 310-11.

Auto-Owners suggests that this Court should overrule JSUB and follow cases that narrowly interpret the concept of "occurrence"[13] or that construe policies predating the 1986 changes in policy language. Auto-Owners' argument that changes to policy language "should not change the result" of cases interpreting different policy language (Auto-Owners' Brief, Pg. 29) is frankly absurd. Such a result would violate every rule of contract construction previously applied by this Court, including Fla. Stat. § 627.419(1) requiring insurance policies to be interpreted according to their plain language. See CTC Dev., 720 So. 2d at 1075. Pozzi respectfully submits that if the language of an insurance policy or any other contract is changed, the contract must be construed in accordance with the changed language, not in a way that nullifies that language, which is what Auto-Owners proposes in its brief. In 1986, the ISO changed the wording of its standard CGL form to provide PCOH coverage for liability arising out of the negligent work of a subcontractor. Auto-Owners incorporated that language in the policy it sold to Coral and Mr. Irby and cannot now eliminate that language from the policy it sold.

[13] The JSUB court rejected the carrier's argument that defective construction work by a subcontractor cannot be an "occurrence" that would trigger coverage under a CGL policy. Pozzi submits that this ruling correctly applies Florida law on this point; however, as noted above, the issue is not presented in this case, as Auto-Owners conceded that there was an "occurrence" of property damage in this case. See notes 5 and 7, supra.

Many other jurisdictions have recognized that the 1986 changes to the standard CGL PCOH language extends coverage to general contractors for liability for property damage caused by a subcontractor's work. See Kalchthaler v. Keller Constr. Co., 591 N.W.2d 169 (Wis. Ct. App. 1999) and O'Shaughnessy v. Smuckler Corp., 543 N.W.2d 99 (Minn. Ct. App. 1996), abrogated on other grounds, Gordon v. Microsoft Corp., 645 N.W.2d 393 (Minn. 2002). In O'Shaughnessy, an insured general contractor built a residence. The homeowners sued, alleging that floors were cracked, trusses were improperly installed, improperly constructed masonry allowed water to leak, and a support column was out of plumb. Id. at 100. In deciding that the contractor had coverage under its CGL policy, the O'Shaughnessy court carefully examined the business-risk doctrine:

> Prior to 1986, the products-completed operations hazard did not except work performed by subcontractors. However, the current CGL policy contains the following exclusion and exception to that exclusion. [The court then quoted the same exclusion and subcontractor exception at issue here.]

Id. at 103. Noting that case authority to the contrary had been "decided before the exception to the exclusion was added," the court ruled that "the plain language of the [subcontractor] exception provides that damage to 'your work' is covered if the damage results from the work performed by a subcontractor." Id. at 104. See also First Texas Homes, Inc. v. Midcontinent Cas. Co., No. 3-00-CV-1048-BD, 2001

WL 238112 (N.D. Tex. 2001), aff'd, 32 Fed. Appx. 127 (5th Cir. 2002) (recognizing the subcontractor exception to the your work exclusion.)

Auto-Owners has never disputed that the damage to the windows, which had to be replaced, was caused by the negligent work of the subcontractor who installed the windows. There is no evidence that Coral or Mr. Irby worked on those windows or that either insured committed any acts of negligence with respect to the installation. See Archon Investments, Inc. v. Great American Lloyds' Ins. Co., 174 S.W.2d 334 (Tex. App. Houston 2005). In Archon, the plaintiff alleged not only that the general contractor was negligent and had breached warranties, but also that damage had been caused by a subcontractor's negligent installation (lack of flashing) of windows. Id. at 336, 341. In finding a duty to defend such claims, the court applied the subcontractor exception to the "your work" exclusion, ruling that the "exclusion does not apply if the damage to property occurred after the house was completed and sold if the work out of which the damage arose was performed on [the general contractor's] behalf by a subcontractor…." Id. at 341-42.

The Auto-Owners' Policy does not bar coverage for the claims against Coral and Mr. Irby arising out of the negligent work of a subcontractor. As the Kalchthaler court noted:

> We realize that under our holding a general contractor who contracts out all the work to subcontractors,

> remaining on the job in a merely supervisory capacity, can ensure complete coverage for faulty workmanship. However, it is not our holding that creates this result: it is the addition of the new language to the policy. We have not made the policy close to a performance bond for general contractors, the insurance industry has.

591 N.W. 2d at 174.

Auto-Owners' Policy includes the "subcontractor exception," distinguishing it from the policy at issue in LaMarche. This Court should reject Auto-Owners' arguments because they (1) ignore the subcontractor exception to the "your work" exclusion, (2) ignore the undisputed facts showing that the PCOH loss was caused by a subcontractor, and (3) ignore the undisputed facts that establish coverage under the plain language of the policy.

b. The "business risks" concept does not bar PCOH coverage for liability arising from the negligence of subcontractors.

Auto-Owners' bases its argument on the erroneous proposition that the 1980 decision in LaMarche and the cases cited therein adopted an immutable presumption that a general contractor's liability for faulty workmanship is a "business risk" that is uninsurable as a matter of Florida public policy, no matter what the policy language says. In effect, Auto-Owners contends that it can collect an extra premium for PCOH coverage it sells and then ignore policy language expressly extending the PCOH coverage to general contractors facing legal liability for property damage caused by a negligent subcontractor. As noted above,

LaMarche did not construe a policy that included the form of PCOH coverage at issue here. Rather, as acknowledged by Auto-Owners' witness at trial, the LaMarche Court applied different coverage exclusions and did not consider policy language expressly covering claims based on negligent work by a subcontractor.[14] Auto-Owners' statement in its brief that the policies construed in LaMarche "are similar to the policies of Auto-Owners" is plainly wrong (Auto-Owners' Brief, Pg. 19) and, as discussed above, contradicts the trial testimony of its own corporate representative, Mr. Norris. The different policy language added to the ISO CGL form in 1986 was outcome determinative in JSUB, 906 So. 2d 303, because the current CGL policy language contains significantly different wording (the subcontractor exception) than the policy considered in LaMarche. [15]

The ruling in JSUB is fully consistent with the weight of recent authority elsewhere recognizing that the so-called "business risk" rationale cannot be used to

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[14] LaMarche relied on Weedo v. Stone-E-Brick, Inc., 405 A.2d 788 (N.J. 1979), a leading cases applying the "business risks" concept. However, the Weedo court clearly relied on "the CGL provisions of the policy in question." Id. at 790. The policy "in question," like the policy at issue in LaMarche, did not include the 1986 ISO language providing PCOH coverage for the negligent work of a subcontractor.

[15] Like JSUB, the decision in Biltmore Constr. Co., Inc. v. Owners' Ins. Co., 842 So. 2d 947 (Fla. 2d DCA 2003), rev. dismissed, 846 So. 2d 1148 (Fla. 2003) applying the PCOH coverage in a leaking window "products" case, correctly recognized that LaMarche did not control because it addressed a different form of CGL policy than the policy at issue in the Biltmore Constr. case.

nullify the actual terms of the CGL policy that apply to the claim. See American Family Mut. Ins. Co. v. American Girl, Inc., 673 N.W.2d 65, 78 (Wis. 2004); Wanzek Constr., Inc. v. Employers Ins. Co. of Wausau, 679 N.W.2d 322, 324-27 (Minn. 2004); Kvaerner Metals v. Commercial Union Ins. Co., 825 A.2d 641, 655-59 (Pa. Super. 2003); Kalchthaler v. Keller Constr. Co., supra; O'Shaughnessy v. Smuckler Corp, supra.

For example, as the Wisconsin Supreme Court recently ruled in American Girl:

> Cases in Wisconsin and in other jurisdictions have consistently recognized that the 1986 CGL revisions restored otherwise excluded coverage for damage caused to construction projects by subcontractor negligence. …
>
> This interpretation of the subcontractor exception to the business risk exclusion does not "create coverage" where none existed before, as American Family contends. There is coverage under the insuring agreement's initial coverage grant. Coverage would be excluded by the business risk exclusionary language, except that the subcontractor exception to the business risk exclusion applies, which operates to restore the otherwise excluded coverage.

Id., 673 N.W.2d at 83-84. In American Girl, supra at 83, the Wisconsin Supreme Court agreed with the previous ruling of the Wisconsin court of appeals in Kalchthaler, supra, and with O'Shaughnessy, supra, in which the Minnesota court explained that the business risk limitation does not apply when there is an express grant of PCOH coverage against liability for subcontractor negligence:

> Here, we are faced not with an omission, but an affirmative statement on the part of those who drafted the policy language, asserting that the exclusion does not apply to damages arising out of the work of a subcontractor. It would be willful and perverse for this court simply to ignore the exception that has now been added to the exclusion.
>
> We cannot conclude that the exception to exclusion (l) has no meaning or effect. The CGL policy already covers damage to the property of others. The exception to the exclusion, which addresses 'property damage' to 'your work,' must therefore apply to damages to the insured's own work that arise out of the work of a subcontractor. Thus, we conclude that the exception at issue was intended to narrow the Business Risk Doctrine.

O'Shaughnessy, 543 N.W.2d at 104-05 (emphasis added). Recent decisions addressing the subcontractor exception are fully consistent with this analysis.

For example, in Broadmoor Anderson v. National Fire Ins. Co. of La., 912 So. 2d 400 (La. Ct. App. 2005), destructive testing showed that the subcontractor's defective workmanship when installing shower tiles caused shower pans to leak, damaging a hotel. Id. at 401. The general contractor sought insurance coverage for the costs incurred in settling the hotel owner's property damage claims, including repairing "the work of its subcontractor" and "the costs of repairing the shower assemblies." Id. at 403. While the Broadmoor court focused on whether there was an occurrence, the court specifically noted that the "subcontractor exception" renders the "your work" exclusion inapplicable when the insured/general contractor experiences the "unanticipated risk" of its

subcontractors' defective work. Id. at 407-08. Other Louisiana courts have followed this result, paying special attention to the fact that PCOH coverage is only obtained after the insured pays an additional premium. Supreme Servs. & Specialty Co., Inc. v. Sonny Greer, Inc., 930 So. 2d 1077 (La. Ct. App. 2006).

As ruled recently by the Kansas Supreme Court in a case involving replacement of leaky windows installed by a subcontractor:

> A court need only ask *why* the CGL policy specifically includes an express exception to the 'your work' exclusion for property damage arising out of the work of a subcontractor to understand that this kind of property damage must be included in the broad scope of the term 'occurrence' in the coverage grant, and that the coverage determination for this kind of property damage must be made based on the construction-specific policy exclusions.

Lee Builders Inc. v. Farm Bureau Mut. Ins. Co, No. 90,944, 2006 WL 1561294 *10 (Kan. June 9, 2006) (emphasis in original). This analysis echoes the ruling in JSUB and is consistent with the rules of policy construction applied in CTC Dev., 720 So. 2d at 1074-75 ("Reading the coverage provision of the policy together with the exclusionary clause could support a conclusion that coverage is provided.").

Auto-Owners does not and cannot invoke the "no occurrence" defense in this case; and once the issue of whether or not actual "property damage" had occurred was resolved, none of the courts in the foregoing cases had any difficulty

finding PCOH coverage under the subcontractor exception. A recent decision of the Texas Court of Appeals, relying in part on Florida law, is fully in accord with these rulings. Lennar Corp. v. Great American Ins. Co., No. 14-02-00860, 2006 WL 406609 (Tex. Ct. App. 2006). This case contains a thorough and complete exposition of the applicable legal principles and recent authorities applying those principles that should be instructive in this case.

The Texas Court of Appeals noted (1) that Weedo and other courts adopting the "business risks" concept applied an "earlier version" of the CGL policy form which did not contain a subcontractor exception; (2) that the "'business risks' doctrine… has been modified by the subcontractor exception"; (3) that "the subcontractor exception demonstrates insurers intended to cover some defective construction resulting in damage to the insured's work"; and (4) that "finding no occurrence" when defective construction damages "the insured's work would render the subcontractor exception superfluous and meaningless." Id. at *11. The court concluded that applying the proposition that "an exception to an exclusion cannot create coverage" to a policy containing the subcontractor exception would be "contrary to the principle that we consider the whole policy to ascertain the parties' intent and give effect to all parts, so that none will be rendered superfluous and meaningless." Id. (citing JSUB). As ruled in Lennar Corp.:

> [T]he subcontractor exception does not create coverage where none otherwise exists under the "insuring agreement." Rather, it restores

> coverage that originally existed… but was precluded by the [unmodified] "your work" exclusion.

Id. This analysis is fully consistent with the rules of policy construction applied in JSUB and by this Court in CTC Dev. JSUB, supra at 310; CTC Dev., supra at 1074-75

The rulings in Lennar Corp. and the other recent cases cited above are fully consistent with the "guiding principles" of Florida insurance law applied by this Court. Because it is undisputed that the insured's liability arose out of subcontractor Brian Scott's defective workmanship that caused the windows to warp and leak, damaging other property as well as the windows themselves, the pre-1986 cases simply do not apply; therefore, the trial court properly ruled that the post-1986 ISO policy language provided coverage for such claims.

c. There is no Florida "public policy" that would release Auto-Owners from the duties it undertook in charging an extra premium for PCOH coverage.

Auto-Owners cannot rely on the rubric of "public policy" to nullify the plain language of its Policy. No such policy bars coverage for the vicarious liability of a general contractor for the negligent work of a subcontractor, and there is no evidence in the record of this case that the window installer somehow conspired with Auto-Owners' insureds to intentionally damage the Perez home. Indeed, even if an "intentional tort" were involved, this Court's recent analysis of Florida public policy would not prohibit insurance coverage for such a claim. Travelers Indem.

Co. v. PCR, Inc., 889 So. 2d 779, 781-82 (Fla. 2004). In PCR, Inc., an employer sought liability coverage for claims based on its alleged creation of a workplace hazard that was "substantially certain" to cause injury and that did in fact injure a worker. Id. at 781-82. In addressing the coverage claims, this Court considered (1) "whether the existence of insurance will directly stimulate commission of the wrongful act" and (2) whether the liability insured against is "to deter wrongdoers or compensate victims." Id. at 794. This Court held that public policy did not prohibit an employer from obtaining insurance coverage for liability incurred under the "substantially certain" test for intentional torts. Id. at 796.

In this case, it is undisputed that the property damage at issue was caused by the negligent work of a third-party subcontractor, not by an intentional tort by the insureds. Also, the only damages at issue in this case are compensatory, awarded to reimburse Pozzi, as assignee of the insureds, for losses incurred as a result of property damage caused by the negligence of Brian Scott. Thus, even under the "intentional tort" analysis set forth in Travelers, Auto-Owners could not invoke "public policy" as an excuse for refusing to apply the plain language of its insurance contract to reimburse the damages at issue.

The insured/general contractor must pay an extra premium to obtain coverage protecting against the unanticipated risk of a subcontractor's defective work. Auto-Owners' argument that "public policy" bars enforcement of such a

policy rests on the fallacious assumption that general contractors do not care if subcontractors negligently perform their work, so long as there is insurance coverage for the resulting damage.[16] Auto-Owners offers no record evidence to support this uninformed assumption. Common sense suggests that general contractors, like other commercial concerns, enjoy repeat business based on their reputations for quality work. No one wants to get sued, even if there is insurance coverage for any resulting liability. Insurers should not be allowed to continue to charge an extra premium for PCOH coverage, but fail to give it effect by invoking a post hoc, specious argument that it must deny coverage under the policy to discourage "sloppy work."

Florida public policy does not justify nullification of express policy language that extends coverage to a general contractor for liability resulting from

[16] A general contractor noted for "sloppy" work would soon find it difficult to obtain a required surety bond, as such bonds may be triggered by "sloppy" work (or uncompleted work) that does not cause any physical damage to insured property. When such physical damage occurs, as happened here, and arises out of the subcontractor's work, the contractor's CGL policy also would respond. Contrary to the arguments espoused in some cases, the fact that the CGL policy would cover such claims does not "convert" a CGL policy providing PCOH coverage to a construction bond. Lennar Corp., supra at *11 (noting that a construction bond is "broader than a CGL policy"). In Lennar, the Texas Court of Appeals cited Federal Ins. Co. v. Southwest Florida Retirement Center, Inc., 707 So. 2d 1119 (Fla. 1998) for the proposition that a performance bond ensures "completion of the work upon contractor's default and insure[s] against losses the owner may suffer if the default occurs." Id.

damages caused by a subcontractor's negligence. The PCOH coverage Auto-Owners sold to its insureds would be entirely illusory if Auto-Owners' arguments to the contrary were accepted by this Court.[17]

2. Auto-Owners' Arguments that Misconstrue the Issues Before this Court Should Not Be Considered in Answering the Certified Question.

The issue before this Court can and should be addressed by analyzing the plain language of the Policy and the subcontractor exception contained therein. Auto-Owners' arguments that that do not address this issue are irrelevant and should be rejected. First, Auto-Owners refers to Pozzi as the "manufacturer" and discusses whether there is coverage for an allegedly defective "product." At page 33 of its brief, Auto-Owners asserts that "[t]o find coverage under Auto-Owners' policies is to make the insurer the warrantor of the manufacturer's product." Like the "occurrence" issue, this issue was not raised in the court below and is not properly before this court. See note 5, supra. To be sure, Pozzi did manufacture the damaged windows and some manufacturers purchase liability coverage; however, such a policy is not at issue in this case. In fact, the Auto-Owners'

[17] An insurance policy should not be interpreted in a manner that would render the coverage illusory. Purrelli v. State Farm Fire & Cas. Co., 698 So. 2d 618, 620 (Fla. 4th DCA 1997) (reversing judgment for insurer because "[w]hen limitations or exclusion completely contradict the insuring provisions, insurance coverage becomes illusory."); Meister v. Utica Mut. Ins. Co., 573 So. 2d 128 (Fla. 4th DCA 1991) (refusing to adopt interpretation of exclusion that would render coverage illusory), rev. denied, 583 So. 2d 1038 (Fla. 1991).

Policy contains a "your product" exclusion that is not subject to the subcontractor exception, which only modifies the "your work" exclusion. (Doc 202 - trial exhibit 1 - section I, coverage A, ¶ 1-Pg. 3 of 10). The "your product" exclusion is irrelevant because the Auto-Owners Policy issued insured Coral and Mr. Irby in their capacity as contractors, not as manufacturers of a "product." As assignee of the policyholder's rights, Pozzi stands in the shoes of the assignors, Coral and Mr. Irby. See Dependable Ins. Co. v. Landers, 421 So. 2d 175 (Fla. 5th DCA 1982). Thus, the issue is not whether the "your product" exclusion applies vis-à-vis Pozzi's product, but whether the "your work" exclusion applies vis-à-vis Coral and Mr. Irby's liability for the negligent work of subcontractor Brian Scott. This is not a "products" case, it is a "work" case.[18]

Auto-Owners also contends that if the plain language rule were used to interpret its Policy, "insurers will be responsible to homeowners for punch list items." (Auto-Owners' Brief, Pg. 33). Again, there is no evidence that the window replacement work necessary in this case should be considered a "punch list" item. Rather, that work was undertaken by Pozzi to resolve a post-completion property damage claim. A general contractor's failure to perform typical punch list

[18] The windows Pozzi manufactured were not even supplied by the insured general contractor or the negligent subcontractor, but were merely purchased directly by the homeowner, Mr. Perez. (Doc. 1, Ex. A, First Am. Comp., ¶¶3-4).

items (even those that should have been completed by a subcontractor) would not be covered by a CGL policy or any other form of policy unless the failure to perform caused "property damage" or "bodily injury" within the scope of the policy coverage. This Court should focus on the facts and issue actually presented in this case and not on Auto-Owners' imaginary concerns about what may happen if another policyholder attempts to apply the PCOH coverage to a "punch list" claim.

Third, Auto-Owners effectively complains that if the PCOH coverage it sold to Coral and Mr. Irby were actually enforced as written, such an outcome would transform Auto-Owners' policy into a performance bond.[19] Again, there is no evidence in this case addressing this issue or suggesting that Mr. Perez required Coral and Mr. Irby to obtain such a bond to secure the performance of their work. Auto-Owners argues that enforcing the PCOH coverage, would "cause injustice to the CGL insurer who, unlike the surety on a performance bond, has no recourse against a contractor for the use of defective materials or poor workmanship." (Auto-Owners' Brief, Pg. 38, citations omitted.) Auto-Owners is wrong. If a CGL insurer must defend and indemnify a general contractor because of the negligence

[19]Of course, as noted above, a surety's obligation under a construction bond, which secures performance of the obligor's contractual obligations under the construction contract, is much broader than an insurer's obligation under a CGL policy. The obligations under a bond can be triggered without proving any cognizable physical damage to the project. See note 16, supra.

of a subcontractor, the insurer is subrogated to the rights of the general contractor against the subcontractor, both in tort and contract. Thus, in this case, Auto-Owners would be subrogated to Coral and Mr. Irby's rights against subcontractor Brian Scott, thereby providing Auto-Owners recourse against the negligent party. The fact that Auto-Owners chose to deny its policy obligations rather than paying the property damage loss and pursuing a subrogation claim against Brian Scott obviously cannot affect the outcome of this case.

Auto-Owners' attempt to assert non-existent issues that are red-herrings, canards and faulty arguments not made in the court below and that are unsupported by the record of this case should not distract this Court from the central issue presented: What does the Policy say? Because the plain language of the Policy extends liability coverage to a general contractor for post-completion property damage to the work and arising out of the work of a negligent subcontractor, this Court should answer the certified question in the affirmative.

B. THE COURT SHOULD EXERCISE ITS DISCRETION TO CONSIDER THE NONCERTIFIED ISSUES OF BAD FAITH AND PUNITIVE DAMAGES.

1. This Court Has Jurisdiction to Consider Noncertified Questions.

In considering certified questions, this Court has jurisdiction to address other issues, even if they have not been certified. Warner v. Boca Raton, 887 So. 2d 1023 (Fla. 2004) , and Savona v. Prudential Ins. Co. of America, 648 So. 2d 705

(Fla. 1995). This Court's authority to do so is "discretionary and should be exercised only when these other issues have been properly briefed and argued, and are dispositive of the case." Savona, 648 So. 2d at 707. This Court is unlikely to address a noncertified issue that "neither the federal district court nor the circuit court addressed." Id.

In this case, the issue of Auto-Owners' bad faith and whether it should be subject to punitive damages has been briefed in the trial court (Doc. Nos. 150, 164, 175, 177) and in the briefs filed in the Eleventh Circuit. These issues obviously were addressed by the courts below in rulings that Pozzi respectfully submits improperly preempted the jury's findings and verdict. Accordingly, Pozzi suggests that this Court examine these noncertified issues and give guidance to the parties, the Eleventh Circuit and future courts with respect to the quantum of evidence necessary to support a jury's award of punitive damages for insurance bad faith.

2. The Jury Correctly Applied Florida Law in Finding That Auto-Owners Acted in Bad Faith and in Awarding Modest Punitive Damages.

Pozzi respectfully submits that confusion is created in bad faith cases that are not "traditional" failure-to-settle cases but, like this one, involve wrongful coverage denial and bad-faith claims handling. Cases alleging bad faith failure-to-settle within policy limits are more common; therefore, courts often struggle to

apply fact patterns derived from bad faith failure-to-settle cases to other types of bad faith cases.

Auto Owners argued and the courts below agreed that the outcome in Butchikas v. Travelers Indem. Co., 343 So. 2d 816 (Fla. 1976), refusing to sanction punitive damages in a bad faith failure to settle situation, warranted rejection of the jury's verdict in this case. In Butchikas, this Court distinguished its earlier decision in Campbell v. Government Employees Ins. Co., 306 So. 2d 525 (Fla. 1974), because the carrier's decision not to settle the underlying claim in Butchikas did not involve "active concealment and active misrepresentations," but rather "non-feasance and a complete lack of essential communication between the insurance company and its insured." 343 So. 2d at 817. Factors such as "active concealment and active misrepresentations," may indeed warrant the sanction of punitive damages, but they are not a prerequisite to bad faith and punitive damages in every insurance case. Here, Auto Owners ignored the plain language of its policy, denied all coverage, refused to defend Mr. Irby, and failed to settle the underlying case; but its actions did not result in an excess-of-limits judgment against its insureds. Rather, the heart of this case is Auto-Owners' conduct following its wrongful refusal to defend Mr. Irby and wrongful denial of coverage for claims alleging damages within the policy limits.

There are relatively few Florida cases upholding punitive damages awards for insurance bad faith in cases involving wrongful denial of coverage and failure to pay a claim within policy limits. One is Home Ins. Co. v. Owens, 573 So. 2d 343 (Fla. 4th DCA 1991), involving failure to pay "first-party" benefits under an automobile policy. Noting that "litigation conduct" was admissible to support a bad faith claim, the court concluded that "evidence-a-plenty of bad faith" established a jury issue under Fla. Stat. § 624.155. Id. at 345. The court upheld a punitive damages award because the record "supports a finding that the insurer acted in reckless disregard for the rights of the insured and the jury so found pursuant to a jury instruction submitted by the insurer." Id. at 346 (emphasis added).

Pozzi submits that in rejecting the jury's verdict, the trial court and the Eleventh Circuit overlooked the "reckless disregard" standard applied in Owens. Butchikas did not reject that standard as a basis for awarding punitive damages to deter repeated carrier misconduct. Indeed, as ruled in Campbell, "insurance companies are vulnerable to punitive damages suits by their policyholders when carriers attempt to deal with their insureds unethically." 306 So. 2d at 531. When a case involves "elements of concealment and misrepresentation – a continued course of dishonest dealing on the part of insurer towards insured," the jury should

decide whether or not to award punitive damages. Id. at 532. See also State Farm Fire & Cas. Co. v. LaForet, 658 So. 2d 55 (Fla. 1995).

A jury may consider "various attendant circumstances" in determining whether or not an insurer acted in bad faith. LaForet, 658 So. 2d at 62; Vest v. Travelers Ins. Co., 753 So. 2d 1270, 1275 (Fla. 2000). When bad faith exists, punitive damages may be awarded based on "clear and convincing" evidence of insurer misconduct. One of the most important question that judges should address in such cases is whether the jury was properly instructed on the appropriate tests for bad faith and punitive damages? There is no dispute in this case that the jury was properly instructed on the subject, using the language of a jury instruction proposed by Auto-Owners. See generally Owens, supra. at 346.

The jury system in this country is one of the strengths of our democracy. Jurors are sworn to uphold the law, as given to them in the court's instructions. Despite some protests to the contrary and the occasional anomalous outcome, the vast majority of jurors, who may never have seen the inside of a courtroom before, honor their sworn duties. Pozzi respectfully submits that the public loses faith in the judicial system when courts too readily substitute their own views of disputed evidence, even if fully rational, for the reasonable views of the jurors who heard the trial evidence and applied the law provided in the instructions to the facts of the case.

Like Owens, Pozzi submits that this case includes evidence "a-plenty" of Auto-Owners' concealments, misrepresentations and reckless disregard for Coral and Mr. Irby's policy rights. For example, Pozzi contended that Auto-Owners denied coverage in reckless disregard of the plain language of its own policy and misrepresented the terms of its own policy in written correspondence to its insured and in misleading testimony presented to the jury at the conclusion of Auto-Owners' case.[20] Auto-Owners' defense is that the coverage question was "fairly debatable" under Florida law. Auto-Owners has a right to assert that defense, which is a restatement of the LaForet factor that goes to "the substance of the coverage dispute or the weight of legal authority on the coverage issue." 658 So. 2d at 63. The defense, however, is a factual one and is not available as a matter of law. Id. ("we reject the fairly debatable standard of determining whether a reasonable basis exists for rejecting coverage"). Auto-Owners presented its "fairly-debatable" / "substance-of-coverage-dispute" defense to the jurors, who soundly rejected it in favor of Pozzi's trial evidence and expert testimony to the contrary.

[20] No new theories of Auto-Owners' bad faith are presented here. All of these theories, and the specific facts and citations to the record appear in the briefing below.

The LaForet Court approved the rationale of the Fifth District Court of Appeals in Robinson v. State Farm Fire & Cas. Co., 583 So. 2d 1063 (Fla. 5th DCA 1991) in which the court ruled that a finding that an insurer had "a 'reasonable and legitimate' basis to deny coverage would be relevant, [but] it is not dispositive…." of the issue of bad faith. Id. at 1068. The Robinson court cited the following factors that should inform the jury's discretion in such a case:

> [W]hether the insurer was able to obtain a reservation of the right to deny coverage if a defense were provided; efforts or measures taken by the insurer to resolve the coverage dispute promptly or in such a way as to limit any potential prejudice to the insureds; the substance of the coverage dispute or the weight of legal authority on the coverage issue; the insurer's diligence and thoroughness in investigating the facts specifically pertinent to coverage; and efforts made by the insurer to settle the liability claim in the face of the coverage dispute.

Id. All of these factors were appropriately considered by the jury here in finding that Auto Owners acted in bad faith and should be sanctioned by an award of punitive damages.

It is undisputed that Auto-Owners breached its duty to defend Mr. Irby, thereby effectively "forfeit[ing] its right to defend" its insured. BellSouth Telecomms., Inc. v. Church & Tower of Fla., Inc., 930 So. 2d 668, 670-773 (Fla. 3d DCA 2006). When the evidence is construed in favor of the jury's verdict, as it should be, the facts establish that Auto-Owners offered Mr. Irby a sham defense, instructing its counsel to file an appearance only after learning (at the mediation)

that Mr. Irby was contemplating a settlement that would assign all of his rights to Pozzi. In a misleading effort to stop the settlement, Auto-Owners effectively asked Mr. Irby to bet against his own interests by accepting $11,000 in payment for the fees he had expended in defending his interests (fees that Auto Owners owed anyway), while still causing him to face much greater liability by wrongfully refusing to accept coverage and settle Pozzi's claims. This misconduct continued at trial, when Auto-Owners' corporate representative attempted to convince the jury that Auto-Owners had acted in good faith by relying upon inapposite cases that did not apply the subcontractor exception language that the jury obviously understood was the basis for coverage in this case. His testimony effectively confirmed that Auto-Owners engaged in a pattern and practice of ignoring its policy language in dealing with its Florida insureds. The jurors found bad faith and that punitive damages should be awarded to deter Auto-Owners from ignoring its policy obligations, which Pozzi respectfully submits were not even "fairly debatable." Even if they were, the ultimate issues were for the jury to decide. LaForet, supra.

The trial court and the Eleventh Circuit obviously disagreed with the jury's factual findings awarding punitive damages for Auto-Owners' bad faith. However, a court's disagreement with a jury's verdict is not an appropriate basis to set that verdict aside as a matter of undisputed fact and law. Accordingly, Pozzi

respectfully suggests that this Court address these issues and provide appropriate guidance to courts, including the Eleventh Circuit, regarding the "various attendant circumstances" that a jury may rely upon to award punitive damages when a carrier ignores the rights of its policyholders under Florida law and under the plain language of the policy they purchased.

V. CONCLUSION

Because Auto-Owners' policy insures against the liability of Coral and Mr. Irby for the negligent work of subcontractor Brian Scott that caused damage to the Perez home after its completion, the certified question should be answered in the affirmative.

Because the evidence and appropriate inferences drawn from the evidence support the reasonable findings of the jury that Auto-Owners acted in bad faith and in a manner warranting a modest award of punitive damages, this Court should address noncertified issues and instruct the Eleventh Circuit to modify its ruling on the issues of bad faith and punitive damages.

Respectfully submitted,

_____
EDMUND M. KNEISEL, ESQ.
RICHARD E. DOLDER, ESQ.

CERTIFICATE OF SERVICE

Undersigned counsel for Appellee Pozzi Window Company, hereby certifies that a true and correct copy of the foregoing was mailed this _____ day of August, 2006 to Denise V. Powers, Esq., DENISE V. POWERS, P.A., 2600 Douglas Road, Suite 501, Coral Gables, FL 33134; David K. Miller, Esq. and Ginger L. Barry, Esq., Broad and Cassel, 215 S. Monroe St., Suite 400, P.O. Drawer 11300, Tallahassee, FL 32302; Mark A. Boyle, Esq., Fink & Boyle, P.A., 2030 McGregor Boulevard, Fort Myers, FL 33901; Nancy W. Gregoire, Esq., Bunnell, Woulfe, Kirschbaum, Keller, McIntyre & Gregoire, P.A., One Financial Plaza, 9th Floor, 100 S.E. 3rd Avenue, Fort Lauderdale, FL 33394; Keith Hetrick, Esq., Florida Home Builders Association, 201 E Park Ave., Tallahassee, Florida 32301-1511; Warren H. Husband, Esq., Metz, Husband & Daughton, P.A., 215 South Monroe St., Suite 505, Tallahassee, FL 32301; Patrick J. Wielinski, Esq., Cokinos, Bosien & Young, 2221 East Lamar Boulevard, Suite 750, Arlington, TX 76006; David S. Jaffe, Esq., National Association of Homebuilders, 1201 15th St., NW, Washington, DC 20005; Ronald L. Kammer, Esq. and Sina Bahadoran, Esq., Hinshaw & Culbertson LLP, 9155 S. Dadeland Blvd., Suite 1600, Miami, FL 33156; and, R. Hugh Lumpkin, Esq., and Michael F. Huber, Esq., Ver Ploeg & Lumpkin, P.A., 100 S.E. Second Street, Suite 2150, Miami, FL 33131-2151.

Signature is contained on the following page.

Kilpatrick Stockton LLP
1100 Peachtree Street
Suite 2800
Atlanta, Georgia 30309-4530
(404) 815-6500

Edmund M. Kneisel, Esq.
Admitted Pro Hac Vice
EKneisel@KilpatrickStockton.com
Fax: (404) 541-3266
Richard E. Dolder, Esq.
Florida Bar No.: 162647
RDolder@KilpatrickStockton.com
Fax: (404) 541-3300

Counsel for Appellee Pozzi Window Co.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief has been prepared with Times New Roman 14-point font and is in compliance with Fla. R. App. P. 9.210(a)(2).

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RICHARD E. DOLDER, ESQ.
Attorney for Pozzi Window Company