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.

REPLY BRIEF OF APPELLANT AUTO-OWNERS INSURANCE COMPANY

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Other Authorities:

SUMMARY OF THE ARGUMENT

Florida has long held that a CGL insurance policy does not provide coverage for repair and replacement of defective workmanship. *LaMarche v. Shelby Mutual Ins. Co.*, 390 So.2d 325 (Fla. 1980); *Auto Owners Ins. Co. v. Tripp Construction, Inc.*, 737 So. 2d 600, 601 (Fla. 3d DCA 1999). This principle of law and the underlying public policy does not and should not change if the CGL policy provides for products completed operations hazard. *Auto Owners Ins. Co. v. Travelers Cas. & Sur. Co.*, 227 F.Supp.2d 1248 (M.D. Fla. 2002).

Florida has stood with the majority of states in its construction of these policy provisions. *LaMarche, supra,* and its progeny. The public policy of Florida should remain that CGL policies do not provide coverage for defective work, but for defective work that injures or damages other property. The products completed operations hazard simply extends the insured's coverage to incidents of property damage or personal injury which occur after the completion of the work by the insured or its subcontractors and caused by the poor workmanship, not the repair of the work itself. *Auto Owners Ins. Co. v. Travelers Cas. & Sur. Co., supra*.

The purpose of the CGL policies with PCOH coverage is to provide the contractor and its subcontractors with coverage for property damage or personal injury that occurs after the completion of the work. It is not intended to reward

them for failing to fulfill their contractual promises.

Under the principles of comity and this Court's constitutionally limited jurisdiction, this Court should not exercise jurisdiction to reverse the Eleventh Circuit Court of Appeals which affirmed the judgment as a matter of law on bad faith and punitive damages entered by the U.S. district court magistrate judge who tried the case.

Pozzi failed to plead and prove an independent tort to support its claim for bad faith and punitive damages. Neither Pozzi nor the insureds suffered any damages not covered within the Auto-Owners' insurance policy, assuming that coverage exists. Both the trial court and the Eleventh Circuit correctly ruled based on clear Florida law.

ARGUMENT

I. UNDER FLORIDA LAW A COMMERCIAL GENERAL LIABILITY INSURANCE POLICY WITH PRODUCTS COMPLETED OPERATIONS HAZARD DOES NOT COVER DAMAGES FOR REPAIR AND REPLACEMENT DUE TO DEFECTIVE WORKMANSHIP OF THE GENERAL CONTRACTOR OR ITS SUBCONTRACTOR.

Pozzi has reached to cases in other states to justify the coverage decision in the present case which should be governed only by Florida law. Clearly, Pozzi has attempted since the mediation in the underlying case to "change" Florida law.

(D.E. (D.E. 214 page 126). The "public policy" of Florida has been set by this Court in *La Marche v. Shelby Mutual Ins.* and its progeny. The contractor received payment for the work he did and has kept that money. The work was poorly done and needed to be redone. The insurer should not have to pay for the repair and replacement of the shoddy work. The CGL coverage with products completed operations hazard (PCOH) does provide the insured with valuable coverage when the poor or defective work causes personal injury or damage to other property.

Pozzi's response to Florida case law is "plain language," which is not unlike the attitude take by Pozzi's expert at trial who, not only disregarded Florida law, but was in fact was ignorant of what Florida law was.

Significantly, at least one of the cases which Pozzi relies upon for the interpretation that the CGL policy with PCOH covers repair and replacement damages caused by defective workmanship does not stand for that proposition. In *Kalchthaler v. Keller Construction Co.* 224 Wis.2d 387, 591 N.W.2d 169 (1999), water entering through leaky windows damaged drapery and wallpaper. Keller was the general contractor and a subcontractor had performed the work. Aetna, Keller's insurer denied coverage. The issue before the court "was whether the damage to the building and its interior was covered by Keller's Aetna policy." 591 N.W.2d at 171. The issue was not the cost of repair. *See also, Nas Sur. Group v.*

Precision Wood Products, Inc., 271 F.Supp.2d 776, 783 (M.D.N.C. 2003)(the court noted that *Kalchthaler* involved "CGL coverage where leaky windows damaged drapery and wallpaper and thus damages extended beyond the scope of contractor's original work."). Thus, the damages sought in *Kalchthaler* were within the policy since this was not repair of the original work but covered damages just like those which Auto-Owners paid directly to Mr. Perez. (D.E. 216, pages 37-38)

The allegations of defective construction and poor workmanship in the installation of the windows in the Perez residence are classic examples of what is **not** covered under a commercial general liability policy in Florida. Pozzi sued the insureds for their own negligence in failing to supervise Brian Scott Builder's installation of the Pozzi windows at the Perez residence. (D.E. 1, Ex. B)

The only Florida case which has found coverage for such damages under a CGL policy is *J.S.U.B., Inc. v. U. S. Fire Ins. Co.*, 906 So. 2d 303 (Fla. 2d DCA 2005)[1], in which the second district rejected *La Marche* and its progeny and adopted the minority view that the CGL policy covered damages for the faulty workmanship by the insured and its subcontractors. The Second District Court of Appeal in *J.S.U.B.* relied upon cases from Minnesota, Wisconsin, Alaska and Kansas to support its construction of the coverage. This is the first case in Florida,

with the exception of the order of the district court judge in the present case, to reach such a conclusion.

Auto Owners Ins. Co. v. Tripp Construction, Inc., 737 So. 2d 600 (Fla. 3d DCA 1999); *Home Owners Warranty Corp. v. Hanover Ins. Co.,* 683 So. 2d 527 (Fla. 3d DCA 1996), *rev. denied*, 695 So. 2d 700 (Fla. 1997); *Lassiter Construction Co. v. American States Ins. Co.,* 699 So. 2d 768 (Fla. 4th DCA 1997); *Tucker Construction Co. v. Michigan Mutual Ins. Co.,* 423 So. 2d 525 (Fla. 5th DCA 1982), and other Florida cases construing CGL coverage are the correct interpretation of what CGL coverage is and should be in Florida.

The decision in *Auto Owners Ins. Co. v. Travelers Cas. & Sur. Co.,* while not controlling, is certainly an instructive and well-reasoned analysis of CGL coverage. Out of state cases are simply not controlling nor instructive. Pozzi merely relies on the order, "plain language" and out of state cases to support the decision on coverage.

The interpretation of the CGL coverage differs from jurisdiction to jurisdiction. *See generally, Reliance Ins. Co. v. Mogavero,* 640 F.Supp. 84 (D. Md. 1986)(public policy argument that defective workmanship not occurrence and not covered under CGL policy); *Sawhorse, Inc. v. Southern Guaranty Ins. Co.,* 269

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[1]Review in this case is also pending before this Court.

Ga.App. 493, 604 S.E.2d 541 (2004)(business risk borne by contractor to repair or replace defective work excluded from CGL policy); *Nas Sur. Group v. Precision Wood Products, Inc., supra,* (law of South Carolina clear that damages for repair and replacement of faulty workmanship not covered under CGL policy). In *Sawhorse*, the repair and replacement of defective work done by a subcontractor was not covered under the CGL policy with "products-completed operations hazard." The damages caused to the other portion of the building due to the defective work were covered.

State Farm Fire and Cas. Co. v. CTC Development Corp., 720 So. 2d 1072 (Fla. 1998) does not help Pozzi. First, *CTC Development Corp.*, is a duty to defend case that does not address the policy language at issue. *See Auto Owners Ins. Co. v. Travelers Cas. & Sur. Co.*, 227 F.Supp.2d at 1258. Second, this Court in *CTC Development,* cited with favor to both *La Marche* and *Lassiter*[2]. 720 So. 2d at 1074-75.

Florida stands with the majority of states that hold that the purpose of commercial liability insurance coverage is to provide protection for personal injury or for property damage caused by the completed product, but not for the

[2]This Court could have questioned the continued viability of these cases had it so chosen. The Court also chose not to exercise discretionary jurisdiction in *Home Owners Warranty Corp., v. Hanover Ins. Co.,* 683 So. 2d 527 (Fla. 3d DCA 1996), *rev. denied*, 695 So. 2d 700 (Fla. 1997).

replacement and repair of that product. *See Tucker Construction Co. v. Michigan Mutual Ins. Co.*, 423 So. 2d 525, 528 (Fla. 5th DCA 1982); *see also, Reliance Ins. Co. v. Mogavero, supra*; *Sawhorse, supra; Nas Sur. Group, supra*, and cases cited therein for some of the majority of jurisdictions which find no coverage under CGL policies with PCOH for repair and replacement of defective work. These states, along with Florida, find it eminently reasonable to construe the CGL coverage so as not to allow the contractor to be paid for shoddy workmanship, keep the money and then have the insurer pay to redo the work. Such coverage would be available under a performance bond or warranty policy but not a CGL policy which provides protection against damages, personal injury and property damage, caused by the defective work. The "products completed operations hazard" extends this coverage to the occurrence of property damage or personal injury which occurs after the completion of the work.

The clear law of Florida and the overwhelming testimony at trial overwhelmingly supported entry of judgment in Auto-Owners' favor on coverage and, thus on all issues. Only by ignoring long standing established precedent can Pozzi urge this Court to change the law.

In this case, what Pozzi and its lawyers sought to do "was change Florida

law on coverage." There is no need to change well-established law and no need for Florida to adopt the minority view on CGL coverage.

The contractors who argue for coverage are those who do not fulfill their contractual promises to construct well-made homes free of defective work. Through their supervision of the work of the subcontractors, the contractors have control of the fulfillment of the contractual promises made to homeowners within well-established law and policy.

II. THIS COURT SHOULD DECLINE JURISDICTION OVER ISSUES WHICH THE ELEVENTH CIRCUIT DECIDED AND REFUSED TO CERTIFY.

A. This Court should not exercise its jurisdiction to overturn issues that the Eleventh Circuit has already decided.

This Court will not need to address this issue if it answers the certified question in the negative. First, Auto-Owners does not believe that this Court has jurisdiction to review an order of the trial court which the Eleventh Circuit has affirmed. Second, if this Court determines that it does have jurisdiction, it should decline to exercise its discretionary jurisdiction to review the trial court's ruling on the judgment as a matter of law. Third, if the Court does decide to address this issue, it must affirm both the trial court and the Eleventh Circuit.

Pozzi asked the Eleventh Circuit to certify to this Court the issues of bad

faith and punitive damages. The Eleventh Circuit declined to do so. The Eleventh Circuit affirmed the granting of judgment as a matter of law on the issues of bad faith and punitive damages. The Eleventh Circuit specifically held: "For the foregoing reasons, the magistrate judge's grant of judgment as a matter of law in favor of Auto-Owners as to the issues of bad faith and punitive damages is affirmed. As to the coverage issue, we certify the above question to the Florida Supreme Court." *Pozzi Window Co. v. Auto-Owners Ins. Co.*, 446 F.3d 1178, 1189 (11th Cir. 2006). Pozzi sought no further appellate review of those issues to the United States Supreme Court, which would have been the appropriate court from which to seek such review. There is no basis for this Court to exercise discretionary jurisdiction over the affirmance of the Eleventh Circuit Court of Appeals.

The issues that Pozzi seeks to have this Court address are not dispositive of the case. Pozzi is seeking to obtain appellate review of the final portion of the Eleventh Circuit's decision for which there is no uncertainty in Florida law. Such an attempt is contrary to the rules of comity and against this Court's limited discretionary jurisdiction. This Court does not have the authority to "overturn" the decision of the Eleventh Circuit.

In *Savona v. Prudential Ins. Co.*, 648 So. 2d 705, 707 (Fla. 1995), this Court refused to consider *de novo* issues that the federal court had not certified. *See also, Warner v. City of Boca Raton*, 887 So. 2d 1023, 1035 (Fla. 2004) (This Court refused to consider an issue which was not dispositive of the case.).

Pozzi requests that this Court "give guidance to the Eleventh Circuit" and "instruct the Eleventh Circuit to modify its ruling on the issues of bad faith and punitive damages." (Appellee's Amended Brief at 42, 49) The Eleventh Circuit rejected the suggestion that it needed "guidance" to decide the issue of bad faith and punitive damages. This Court does not have jurisdiction, nor the constitutional power, to offer such advisory opinions on general issues of law.

The jurisdiction of this Court to review questions certified by a federal court of appeals comes from the Florida Constitution. Art. V, §3(b)(6); *see* Philip J. Padovano, *Florida Appellate Practice* § 27.7 (2006). No basis exists for the exercise of this Court's discretionary jurisdiction to address issues that are not dispositive of the case, issues upon which there exists no uncertainty in Florida law, and for which the Eleventh Circuit Court of Appeal has directly and succinctly ruled. For this Court to "reverse" the Eleventh Circuit on an issue not certified would, under the circumstances of this case, be a gross violation of the

principle of comity.

B. The Eleventh Circuit correctly affirmed the judgment as matter of law on bad faith and punitive damages.

In the event this Court does exercise its discretionary jurisdiction and reviews the propriety of the Eleventh Circuit's decision affirming the trial court's order granting judgment as a matter of law in favor of Auto-Owners as to the issues of bad faith and punitive damages, this Court should also affirm. Prima facie evidence of the lack of bad faith is the certification by the Eleventh Circuit of the coverage issue to this Court. As the Eleventh Circuit stated:

> [A]s the magistrate judge's order explained, the coverage issue was and is subject to serious debate; the evidence showed that Auto-Owners' denial of coverage was well-reasoned; there was no evidence that Auto-Owners misrepresented the terms of its Policies; Auto-Owners did not subject its insured to any damages beyond the denial of coverage; and the evidence was insufficient to support the jury's bad faith verdict. We conclude that Auto-Owners was entitled to judgment as a matter of law on the bad faith issue.

Id. at 1189 (footnote omitted)

Pozzi had no damages in the bad faith claim and failed to plead and prove the essential elements of an independent tort to sustain the claim. Pozzi continues to rely upon Auto-Owners' decision to question coverage as the basis for bad faith.

As a matter of undisputed fact, all the damages that Pozzi sought in the

underlying case fell within the amount of coverage afforded by the Auto-Owners' insurance policy, in the event that there was coverage. Pozzi had no claim for compensatory damages for the denial of coverage. Damages are an essential element of a claim for bad faith. *Conquest v. Auto-Owners Ins. Co.,* 773 So. 2d 71, 74 (Fla. 2d DCA 1998)(decided under Fla. Stat. §624.155). Thus, the trial court and the Eleventh Circuit were both correct as a matter of law on bad faith and punitive damages. Without "damages" there can be no bad faith.

Pozzi failed to prove an independent tort so as to allow for an award of punitive damages. It is axiomatic that punitive damages cannot be awarded in Florida for breach of contract without proof of an independent tort such as fraud or intentional infliction of emotional distress. *See Home Ins. Co. v. Crawford & Co.,* 890 So. 2d 1186, 1188 (Fla. 4th DCA 2005). In order to assert a claim for punitive damages in a third party suit at common law, the alleged conduct of the insurer against the interests of the insured must be so egregious as to constitute an independent tort. *T.D.S. v. Shelby Mutual Ins. Co.,* 760 F.2d 1520 (11th Cir.1985). Neither the law nor the facts supported an award of punitive damages. The trial court and the Eleventh Circuit properly recognized this.

An excess judgment is usually the extent of provable compensatory

damages. *Swamy v. Caduceus Self Ins. Fund, Inc.*, 648 So. 2d 758, 759 (Fla. 1st DCA 1995)(noting that excess judgment is the only measure of damages in the standard jury instruction for an insurer's bad faith to settle within policy limits); *Dunn v. National Security Fire and Cas. Co.*, 631 So. 2d 1103, 1106 (Fla. 5th DCA 1993). The court in *Swamy* further noted that it does not appear to make a difference whether action is based on common law or Florida Statutes §624.155. *Swamy*, 648 So. 2d at 760 n. 3.

The certification of the coverage question by the Eleventh Circuit dispels any notion that Auto-Owners "misled" the insureds by questioning coverage. Procedurally, Pozzi never pled nor proved fraud. From a factual standpoint, the insureds' own attorney conceded that what Auto-Owners did in sending the reservation of rights letter and filing a declaratory action is the correct and proper conduct of an insurer. (D.E. 214, pages 96, 123-124)

The trial court properly set aside the jury's award of punitive damages because "there is no legally sufficient evidentiary basis for a reasonable jury to have found for [Pozzi] on that issue." Fed. R. Civ. P. 50(a). Auto-Owners was entitled to judgment in its favor on this issue. As soon as the jury returned the verdict, the trial judge expressed his concerns that the punitive award could not

stand: "I have very, very serious doubts about the question of whether or not the standards have been met for the punitive damages." (D.E. 217, page 4)

Punitive damages for breach of contract are barred by Florida law. *See John Brown Automation, Inc. v. Nobles,* 537 So. 2d 614, 617 (Fla. 2d DCA 1988) and cases cited therein. Pozzi failed to prove that the insureds had sustained compensatory damages based on a theory of fraud, which were any way separate or distinguishable from their compensatory damages based on the insurance contract.

Even if Pozzi had pled a tort claim, which it did not, the evidence still would not be sufficient to uphold the jury award of punitive damages. *See Air Ambulance Professionals, Inc. v. Thin Air,* 809 So. 2d 28, 30-31 (Fla. 4th DCA 2002). The burden of proof for entitlement to punitive damages is "clear and convincing evidence." § 768.725, Florida Statutes. Pozzi failed to meet its burden of proof on the issue of entitlement to punitive damages.

As to the attorneys' fees issue, if there was coverage, Auto-Owners would pay the insured's attorneys' fees. If there was no coverage, then the insureds would to pay the fees. Either way, the attorneys' fees do not change the legal analysis of damages.

All Pozzi proved was that Auto-Owners challenged coverage, defended Coral under a reservation of rights, and was wrong on coverage. All the facts at trial were insufficient as a matter of law to support punitive damages.

As United States Magistrate Klein succinctly stated: "Thus, Pozzi (and the insureds) had no claim, and proved up no claim, for compensatory damages over and above the amount of coverage provided by Auto-Owners based on the mere fact of Auto-Owners having denied coverage. **Without damages,** Pozzi failed to show that Auto-Owners' actions resulted in some damage other than the denial of coverage, and therefore, Pozzi cannot prevail on its claim for punitive damages." (D.E. 180 at 15)(emphasis supplied). For the reasons expressed by the trial court and the Eleventh Circuit, this Court should approve the result on this issue.

CONCLUSION

This Court should answer the certified question in the negative. Florida should reaffirm its position with the majority of jurisdictions that standard form comprehensive general liability policies with product completed operations hazard coverage, issued to a general contractor, **do not** cover the general contractor's liability to a third party for the costs of repair or replacement of defective work by the contractor or its subcontractor.

Auto-Owners requests that this Court decline to exercise its discretionary jurisdiction over the issues of bad faith and punitive damages upon which the Eleventh Circuit has already ruled.

Respectfully submitted,

DENISE V. POWERS, ESQ.

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).

BY

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CERTIFICATE OF SERVICE

Undersigned counsel for Appellant Auto-Owners Insurance Company, hereby certifies that a true and correct copy of the foregoing was mailed this 6th day of October, 2006 to all parties on the attached service list.

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