

NOT DESIGNATED FOR PUBLICATION

ANGELA MCKEY, ET AL * **NO. 2002-CA-0932**
VERSUS * **COURT OF APPEAL**
CANAL INDEMNITY * **FOURTH CIRCUIT**
INSURANCE COMPANY, ET * **STATE OF LOUISIANA**
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 98-11491, DIVISION "I"
Honorable C. Hunter King, Judge

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Judge David S. Gorbaty

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(Court composed of Judge Steven R. Plotkin, Judge Dennis R. Bagneris, Sr.,
Judge David S. Gorbaty)

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JUDGMENT VACATED; REMANDED

In this appeal, defendant Canal Indemnity Company (“Canal”) asserts that the trial court’s judgment as to punitive damages must be reversed or vacated. For the reasons set forth below, we vacate the judgment and remand this matter to the trial court for further proceedings.

FACTS AND PROCEDURAL HISTORY

Angela McKey operated Ann’s Auto Repair. On September 14, 1997, a fire broke out in the building next to Ann’s Auto Repair and spread, resulting in the total destruction of the shop, all equipment, tools, and the twelve automobiles being repaired at the business. After the fire, plaintiff made a claim against her insurer, Canal. Canal hired and sent I.A.S. Claim Service, an independent adjusting company, to assess and adjust the loss suffered by Ann’s Auto. On July 1, 1998, asserting that Canal failed to timely pay the claim in bad faith, plaintiff filed suit. A second lawsuit, captioned *Greg Porter, et al. v. Canal Indemnity*, was filed by the vehicle owners whose cars were destroyed in the fire.

Angela McKey filed a motion for summary judgment, arguing that

Canal failed to make payment of any portion of the policy within sixty days of satisfactory proof of loss, as required by Louisiana law. On May 10, 2000, the motion was granted, and defendant appealed to this court.

After a trial of the remaining portions of McKey's claim for damages under La. R.S. 22:1220, on November 16, 2000, a jury awarded plaintiff \$90,000.00 for consequential damages. The trial court denied defendant's motions for judgment notwithstanding the verdict and new trial. Defendant subsequently filed an appeal with this court.

The *Porter* case was also, apparently incorrectly, forwarded to this court along with Canal's appeal in *McKey*. The *Porter* case, which had been consolidated with the *McKey* case for discovery purposes, had not been appealed by either party, and had been settled. Nonetheless, the *McKey* appeals, along with *Porter*, were transferred to the Louisiana Fifth Circuit Court of Appeal because Mr. Porter is a lawyer for the Central Staff of this court.

Once transferred to the Fifth Circuit, the *McKey* appeal of the summary judgment was given the case number 2001-CA-950. The *McKey* appeal of the damages awarded by the jury was numbered 2001-CA-1166. *Porter* was given the case number 2001-CA-951. On February 7, 2002, realizing the mistake, the Fifth Circuit dismissed *Porter*, case number 2000-

CA-2171 in this court, and case number 2000-CA-951 in the Fifth Circuit.

The Fifth Circuit proceeded with the appeals pending in *McKey*, which had been consolidated, and on May 29, 2002, reversed the granting of the summary judgment. The court dismissed as premature the appeal of the judgment for damages.

Earlier, on July 20, 2001, based upon the granting of the summary judgment in *McKey*, the trial court imposed penalties against Canal for its arbitrary and capricious conduct in destroying plaintiff's business at one hundred and sixty-six percent of the damages, or \$150,000, plus legal interest from the date of judicial demand. From that judgment, defendant subsequently filed the instant appeal.

DISCUSSION

In its first assignment of error, defendant contends that since the summary judgment respecting liability was overturned, the trial court's subsequent judgment as to punitive damages must be reversed or vacated.

In its May 29, 2002 ruling, the Fifth Circuit vacated the summary judgment entered against Canal by the trial court, the subject of case number 2001-CA-950. The summary judgment provided the foundation for the subsequent jury award for consequential damages and the punitive damage award that is the focus of the instant appeal.

In their ruling, the Fifth Circuit “dismissed as premature” the appeal of the judgment for damages, citing *Premier Restaurants, Inc. v. Kenner Plaza Shopping Center, LLC*, 00-1700 (La. App. 5th Cir. 1/30/01), 778 So.2d 1180. In *Premier*, it was not the appeal that was premature, but rather the judgment imposing the damages. The court stated:

As matters now stand, the damage award at issue in the instant appeal has no underlying basis because the issue of liability is yet to be tried and determined. In this circumstance, we must vacate the judgment imposing these damages as premature and remand the case for further proceedings.

Premier, 00-1700, p. 2, 778 So.2d at 1181.

Applying the reasoning of *Premier*, we find that since the summary judgment as to liability has been overturned by the Fifth Circuit, the trial court’s judgment with respect to punitive damages has no underlying basis. As such, it is premature and must be vacated.

Plaintiff has argued that the Fifth Circuit lacked subject matter jurisdiction to review the May 10, 2000 summary judgment. Plaintiff presented these same arguments to the Louisiana Supreme Court in an “Exception of Subject Matter Jurisdiction and Writ of Certiorari and/or Review to Review the Ruling of May 29, 2002, of the Fifth Circuit Court of Appeal...” lodged in the Supreme Court on June 28, 2002, and assigned case number 2002-C-1800. On October 4, 2002, the Supreme Court issued a

ruling denying plaintiff's Writ of Certiorari and/or Review. In light of this ruling, we find that the plaintiff's argument as to subject matter jurisdiction is without merit.

CONCLUSION

Accordingly, for the foregoing reasons, the judgment of the trial court is vacated, and this matter is remanded to the trial court for further proceedings.

JUDGMENT VACATED; REMANDED