In the Supreme Court of Florida

CASE NO. SC06-1088

JUAN E. CEBALLO and JACQUELINE CEBALLO,

Petitioners,

v.

CITIZENS PROPERTY INSURANCE CORPORATION,

Respondent.

ON DISCRETIONARY REVIEW FROM THE
THIRD DISTRICT COURT OF APPEAL

AMICUS BRIEF OF STATE FARM FLORIDA INSURANCE COMPANY FILED IN SUPPORT OF RESPONDENT CITIZENS PROPERTY INSURANCE CORPORATION

Respectfully submitted,

RUSSO APPELLATE FIRM, P.A.
6101 Southwest 76th Street
Miami, Florida 33143
Telephone (305) 666-4660
Facsimile (305) 666-4470

Counsel for Amicus State Farm
Florida Insurance Company

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STATEMENT OF AMICUS' IDENTITY AND INTEREST IN THE CASE

State Farm Florida Insurance Company ("State Farm") is a Florida insurer that is authorized to and in the business of writing insurance in Florida, including homeowners and commercial policies that provide property and casualty coverage. State Farm is one of the largest writers of property insurance in Florida. The State Farm Florida property and casualty policies are, in material parts, substantively identical to the policy of Respondent Citizens at issue here.

These review proceedings arise from a decision of the Florida Third District Court of Appeal certifying conflict with the decision of the Florida Fourth District Court of Appeal in *Mierzwa v. Florida Windstorm Underwriting Ass'n*, 877 So. 2d 774 (Fla. 4th DCA 2004). The issue as to which conflict was certified involves the interplay between Florida's Valued Policy Law, §672.702, Fla. Stat. (hereinafter "VPL") and the Law and Ordinance coverage provision of the Citizens' policy in cases where the insured structure has suffered damage rendering it a total loss.[1] The Third District and Fourth District have reached conflicting decisions based on their respective analyses of the VPL and Florida insurance contract law.

[1] Again, this provision in the Citizens' policy is substantively identical to that in State Farm's policies, as are most of the provisions in the Citizens and State Farm policies.

State Farm Florida, as one of the largest property insurers in the state, seeks to participate as an *amicus* herein because resolution of the issues presented in these review proceedings as to the meaning and proper application of the VPL are of paramount importance in thousands of pending claims and lawsuits in which insurers and insureds are grappling with the uncertainties caused by the *Mierzwa* decision's unsupportably distorting 'interpretation' of the VPL.

Amicus State Farm supports the position of Respondent Citizens Property Insurance Corporation. Both State Farm and Citizens seek to have the VPL applied as worded and as intended, and not as 'interpreted' in *Mierzwa,* under which insurers are required (a) to pay losses not covered by their policies, and (b) to pay losses in disregard of clear policy language that in no way conflicts with the language or intended purpose of the VPL.

Never have such statutes required insurers to pay for losses caused by perils not covered by their policies. The Third District's decision herein disagreed with the *Mierzwa* decision's interpretation of the Florida valued policy law (VPL), and Amicus State Farm seeks to support the Third District's position, and to oppose Petitioners' requested relief that this Court "approve the Fourth District's decision in *Mierzwa* [.]"

SUMMARY OF ARGUMENT

These review proceedings present the Court with the opportunity to review a misapplication of the Florida Valued Policy Law, §627.702, Fla. Stat. ("VPL") created by the conflict decision in *Mierzwa v. Florida Windstorm Underwriting Ass'n*, 877 So. 2d 774 (Fla. 4th DCA 2004). In an unprecedented use of a valued policy statute that disregarded the history, purpose, and wording of the statute, *Mierzwa* incorrectly held that Florida's VPL requires insurers (a) to pay for losses specifically excluded by their policies, and (b) to pay additional Law and Ordinance coverage as a liquidated sum automatically owing in all cases involving a total loss to the insured structure, even though the policy's terms provide otherwise. The unjustifiable anomaly in valued policy law created by the *Mierzwa* decision is hindering resolution of thousands of pending claims. *Mierzwa* should be disapproved.

STANDARD OF REVIEW

These review proceedings present issues as to the proper interpretation of a statute, §627.702, Fla. Stat., and the standard of review is accordingly *de novo*. *Kephart v. Hadi*, __ So. 2d __, 2006 WL 1548026, 2 (Fla. 2006).

ARGUMENT

A. Overview of the issues presented

The decision in the certified conflict case of *Mierzwa v. Florida Windstorm Underwriting Ass'n,* 877 So. 2d 774 (Fla. 4th DCA 2004) based its ruling as to the *Mierzwa* insureds' entitlement to Law and Ordinance coverage on its interpretation of how the VPL is to be applied generally. The briefs of both the Petitioners and Amicus The Academy of Florida Trial Lawyers ("AFTL") have urged this Court to approve the *Mierzwa* decision in full because its disposition of the Law and Ordinance provision issue was dictated by its overall reading of the VPL. Petitioners and Amicus AFTL both point to the dependency of the Law and Ordinance coverage ruling on the main analysis. Amicus AFTL also points to a decision from the First District that cited *Mierzwa* for the proposition that resolution of issues as to other coverages that may be available under a policy are necessarily related to the main claim for payment of the policy's face value under the VPL, such that an appeal from a partial final judgment disposing of the insured's VPL claim for the policy's face value would be dismissed as premature due to still pending claims for other coverages under the policy:

> [T]he Court has determined that the order on appeal is not an appealable partial final judgment. Specifically, any additional claim or claims based on "other coverages under the policy," which remain pending in the lower tribunal at this time, and which arise out of the same contract for insurance and from the same incident causing loss are necessarily related to the claim applying the Valued Policy Law, Section 627.702, Florida Statutes, to the contract. *See generally Mierzwa v. Florida Windstorm Underwriting Ass'n*, 877 So. 2d 774, 779 (Fla. 4th DCA 2004)(noting

> that the resolution of an Ordinance or Law Coverage claim under a windstorm insurance policy is related to the decision on the Valued Policy Law issue). Accordingly, the appeal is hereby DISMISSED for lack of jurisdiction.

State Farm Florida Ins. Co. v. Mix, 928 So. 2d 488 (Fla. 1st DCA 2006).

As presented by Petitioners and their Amicus AFTL, the issues are the propriety of the *Mierzwa* decision's general interpretation of the VPL, and, accordingly, the propriety of the decision's ruling on the Law and Ordinance coverage based on that interpretation. The relief requested from this Court by both Petitioners and their Amicus AFTL is that the decision in *Mierzwa* be approved. (Petitioners' Initial Brief on the Merits, p 22; AFTL's Amicus Brief, p 16).

Amicus State Farm accordingly directs it discussions in this *amicus* brief to the issues as raised by Petitioners and their Amicus and by their request for the Court to approve the *Mierzwa* reasoning and decision. The issues are certainly in dire need of a ruling from this Court because the unprecedented - and unwarranted, State Farm submits - construction of the VPL set out in the *Mierzwa* decision has created confusion and uncertainty that currently affects thousands of pending cases. As noted in a recent Florida federal district court order staying a case in which insureds sought payments based on the *Mierzwa* interpretation of the VPL:

> This is an issue of major significance throughout the state of Florida. In *Mierzwa v. Florida Windstorm Underwriting Assoc*., 877 So.2d 774 (Fla. 4th DCA 2004), the Fourth District Court of Appeal for Florida held

> that Section 627.702 requires an insurer to pay the face amount of the policy when a property is considered a "total loss" due in any part to the risk covered by the policy. Because of the widespread application of this statute to similar factual situations throughout Florida, it seems certain that a decision from the Supreme Court of Florida will be necessary for final resolution.

Arenson v. Citizens Property Ins. Corp., 2005 WL 2807153, 1 (N.D. Fla. 2005). Later in the decision, the *Arenson* court explained why the extraordinary relief of stay of the federal action was granted, underscoring the volume of cases affected by the *Mierzwa* decision, and reiterating the need for final resolution from this Court:

> Exceptional circumstances exist in this case. In resolving the issues presented, this court would be called upon to decide an issue of unsettled state law which significantly affects a substantial portion of Florida's citizens. The major issue presented in this case is ubiquitous and affects more than just the parties to this federal action. Both federal and state courts across the state of Florida have had hundreds of lawsuits filed following the 2004 hurricane season, all of which hinge predominately on the interpretation of Section 627.702, and its application to structural damage caused by flooding. Thus, there is little doubt that this issue will eventually be resolved by the Supreme Court of Florida.

2005 WL 2807153 at 4 (emphasis added).

The Third District's decision herein has disagreed with the *Mierzwa* decision and certified the conflict. This Court has thus been provided the opportunity to resolve the issues as to proper interpretation and application of the VPL addressed in *Mierzwa* and in the Third District's decision below.

B. The Mierzwa decision

In *Mierzwa*, the court was presented with the situation created by losses sustained during hurricanes. Two powerful forces of nature - wind and flood - can each inflict damage on structures during a hurricane. In turn, the partial losses from wind and partial losses from flood can, in combination, result in the structure becoming an actual or constructive total loss.

Coverage for wind losses and for flood losses are, however, subject to entirely separate insurance, due to the National Flood Insurance Act ("NFIA"), 42 U.S.C. § 4001 *et seq*., passed in 1968 as a matter of national policy because of previous disasters from flood for which citizens had not purchased insurance at all.[2] The NFIA established a unified national flood insurance program ("NFIP"), under which the federal government provides flood insurance and in exchange mandates that

[2] Congress found that "many factors have made it uneconomic for the private insurance industry alone to make flood insurance available to those in need of such protection on reasonable terms and conditions." 42 U.S.C. § 4001(b). *See also Flick v. Liberty Mut. Fire Ins. Co.*, 205 F.3d 386, 387-88 (9th Cir. 2000) (same). Through the NFIA, Congress sought not only to make flood insurance available at a reasonable premium, but also to reduce future flood relief burdens on the federal government. *See United States v. Parish of St. Bernard*, 756 F.2d 1116, 1122 (5th Cir. 1985). Congress sought to establish "as a matter of national policy" a program of flood insurance that would "complement and encourage preventive and protective measures" (42 U.S.C. § 4001(a)(3)) and would be "integrally related to a unified national program for flood plain management." *Id.* § 4001(c)(2).

participating communities undertake appropriate flood control measures.[3]

Flood policies, however, are governed exclusively by federal law, 44 C.F.R. Part 61 App. A(1), Art. IX; *see also, e.g., Gibson v. American Bankers Ins. Co.*, 289 F.3d 943, 949 (6th Cir. 2002), and are thus not subject to state valued policy laws. *See, e.g., Greer v. Owners Ins. Co.*, --- F. Supp. 2d ----, 2006 WL 1589815 (N.D. Fla. 2006).The federal program has also limited the amount of coverage available under flood policies to $250,000.

While flood coverage is provided under the federal flood policies, windstorm coverage is included in the property coverages of homeowners policies for residential properties, and commercial general liability (CGL) policies for business properties. Both homeowners and CGL policies exclude flood coverage due to the federal preemption of the field of flood insurance.

The *Mierzwa* suit was brought solely against the homeowners carrier, the

[3] Homeowners purchase NFIP flood insurance directly from the Federal Emergency Management Agency ("FEMA") or through private insurers, known as "Write-Your-Own" ("WYO") carriers. All policies sold by FEMA and by WYO carriers are in the form of the Standard Flood Insurance Policy, the terms of which are prescribed by FEMA regulation. 44 C.F.R. Part 61 App. A; *see also* 44 C.F.R. §§ 61.4(b), 61.13(d), (e), 62.23(c). Federal funds pay all of the claims under the flood policies, i.e., the federal government bears the risk of loss, with the WYO private carriers acting merely as its fiscal agents. *See* 42 U.S.C. § 4071(a)(1); 44 C.F.R. § 62.23(g)); *Wright v. Allstate Ins. Co.*, 415 F.3d 384, 387-88 (5th Cir. 2005).

Florida Windstorm Underwriting Association, statutory predecessor to Respondent Citizens here. Although, as the face of the decision affirmatively reflects, the *Mierzwa* insured had sustained only a partial loss from the peril covered by his homeowners' policy, i.e., wind, and although the Florida VPL, §672.702(a) applies only to require payment of the full face amount of the policy in cases of total loss, the *Mierzwa* court decided that the VPL should be read to require the homeowners insurer to pay the full face amount. The *Mierzwa* court felt that the fact that the structure was a total loss was the important point; not whether the peril covered by the policy in question had caused a total loss. The version of the statute in effect when the *Mierzwa* decision was issued provides, in pertinent portion:

> (1) In the event of the total loss of any building, structure, mobile home as defined in s. 320.01(2), or manufactured building as defined in s. 553.36(12), located in this state and insured by any insurer as to a covered peril**,** in the absence of any change increasing the risk without the insurer's consent and in the absence of fraudulent or criminal fault on the part of the insured or one acting in her or his behalf, the insurer's liability, if any, under the policy for such total loss shall be in the amount of money for which such property was so insured as specified in the policy and for which a premium has been charged and paid.

§627.702 (a), Fla. Stat. (2003). The *Mierzwa* court's explanation as to why this statutory language would require an insurer to pay a total loss amount under circumstances where the peril covered by its policy admittedly caused only a partial loss was the following:

> The meaning of the VPL is simple and straightforward. There are two essentials in the statute. The first is that the building be "insured by [an] insurer as to ***a*** [e.s.] covered peril." § 627.702(1). The second is that the building be a total loss. If these two facts are true, the VPL mandates that

> the carrier is liable to the owner for the face amount of the policy, no matter what other facts are involved as to the cost of repairs or replacement. That is to say, if the insurance carrier has any liability at all to the owner for a building damaged by a covered peril and deemed a total loss, that liability is for the face amount of the policy. VPL § 627.702(1) ("[T]he insurer's liability, ***if any*** [e.s.] shall be [the face amount of insurance].") The VPL statutory text does not require that a covered peril be the covered peril causing the entire loss; it need merely be a covered peril. VPL § 627.702(1) ("insured by any insurer as to ***a*** [e.s.] covered peril").

Mierzwa, supra, 877 So. 2d at 775-776 (Fla. 4th DCA 2004).

We discuss below the clearly flawed nature of this reasoning, and its total disregard of the language, history, and purpose of valued policy statutes, like that of Florida. We first note here the *Mierzwa* court's holding as to the Law and Ordinance coverage, which it based on its ruling as to the insurer's obligation to pay the total loss amount, with the following *non-sequitur*:

> In addition to the foregoing issue, the owner also claims error as to the trial court's failure to enforce the "Ordinance or Law Coverage" provision in the policy. This provision of the policy affords an additional 25% in benefits, in excess of the face amount of insurance, when the building is deemed a total loss and must be rebuilt. The purpose of this particular provision is to cover the increased costs of reconstruction caused by changes in local building codes adopted after the original construction of the building. <u>The resolution of this claim is partially related to the decision on the VPL issue; if the building is deemed a total loss for the purpose of VPL it should certainly be deemed a total loss for purposes of this ordinance or law coverage.</u>

877 So. 2d at 779.

The above are the rulings that Petitioners and Amicus AFTL urge this Court to

sanction as the law of Florida. As set forth below and in the brief of Respondent Citizens, the rulings do not comport with the wording or purpose of the VPL or with Florida insurance contract law and should accordingly be disapproved.

C. The history and purpose of Florida's valued policy law - and the Mierzwa's decision's departure therefrom

As detailed in the legal discussions below, Florida's VPL, like other valued policy statutes, is directed only to mandating the amounts to be paid for losses caused by covered perils for which premiums have been received. In direct contrast with the *Mierzwa* decision, VPL statutes have *never* required insurers to pay the valued policy amount for losses caused by perils not covered by their policies, or to vary the payment terms of additional coverages the policy may provide beyond the valued policy amount set for the insured structure. As will be shown, *Mierzwa* is a complete anomaly that comports with neither the language or the purpose of the VPL.

Florida's VPL was originally passed as Chap. 4677 of the General Laws of 1899. Before discussing the history of the statute, we initially note that the statute was amended effective June 1, 2005 to clarify *Mierzwa's* misinterpretation of the VPL. §627.702(1)(a) and (1)(b), Fla. Stat. (2005). As stated in the Senate Staff Analysis:

> *Valued Policy Law (Mierzwa)*- In response to a recent district court opinion, [the bill] provides legislative intent that the valued policy law is not intended to require an insured to pay for a loss caused by a peril other than the covered peril.

The 2005 amendment, however provided that: "It is the intent of the Legislature that the amendment to this section shall not be applied retroactively and shall apply only to claims filed after effective date of such amendment [June 1, 2005]". 2005 Fla. Sess. Law Serv. Ch. 2005-111 (C.S.S.B. 1486) (WEST).

Although the legislature did not make the 2005 amendment retroactive, the history and intent of the VPL also make it clear that the VPL provides no basis at all for the *Mierzwa* rulings such that this Court should judicially disapprove *Mierzwa* as to all claims, like that of Petitioners' here, filed before June 1, 2005.

This Court first addressed the VPL in 1904, holding it to be constitutional and describing its purpose, i.e., that parties agree on a liquidated amount ***prior*** to any loss:

> The statute requires the insurer to fix the insurable value of the building, and to specify such value in the policy, and the measure of damages in case of total loss is fixed at the amount mentioned in the policy upon which a premium is paid. The statute does not undertake to deprive the insurer of any proper defense it may have to an action upon the policy, except in respect to the measure of damages and the authority of certain agents. Its principal object and purpose is to fix the measure of damages in case of loss total, or partial; and, to this end, it requires the insurer to ascertain the insurable value at the time of writing the policy, and to write it therein.

Hartford Fire Ins. Co. v. Redding, 37 So. 62, 67 (Fla. 1904). As later explained:

> [The valued policy law] serves to remove what would otherwise be a very troublesome and difficult issue to resolve either between the parties by negotiation or by the courts in litigation. This issue is the money loss sustained which the insured must indemnify. The value specific property had is hard to ascertain after its destruction because the usual evidence relied upon for such assessment is unavailable. The difficulties and uncertainties this created were productive of suspicions of and opportunities for false or exaggerated claims on the one hand and for accusations, minimizations and oppressions on the other. Thus, vexatious contests on this issue would persist when the best interests of all demanded prompt settlement and relief from the loss. A solution to this is found in the statute which in effect requires the parties to ascertain and agree in advance what the value is and in the case of total loss by the insured peril this amount shall be paid as liquidated damages.

Springfield Fire & Marine Ins. Co. v. Boswell, 167 So. 2d 780, 784 (Fla. 1st DCA 1964).

The point of valued policies with respect to total losses is thus to have the parties agree beforehand to the value of the property, such that, upon the happening of a total loss, no time or court resources need be wasted on arguments about the amount the insured should recover. The insurer cannot argue about depreciation or that the insured had allowed the property to become run down or any other factor that might affect value because the insurer was able to set the valuation before the loss and to charge whatever premium was deemed appropriate. Similarly, the insured cannot argue that the property has appreciated in value due to improvements made or otherwise because the insured, too, had the pre-loss opportunity to agree upon the valuation stated in the policy, and to pay only the premium for that valuation.

> In the "valued policy" ... type of agreement, the value of the object being insured is determined in advance, with both parties agreeing to this valuation or appraisal. Once this value is fixed in the policy, both parties are bound by it and, in the absence of fraud or willful destruction of the property by the insured, the insurer must pay this amount in case of a total

loss, regardless of what the property's actual value might be.

16 Williston on Contracts § 49:30 (4th ed.).

In short, the entire point of valued policy statutes as they apply to total losses is to prevent after-the-fact quarreling over what amount is recoverable under the policy. The insurer has received the premium commensurate with the agreed valuation, and the insured has paid the premium commensurate with the agreed valuation. Under such circumstances, each party has received that for which it bargained, and the economic fairness of the loss payment has been preordained.

Absolutely nothing about VPL statutes, however, contemplates or introduces any provision that in the event of a total loss an insurer will be required to pay for losses resulting from perils that are ***not covered by the policy sold to the insured.*** Reference to Florida's own VPL makes clear what should in any event be obvious as a matter of basic contract law and fairness, i.e., that the statute only applies if a loss from a covered peril has occurred, and the insurer has received the premium for providing coverage for that loss. To reiterate the pertinent language of the statute: "In the event of the total loss of any building ... located in this state and insured by any insurer as to a covered peril, the insurer's liability, if any, under the policy for such total loss shall be in the amount of money for which such property was so insured as specified in the policy and for which a premium has been

charged and paid."

The *Mierzwa* court completely disregarded these portions of the statute.[4] The decision instead focused myopically on the "***if any***" phrase in the statute, using the backward reasoning that the *only* meaning to be derived is that if the insurer has to pay *anything* in connection with a structure that has become a total loss, it must pay the policy face value:

> [U]nder the VPL if a building is a total loss, and if the damaged building is "insured as to a [e.s.] covered peril," then any liability of such insurer is for the face amount of the policy. ("[T]he insurer's liability, ***if any***, [e.s.] under the policy for such total loss shall be in the amount of money for which such property was so insured....")

Mierzwa, supra, 877 So. 2d at 777 (*Mierzwa* court's emphasis).

The obvious and more reasonable meaning of the VPL phrase "the insurer's liability, if any" is that the VPL recognizes that notwithstanding the existence of a total loss, there may be coverage defenses (e.g., arson on the part of the insured in the case of a total loss from fire, to use a simple example) as a result of which the

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[4] Commentators who have addressed the *Mierzwa* decision have criticized the errors in reasoning in both the actual holding and in the over-abundance of *dicta* needlessly included in the *Mierzwa* majority's opinion. *See, e.g.*, R. Groelle, FLORIDA'S VALUED POLICY LAW: AN INSURER'S OBLIGATIONS FOR ADDITIONAL COVERAGES AFTER MIERZWA v. FWUA, 24 No. 1 Trial Advoc. Q. 19 (Winter, 2005); K. Huai and M. Schofield, VALUED POLICY LAW: A HISTORICAL PERSPECTIVE ON THE COMPOUNDING EQUATION, 24 No. 3 Trial Advoc. Q.29 (Summer, 2005); J. Garaffa, FLORIDA'S VALUED POLICY LAW, 79-APR Fla. B.J. 8 (April, 2005).

insurer has no liability under the policy at all. As this Court has pointed early on: "The [VPL] statute does not undertake to deprive the insurer of any proper defense it may have to an action upon the policy, except in respect to the measure of damages and the authority of certain agents." *Redding, supra,* 37 So. at 67.

Valued policy laws were, in short, intended to prevent either party from contesting the value of the covered property in the event that the insured property became a total loss. At the time that valued policy laws were first adopted in the late 1800s and early 1900s by various states, including Florida, the property insurance policies to which they were addressed were fire insurance policies, as fire was then the main peril to property to which the insurance industry had yet addressed itself. Indeed, Florida's first enactment of the valued policy law stated: " That from and after the passage of this act any individual, firm, corporation or association insuring any building or structure in this state against loss or damage by fire or lightning, etc." Laws of Florida, Chap 4677, p 33 (1899). Other perils were added later over time as society and the insurance industry evolved.[5]

[5] Florida amended the VPL almost a century later to include all covered perils. Laws of Florida, Chap. 82-243; §627.702(1), Fla. Stat. (1982). It was this somewhat clumsy amendment that, by failing to think through the language of the statute when converting it from applying to the single peril of fire to applying to more perils for which insurance had become available, gave the *Mierzwa* court any leeway at all to reach its anomalous conclusions.

The significance of VPLs' origins when property insurance covered only the peril of fire is that the VPL was only intended to differentiate between fire causing a property to become a total loss and fire causing only a partial loss**.** VPLs were designed for the sole purpose of addressing total losses**,** to provide an easy process for getting an insured paid if the insured property became a total loss from a fire, the only covered peril. A VPL does not apply - in language or purpose - to partial loss situations. Partial losses do not, for obvious reasons, lend themselves to a predetermined flat sum payment, but rather must be adjusted based on what damage has occurred.

With this background, the present conundrum is more easily understood. As originally conceived and adopted, VPLs neither contemplated nor addressed the concept of multiple perils that might each cause damage to a property. When VPLs were first adopted, there was either a fire loss or there was not. Again, fire losses were the only peril that had then been made the subject of insurance. So, the only topic addressed by VPLs were total losses from fire, as to which a flat sum payment could be preordained, with an opportunity for the insurer to conduct a valuation. Partial losses were left to the usual loss adjusting processes.

Fire was the main peril to property throughout the country, and thus the subject of the VPLs. Specialized policies for specific perils likely to occur in

specific regions were also available - e.g., for tornados or hailstorms - but such specialized policies addressed perils which were not likely - as was fire - to result in total losses on a fairly regular basis such that they caught the attention of legislators first adopting VPLs for fire policies. Because of the origins of the VPLs - with fire generally being the only peril possible as the cause of an insured total loss - there has been very little law addressing situations where more than one peril causes damage and the combined damage resulted in a total loss. One of the only cases that appears to have addressed such a situation is an early decision from the Supreme Court of Nebraska. *Brady v. State Ins. Co. of Neb.*, 100 Neb. 497, 160 N.W. 882 (1916). In *Brady*, the insured residence was destroyed, partially by a tornado and partially by fire. The homeowner had separate policies for tornado and fire. Under Nebraska's VPL, where two insurers provided coverage for the *same* peril and received a premium for the coverage, each was held liable for the full policy amount in the event of a total loss from the peril.

But, the *Brady* court held, where two or more different perils cause damage to a structure and it ends up being a total loss "[t]he case is entirely different from where two or more insurance companies . . . write a specific amount of insurance upon a building covering the same liability", and the insurer would not be required to pay out the policy limits for the non-covered peril. Specifically, the court

reasoned as follows:

> We think it is a matter of common knowledge, not only among insurers but with the insuring public, that insurance for a certain sum against loss or damage by fire or lightning, and for the same sum for loss or damage by tornado, is understood and intended to mean that the insurance by the second policy is not for a sum in addition to the first, but is the assumption by the insurer of risk from elements not covered by the first policy. When a fire policy is taken on a building, it is not unusual for the insurer to grant additional protection against loss or damage by tornadoes by what is called a "rider" attached to the fire policy, in which the insurer, for a certain additional amount of premium, assumes the risk for damage by tornado; the amount of this additional premium being based upon the extent to which the insured desires the insurer to assume this additional risk. In such a case, it surely would not be claimed that under the valued policy law the insurer could be held liable for both amounts; this, for the reason that **the assured can only recover under the provisions of the valued policy law when his building is "wholly destroyed," and, as it could not be wholly destroyed by fire and also wholly destroyed by tornado,** there will be no theory upon which the assured could recover under both. The case is entirely different from where two or more insurance companies, each with the consent of the others, write a specific amount of insurance upon a building covering the same liability.

160 N.W. at 883.

As the history and wording of VPLs, including the Florida VPL, shows, these statutes were simply designed to simplify the loss payment process when an insured peril (originally, only fire) caused a <u>total</u> <u>loss</u>. The distinction being drawn was between total loss (as to which the VPL would apply to require payment of face value) and partial loss (as to which the usual loss adjustment processes would be necessary to assess the amount of damage). No valued policy law, including that of Florida, addresses <u>partial</u> <u>losses</u> by requiring payment of face value for a <u>partial loss</u>.

The *Mierzwa* court had absolutely no basis in the history and purpose of

valued policy laws, including that of Florida, for concluding that in cases where a covered peril results in a partial loss to a insured's structure, Florida's VPL will require the insurer to pay the face value of the policy if an excluded peril also caused damage such that the structure ended up a total loss. Such a result was never contemplated by any version of the VPL, and the Florida legislature has now added clarifying language to emphasize that no such result is intended.

The fact is much of the damage that occurs during a hurricane can be from flooding, but flood insurance is often inadequate because of the nature of the federal flood insurance program and the coverage limitations it imposes. The answer to that problem is not, however, that devised by *Mierzwa* and its mis-use of the VPL. The *Mierzwa* decision's use of the VPL where it did not apply served only to single out windstorm carriers and require them to pay - without consideration - a judicially created debt of as yet immeasurable proportions.

Mierzwa also wrongfully holds, under Petitioners' urged interpretation, that the VPL requires insurers to pay the full amount of Law and Ordinance coverage as a *liquidated* amount whenever a total loss situation arises, including a *Mierzwa* 'total loss' created by combining covered partial losses and excluded partial losses. Law and Ordinance coverage like that in Respondent Citizens' policy here agrees to pay "*up to*" 25% of the limit of liability for costs the insured *incurs* due to the

enforcement of any ordinance or law..." *Nothing* about the VPL, requires an insurer to pay additional coverages, like Law and Ordinance coverage, in a manner inconsistent with the policy's terms.

The only basis for disregarding plainly-worded policy provisions is if the Legislature has required coverage beyond that provided by the policy, in which case the insurer is deemed to have incorporated the statutory modification into the policy. *See, e.g., Citizens Ins. Co. v. Barnes*, 124 So. 722, 723 (Fla. 1929). The VPL certainly does not require the Law and Ordinance coverage to be paid as a liquidated sum, contrary to the policy terms. On the contrary, as Respondent Citizens' answer brief points out, additional coverage for compliance with building ordinances and laws is addressed in an entirely separate section of the statute, §627.702(8), Fla. Stat. which allows insurers to offer such coverage, but certainly does not require it to be offered, or paid, only as a liquidated amount.

Petitioners and Amicus AFTL have asked this Court to approve *Mierzwa*. Amicus State Farm respectfully submits that Mierzwa is (a) wrong in its general holding that the VPL requires insurers who cover partial losses to pay excluded losses as well so long as the insured structure has become a total loss, and (b) wrong in its subsidiary holding that whenever there is a total loss, additional Law and Ordinance coverage under a policy must automatically be paid in full as a

liquidated amount, regardless of policy terms to the contrary. *Mierzwa* should be disapproved. The Third District's disposition of the Law and Ordinance issue herein should be affirmed.

CONCLUSION

Based on the foregoing, Amicus State Farm Florida Insurance Company hereby respectfully submits that the Third District's decision herein should be affirmed and that the conflict decision of the Fourth District should be disapproved.

Respectfully submitted,

RUSSO APPELLATE FIRM, P.A.
6101 Southwest 76th Street
Miami, Florida 33143
Telephone (305) 666-4660
Facsimile (305) 666-4470
Counsel for Amicus State Farm
Florida Insurance Company

By:
ELIZABETH K. RUSSO
Florida Bar No. 260657

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the Amicus Brief of State Farm Florida Insurance Company was sent by facsimile and by U.S. mail this 31st day of July, 2006 to: Lauri Waldman Ross, Esquire, Lauri Waldman Ross, P.A., 9130 South Dadeland Boulevard, Suite 1612, Miami, Florida 33156, Counsel

for Petitioners; James M. Fishman, Esquire, James M. Fishman, P.A., 9655 South Dixie Highway, Suite 102, Miami, Florida 33156, Counsel for Respondent; and Louis K Rosenbloom, Louis K. Rosenbloom, P.A., 4300 Bayou Boulevard, Suite 6, Pensacola, Florida 32503, Counsel for Amicus Curiae The Academy of Florida Trial Lawyers.

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel hereby respectfully certifies that the foregoing Amicus Brief complies with Fla. R. App. P. 9.210 and has been typed in Times New Roman, 14 Point.

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