SUPREME COURT OF FLORIDA

CASE NO. SC 06-1088

JUAN E. CEBALLO and JACQUELINE CEBALLO,

Petitioners,

vs.

CITIZENS PROPERTY INSURANCE CORPORATION,

Respondent.

ON REVIEW FROM THE
DISTRICT COURT OF APPEAL, THIRD DISTRICT
L.T. CASE NO. 3D05-2259

RESPONDENT'S ANSWER BRIEF

JAMES M. FISHMAN
Fla. Bar No. 291201
JAMES M. FISHMAN, P.A.
9655 South Dixie Highway
Suite 102
Miami, Florida 33156
(305)661-1680
(305)661-1606
jmflaw@aol.com

Counsel for Citizens Property Insurance Corporation

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ISSUE PRESENTED FOR REVIEW

Whether Petitioners are automatically entitled to recover the additional value of ordinance or law coverage by application of Florida's Valued Policy Law?

STATEMENT OF THE CASE AND OF THE FACTS

The Petitioners in this appeal are insured under a policy of homeowners insurance issued by Citizens. (Record supplemented with a complete copy of the policy by order of the Third District, January 12, 2006). Citizens acknowledged the Petitioners' claim that their home was a total loss, and paid the full face value of the dwelling coverage in the amount of $125,000.00. Citizens did not, however, pay the "additional insurance" coverage of ordinance or law (an additional 25% of the dwelling coverage for increased costs incurred due to the enforcement of any ordinance or law which requires or regulates the restoration of the dwelling), debris removal (an additional 5%) and landscape repair (an additional 5%), sought by Petitioners totaling an additional 35% of the Coverage A-Dwelling limits.

This determination by Citizens was on the grounds that the Petitioners had not documented that they had incurred any such losses, in order for their demand to be a covered claim under those provisions.

Petitioners brought suit seeking payment for "additional insurance" coverages of ordinance or law, debris removal and landscape repair. (R. 2-5). Citizens response indicated that these coverages are for repayment of incurred costs, and are not automatically paid upon presentation of a demand without presentation of proof of loss relating to those coverages. (R. 16-18) Petitioners filed a motion for partial summary judgment asserting an entitlement to payment for the additional insurance based on the premise that they had suffered a "total loss", and that Florida's Valued Policy Law entitles them to payment of the face dollar amount of the policy (Coverage A-Dwelling), and all other coverages for which a premium was charged and paid without further documentation. (R. 59-66) The trial court ruled in Petitioners' favor, allowing for payment of ordinance or law coverage without proof of loss, but the portions of their motion pertaining to debris removal and landscape repair coverages were denied. (R. 67).

Citizens took a timely appeal and The Third District Court of Appeal reversed the trial court's decision in the matter. The maximum possible value of this "additional insurance" was simply demanded as a

matter of entitlement. Citizens has acknowledged before the Third District Court of Appeal, and again to this court, that it stands ready, willing and able to pay such claim when appropriately documented as "increased costs" having been "incurred due to the enforcement of any ordinance or law" which requires or regulates the restoration of the dwelling. Until it is so documented, it remains only as an unripe potential claim. It is undisputed that the Petitioners have not documented that they have incurred any additional expenses incident to the application of ordinances or laws.

It agreed that there is coverage for ordinance or law losses, but only for the value of the losses the Petitioners actually incur. Because no such losses were documented in the record, the matter was remanded for supplementation of the record. The court stated, "To hold otherwise would be a windfall to the homeowners." The case was remanded, "for the Ceballos to present proof of incurred expenses consistent with the policy." *Citizens Property Insurance Corp. v. Ceballo*, ___ So.2d ___, 31 Fla.L.Wkly D1310 (Fla. 3rd DCA 2006).

This matter, therefore, arises out of the failure of the Petitioners to present any documentation that a loss had occurred so as to invoke the coverage of the ordinance or law provision of the policy at issue.

SUMMARY OF THE ARGUMENT

The trial court authorized the payment of the ordinance or law "additional insurance" coverage as an automatic entitlement to the enhanced value of such benefits, irrespective of whether the homeowner has incurred such a loss, based upon the decision in *Mierzwa v. Florida Windstorm Underwriting Association*, 877 So.2d 774 (Fla. 4th DCA 2004). This was an error in the understanding of that decision and the intention of the *Mierzwa* court's opinion, an abuse of the notion of indemnity, as well as error in the application of the Valued Policy Law in this state.

Citizens' homeowners insurance policy expressly limits Petitioners' claim for ordinance or law coverage to losses which have actually been incurred as a result of the application of new building codes, for example. This coverage, consistent with other forms of "additional insurance" coverage, are not reflected in the homeowner insurance policy as having "dollar amount" figures on the face of the insurance policy. It is the position of Citizens that, according to the terms of the Valued Policy Law upon which the Petitioners rely, ordinance or law coverage is not included in the application of the Valued Policy Law, even in the case of a total loss and that unless and until there is a documented claim that the insureds have

incurred the expense incident to such coverage, there is no entitlement to payment of any amount therefore.

On this basis, the Third District Court has reversed, and has certified conflict with *Mierzwa*. Citizens urges that this ruling is correct on the merits, but that *Mierzwa* does not expressly and directly conflict with that ruling, as it appears that the policy language, defenses raised by the insurer and other matters of record in that matter distinguish the case on the facts.

There is nothing in the record below or before this court to indicate that the Petitioners have incurred any loss which would be covered by the ordinance or law provision of the Citizens homeowner insurance policy at issue in this matter. The Third District Court of Appeal held that while the Petitioners were entitled to coverage, they were entitled to such coverage only to the extent of their actually incurred losses. *Ceballo* at page 1. In reversing the partial summary judgment below, the court noted that the Petitioners had not documented any claim under the ordinance or law provisions of the homeowners insurance policy. There has been no supplement to the record to reflect that any such losses have been incurred. Therefore, any payment under the terms of this policy provision under the circumstances as presented herein, would be "a windfall," as characterized by the Third District opinion, *Id.*

CITIZENS' ARGUMENT

I. Introduction:

It is common knowledge that the insurance industry has been hit hard by the windstorm events and homeowners' claims of the past few years. The resultant costs to the industry have been unprecedented. The argument by the Petitioners that they are entitled to automatic payment of benefits without suffering any actual loss serves to further undermine the viability of the industry in Florida and violates the public policy to have a viable insurance industry to help property owners to recover from their actual losses.

It is important to draw the distinction between indemnity for losses and the reimbursement for expenses incurred in rebuilding. On one hand, the loss suffered by the insured structure has a value which is predetermined (the value of what was lost). This is what is contemplated by the Valued Policy Law. On the other hand, the additional costs incident to the repair, rebuilding or replacement (the future value of unknown changes to ordinances and laws) is not contemplated by the agreed value, or the statute would so state. For example, there are total loss cases in which there are no increased costs incurred incident to ordinance or law requirements and

therefore, no benefits are payable in the absence of any such loss. To state otherwise would be to say that every total loss claim is automatically enhanced by the value of the ordinance or law, debris removal and landscaping "additional coverages" (totaling 35% in excess of the stated dollar amount of Coverage A upon which the calculation would be based), which is what the Petitioners have claimed below.

In the event that a loss occurs to a structure which is new, or recently renovated and insured with a stated value under Coverage A (dwelling), it is very possible that there are no ordinances or laws which require any kind of upgrade. In such case, the carrier is only responsible for the value of what was there, and not for the prospective cost of something that is not required. The building will be built as it existed prior to the loss, for the full amount of the value stated on the face of the policy. Ordinance or law coverage does nothing to increase the face value of the loss, as that coverage is not triggered. It is only available as needed.

The Petitioners present the issue of whether Florida's Valued Policy Law or the insurance policy language applies when there is a total loss. With respect to ordinance or law coverage, there is no dollar amount fixed as a part of the insurance policy, and it cannot be determined whether such

"increased costs" have been incurred so as to trigger the application of such a provision in the policy.

It is respectfully submitted, that the Petitioners' analysis is otherwise deficient in the application of the facts of this matter to the law as it existed at the time of the loss which is the subject of this action.

II. Analysis of Florida's Valued Policy Law:

The brief presented by the Petitioners focuses on Florida's Valued Policy Law, §627.702(1) Fla.Stat. (2004) (hereinafter referred to as stated or as "VPL"), and includes a detailed history including many aged citations, detailing the development of the law.

Citizens is in agreement with the Petitioners in citing *Fleischman v. Department of Professional Regulation*, 411 So. 2d 1121 (Fla. 3rd DCA 1983), in which the court was addressing itself to the manner in which a statute should be read. The court stated succinctly, "Every statute must be read as a whole with meaning ascribed to every portion and due regard given to the semantic and contextual interrelationship between its parts." *Fleischman*, at page 1123.

The Petitioners' rely on subsection 1 of the VPL, which indicates that, if there is a total loss of any building by a covered peril, the insurer's

liability is for the total amount of money (stated dollar value), for which the property was insured and for which the premium has been charged and paid. (Petitioners brief, page 6). The history behind this simple concept, it is agreed with the Petitioners, was an effort to make adjustment of total losses easier and less complicated for both the insureds and insurers in this state by agreeing in advance to the dollar amount to be paid for total losses. Such as been the law for over a century.

That simple statement of the law is incomplete. As an example, subsection 5 of the VPL includes exceptions which are quite relevant, but conspicuously absent from the Petitioners' argument. It states initially that it **does not apply** to personal property. The Petitioners argue entitlement to all coverages, (The insurance policy, Coverage C-Personal Property, pertains specifically to such property.). If the argument of the Petitioners is correct, they would be entitled to payment for their personal property loss because the premium had been charged and paid. This exception, which has not been addressed by the Petitioners in their brief, would deny that recovery.

An important point about this is that the Petitioners have failed to advise this court of the second sentence of the Valued Policy Law, §627.702(5), which states:

> Nor does this section apply to coverage of an appurtenant structure or other structure **or any coverage or claim in which the dollar**

> **amount of coverage available as to the structure involved is not directly stated in the policy as a dollar amount** specifically applicable to that particular structure. (Emphasis added).

This portion of the statute states, that there is also an exclusion for coverages for which a premium has been charged and paid, but for which **there is no stated dollar value in the policy**.

It is undisputed that portion of the policy which is the subject of this action makes no mention and reflects no dollar value for any "additional insurance" coverages, including ordinance or law, which are benefits to be calculated as a percentage of Coverage A-Dwelling.

The most important point is that the Petitioners have failed to add to their analysis the language of the VPL, §627.702(8), which states as follows:

> Any property insurer may, by an appropriate rider or endorsement or otherwise, **provide insurance indemnifying the insured** for the difference between the insurable value of the insured property at the time any loss or damage occurs, and **the amount actually expended to repair, rebuild, or replace within this state**, with new materials of like size, kind and quality, such property as has been damaged or destroyed. (Emphasis added).

The Citizens endorsement is in complete accord with the VPL statute. The relevant portions of the Citizens Homeowner Insurance Policy, Florida Endorsement (CIT-23 07 02, page 2 of 7) under which the Ordinance or Law expenses are covered. **Ordinance or Law**, Par. 11(a.), states with specificity and without ambiguity:

> You may use up to twenty five (25%) of the limit of liability that applies to COVERAGE A **for the increase of costs <u>you incur</u>** due to the enforcement of any ordinance or law which requires or regulates…(Emphasis added).

Citizens' policy did two things under the statute. First, it enabled the insured to be paid the face dollar value of the policy, (Coverage A-Dwelling, indemnifying the insured for their loss under §627.702(1) Fla.Stat.). Second, by the endorsement authorizing the ordinance or law coverage, it enabled the insureds to repair, rebuild or replace the structure by agreeing to pay the difference between the insurable value (Coverage A) and "the amount actually extended to repair, rebuild or replace," the structure, pursuant to §627.702(8) Fla.Stat..

Further, subsection 8 of the statute specifically addresses the fact that this endorsement will, "provide insurance **indemnifying** the insured…" The Petitioners and their *Amicus Curiae* declare to the complete derogation of the subsection 8 of the VPL, an entitlement to the additional insurance without regard to principals of indemnity. The Petitioners have presented their arguments and have claimed, "A 'valued policy' statute represents an **exception** to the general law of indemnity." (See Petitioners brief, pages 9-10). This would appear to be incorrect based on the express language of the Florida Valued Policy statute. Furthermore, the courts have ruled contrary

to the "entitlement theory" espoused by the Petitioners and their *Amicus Curiae*, which will be discussed further below.

The foregoing language is directly on point. A complete reading of Florida's Valued Policy Law, including its subparts and by giving meaning to all as required by *Fleischman*, leads to the conclusion that Citizens has properly applied the VPL in its analysis of coverage in this case.

III. Distinguishing *Mierzwa* from this matter:

In *Mierzwa v. Florida Windstorm Underwriting Association*, 877 So.2d 774 (Fla. 4th DCA 2004), the court noted that the ordinance or law coverage was an additional 25% in benefits, **in excess of the face amount of insurance**, [the face amount being the value of the dollars reflected in the declarations of insurance], when the building is deemed a total loss **and must be rebuilt**. (Emphasis added). *Mierzwa* at page 779. The inarticulated premise of that decision is that the **value** of the ordinance or law coverage is not a part of the face value and is not to be included in the analysis of what the face value of the policy may be.

The court in that case had an issue before it of conflicting causes of loss and the issue that the insurer for the policy it was considering **declined to cover** ordinance or law expenses, based on the language of a windstorm

policy, which is not identical to the policy in this matter. As a result of issues which are not before this court, the Fourth District found that the conflicting causes of loss, and the language of that policy had created an ambiguity to be resolved in favor of the insured. No such ambiguity exists here in the plain meaning of the Citizens homeowner insurance policy language.

The Petitioners do not mention that the Fourth District opened the door to the potential that VPL could be overcome by other language of the insurance policy. It stated, "If these carriers aspire to apportion total loss damages under the VPL when differing causes combine to create a total loss, they should begin that effort with express text in their policies so indicating…Here we have no occasion to make that judgment because we face no such text." *Mierzwa* at page 779. The opinion of the Fourth District, therefore, did not agree with the Petitioners' premise that the language of the VPL "trumps" the language of the policy.

Similarly, there is no claim by the Petitioners that there is any ambiguity in the Citizens policy, so the court below had no difficulty in reaching their conclusion. There is nothing in the record below which reveals that there have been any increased costs of reconstruction or that there have been any changes in the local building codes. This can be

assumed *arguendo*, but that would only go to the issue of coverage, not the issue of *value* of such a claim.

The insurer in *Mierzwa*, the FWUA, argued that the ordinance or law coverage was **excluded** by the general exclusion of the policy, and such coverage was denied to the insured. This explains the statement by the court, that the claim before it was only partially related to the decision on the VPL issue, in which it states that, "if the building is deemed a total loss for the purpose of VPL it should certainly be deemed a total loss for the purposes of this ordinance or law **coverage."** (Emphasis added). *Mierzwa* at page 779.

There is no dispute in this case as to whether the insured Petitioners are entitled to such **coverage**. As stated in the decision below at footnote 3, coverage was acknowledged by Citizens in its brief and oral arguments below. *Ceballos* at page 1.

In *Mierzwa*, the court specifically states (at page 779) that, "The purpose of this particular provision [ordinance or law coverage] is to cover the increased costs of reconstruction caused by changes in local building codes adopted after the original construction of the building." The court did not specifically discuss the **value** of such payments in any way. In distinguishing the result below from the *Mierzwa* decision, the *value* of the

claim is the only issue to which the Third District has spoken, since Citizens "does not dispute entitlement to payments once the cost for which coverage is provided under the policy is actually incurred." *Ceballo*, at footnote 3.

By analogy, the remedy for determination of the *value* in a disputed property loss covered by insurance is for the parties to submit to the remedy of appraisal. *Before the insured is entitled to such a remedy,* the insured is required to assist the insurer with the investigation and evaluation of the claim by compliance with all of the obligations under the terms of the insurance policy, particularly the post loss obligations as enumerated in the policy concerning notice, investigation and assistance in handling the claim by the insured. *United States Fidelity & Guaranty v. Romay*, 744 So.2d 467 (Fla. 3rd DCA 1999). In the case *sub judice*, the insured has presented a total loss claim, but has not complied with the conditions precedent to the payment by the insurer of any ordinance or law benefits, as there is no record of documentation of any such claim. The relief they seek should be similarly unavailable.

The trial court denied the Petitioners' motion for partial summary judgment for payment of the "additional insurance" coverages of debris removal and landscaping repair, which were sought on the same basis. (R. 59-66, 67). It is clear that they were not specifically mentioned or

"authorized" by *Mierzwa*, and therefore, the trial court declined to apply the Petitioners' incorrect logic below to justify granting their motion for those coverages.

The trial court applied the *Mierzwa* case to its decision on the ordinance or law coverage, but was incomplete in its analysis and in error in the result, which lead to reversal below. It is clear that no effort was made by the Petitioners to argue in this appeal that the trial court was in error when they were denied recovery for the other "additional insurance" coverages. Their position is patently inconsistent, as was the result at the trial level.

IV. Response to Specific Points Within Petitioners Brief:

As the title suggests, this section will take the Petitioners' brief point by point, page by page, for ease in indentification and comparison.

In their Preface, the Petitioners reveal the faulty nature of their appeal. On page 1, the Petitioners state that, "the Third District held that the insureds were required to prove that they actually incurred expenses, **before they could obtain such coverage under their policy."** Not only are the Petitioners inaccurate as to this statement, but this statement reflects that the Petitioners completely misperceive the holding below, in which the court

specifically stated that Citizens had conceded that it does not dispute entitlement to coverage, and that payment would be made once the increased cost for the repairs covered by ordinance or law is incurred and paid for by the insured. Citizens had made payment on the full value of the Coverage A-Dwelling claim, so in proper candor, there is no "lack of coverage" issue before this court. Therefore, the statement of the Petitioners' brief is misleading at best, if not totally inaccurate.

The Petitioners continue with this flawed analysis, by misstating the holding of *Mierzwa*, suggesting that, "the Fourth District…required payment of a liquidated amount for "law and ordinance" coverage by virtue of a total loss." (Petitioners' brief, page 1). There is no such finding in that opinion.

The Fourth DCA made the critical observation that, "The owner has established beyond any question its entitlement to the additional 25% in benefits under the ordinance or law coverage." *Mierzwa* at page 780. There is a stark contrast between that statement and the observation of the Third District in this case, in which it stated, "It is undisputed below that the Ceballos **presented no evidence that they suffered a loss**, i.e., incurred expenses, with regard to the coverage provided in the Additional Coverage provisions." *Ceballo* at page 1. (Emphasis added).

It is clear from the opinion, that the court in *Mierzwa* had information in the record before it which revealed that the *value* of the ordinance or law coverage was already established, so it was only addressing its comments to the *coverage* issue.

The Petitioners appropriately present on page 2 of their brief, the language of the relevant portions of the Citizens Homeowner Insurance Policy, Florida Endorsement (CIT-23 07 02, page 2 of 7) under which the ordinance or law expenses are covered. It is obvious that the contractual agreement governing the obligations of the parties has anticipated this issue. Petitioners correctly point out that Citizens stated that there is a condition precedent to such coverage, i.e., that the insureds had yet to incur any such costs, or at least, had not presented any claim for same. There is nothing in the record to change that circumstance.

The Petitioners digress by stating on page 3 of their brief, that the insureds had moved for partial summary judgment "for the increased costs necessary to bring the damages dwelling up to current building codes. This totaled $31,250.00." Again, there is nothing in the record to suggest that there was <u>any</u> building code change or what it would cost the insured, had they incurred any such cost. To suggest that the insureds had any actual basis for that figure, i.e. estimate or contractual arrangements, and not as a

calculation from taking 25% of the face value of $125,000.00, is unsupported by the record. Thus, their "fact" is nothing more than an empty assertion.

The Petitioners noted on page 3, correctly, that the trial court denied the same motion as to the other issues of the "additional insurance" coverages of debris removal and landscaping, but is again inaccurate in stating that they are not at issue here. While they are not being appealed, and are not a part of the opinion by the Third District from which the Petitioners seeks an appeal, these issues were correctly decided below on the very grounds which the Third District reversed the ruling on the issue of ordinance or law. The trial court faced with the decision of the Fourth DCA, simply misinterpreted the *Mierzwa* decision, which lead to the granting of the partial summary judgment, which was corrected by the Third DCA.

Petitioners appear, in this portion of their brief, to misinterpret the Third DCA opinion, suggesting that by the court agreed that the insureds were entitled to coverage, that the Petitioners had somehow won a decisive point. This is hardly the case when one reads the opinion. The court states initially in its discussion of the facts that, "Citizens denied the allegations and asserted that it was not obligated to make payments of any amount pursuant of the Additional Coverage provision **until the losses covered in**

those provisions were incurred by the Ceballos...In his brief and at oral argument, Citizens' counsel conceded that Citizens **does not dispute entitlement to payments once the cost for which coverage is provided under the policy is actually incurred.**" (Emphasis added). *Ceballo* at page 1, also see footnote 3. There was no accomplishment by the Petitioners on that point.

Furthermore, to state that the Third DCA "concluded that this placed a ceiling, not a floor, in the amount of the insureds' recoverable costs," is not an accurate reflection of the language or intent of the opinion. The maximum value of the ordinance or law coverage provision is specified in the endorsement as 25%, so any statement relative to the maximum recovery was not a "finding" by the court, nor was it included by innuendo within the opinion as an issue. Reference to the 25% figure as a ceiling is simply inconsequential to the legal analysis of this matter.

The Petitioners' brief analysis of the basis of the conflict certified by the Third DCA suggests on page 4, that in the opinion appealed from the court, "held that the policy provisions control over Florida's VPL, and only require reimbursement of rebuilding costs, once they are actually expended." The Third DCA made no such ruling. The VPL speaks to coverages which have a dollar amount, while the additional coverages of debris removal,

landscape repair and ordinance or law, do not. The opinion below does nothing to disturb the VPL as it pertains to dollar amount coverage for which coverage has been charged and paid. The difference is that there is no liquidated amount at it pertains to ordinance or law coverage, as no one knows the value of that claim until the insured has determined that it will cost *in excess* of the dwelling coverage (Coverage A). This is the only time that the ordinance or law coverage is triggered, since by its terms, it will only provide coverage "for the increase of costs you incur."

Petitioners claim on page 6 of their brief that VPL statues have the effect of converting unvalued policies into valued policies. This is far from accurate. On page 7 of their brief, they cite to *Continental Casualty Co. v. Curl*, 721 So.2d 431 (Fla. 3rd DCA 1998), in which the court defines a "valued policy", as "[o]ne in which the value of the thing insured, and also the amount to be paid thereon in the event of loss, is settled by agreement between the parties and inserted in the policy." *Continental* at page 433. VPL does not confer coverage where there is none. As described in detail, above, valued policies and the Valued Policy statute, specifically rely on the dollar value as stated on the face of the policy to determine the amount to be paid. There is no entitlement to the value of 25% over the Coverage A value, as such **coverage** exists only as a potential claim contingent on

whether it is triggered by proof that the costs to be incurred *exceed* the value of Coverage A. If there is a total loss, it is available to pay the increased costs incident to reconstruction.

As a example, the Petitioners have also cited the case of *DeCespedes v. Prudence Mutual Casualty Company of Chicago, Illinois*, 193 So.2d 224, 226 (Fla. 3rd DCA 1967), in which the court interpreted an entitlement to medical payment coverage. The court found that the insureds were, "not entitled to receive a stipulated amount merely upon the happening of a specified event, but rather indemnification, within the limits of the policy, for his actual loss." The coverage in that matter is very similar in tone and intent, and includes that, "all reasonable expenses **incurred**…" would be paid. (Emphasis added). Such is the case at bar. There is no agreed amount and further proof of actual loss is required.

The Petitioners argue on page 9 of their brief that VPL statutes are enacted to serve the public policy and are read into every policy of insurance. The "public policy" argument is certainly not limited to that concept. What does this say about the public's right to be free from the abuse of VPL statutes by allowing windfall payments to insureds? Consider examples of those insureds that either have not incurred the loss or have determined not to rebuild and have sold the property in an "as is" condition

for market value after being paid in full for the dollar value. Certainly the Petitioners cannot be heard to suggest that they should have the profit of an additional 25-35% irrespective of whether they incur the damages or loss. Nevertheless, that is precisely their argument.

The Petitioners claim on page 9 of their brief that a "valued policy" statute represents an exception to the general law of indemnity. Or does it? Actually, based on the history provided by the Petitioners' review of the development of VPL caselaw, it appears otherwise. As has been discussed previously, The VPL statutes provide that the insured does not have to show proof of certain losses where there is a total loss as a result of a covered claim, as the value is agreed to in advance.

The answer to the inquiry posed by the Petitioners' assertions is, "No", VPL is not an exception to indemnity, it is a vehicle for efficient administration of total loss claims. Hence, there is indemnification for an amount to which the parties have stipulated which serves the interests of the public by making the post loss adjustment faster and without the potential for fraud inherent to the overvalued policy. Additionally, it is not a matter of "liquidated damages" as the Petitioners suggests on page 10, as much as a contract for an amount certain. The insureds under an insurance policy do not recover "damages," but rather payment from the insurance carrier is

made for losses incurred, when a claim is paid. It does a disservice to the insurance industry to characterize payment of a claim as "damages" which is a term of art characterizing a legal recovery as a result of a despite.

V. Analysis of Petitioners' Legal Position and Authorities Cited:

Citizens' position in this matter is not at issue with the VPL as it entitled homeowners to payment in full of the dwelling coverage (Coverage A) without deduction for depreciation, haggling or negotiation, when there has been a total loss as a result of a covered claim. What is offered by the Petitioners brief is a lengthy discussion of the history, the basis for and the logic behind the VPL, which are not at issue here. Similarly, their *Amicus Curiae* offer a lengthy discussion involving similar cases and issues involved in the response to the Florida legislature to issues of concurrent cause raised by the *Mierzwa* opinion, but no analysis of the issues presented by the application of "additional insurance" in the form of ordinance or law coverage as authorized under the VPL.

Although the Petitioners do not acknowledge it, claiming that the VPL supersedes notions of indemnity and the application of the language of the insurance policy, there is no question that the purpose behind the VPL is the efficient handling of **indemnity** payment for total loss claims. This is

even within the language of the statute itself and the apparent reasoning of the cases cited by and on behalf of the Petitioners. Historically, there have been conflicts over deductions for depreciation, pro rata payments based on fault or actual cash value. The cases cited by the Petitions do nothing to analyze the ordinance or law endorsement, its implementation, operative effect, and are limited only to the resolution of claims relating to the main coverage (dwelling) of the property, which are not at issue here.

Contrary to the position and cases cited by the *Amicus Curiae*, this case does not involve the "haggling" over a loss, and the position taken with respect to the endorsement is not the result of an ambiguous policy provision. Indeed, there are no policy provisions which are at issue with the VPL to be interpreted. If that was the case in this matter, the Petitioners would have had the opportunity to raise that issue below and potentially seek a declaratory judgment. This issue has not been preserved. Instead, the misreading of the law to further their monetary recovery by the Petitioners and their *Amicus Curiae* on behalf of those similarly situate, have caused unfounded and expensive litigation throughout the state.

This is not in derogation of concepts of indemnity, arguments to the contrary notwithstanding. In over a century of precedent cited by the Petitioners and *Amicus Curiae*, there is no case which supports their

interpretation of the ruling by the Third District. What is not offered by the Petitioners or their *Amicus Curiae*, is any recent decision which has taken the state of Florida toward the result that they seek. There are recent decisions which speak to the issues analogous to this case, albeit, not all directed to Florida's Valued Policy Law.

The United States District Court for the Northern District has shouldered the burden of many cases in this context arising out of the litigation of recent hurricane losses. In one such case, *Langhorne v. Fireman's Fund Insurance Co.*, 2006 WL 1517048 (N.D. Fla., May 26, 2006), there was a homeowner insurance policy issued which included an endorsement which provided additional coverage over the face value of the policy. That endorsement requires an insured to repair, rebuild or replace the dwelling *before* the extended replacement cost coverage is applicable. The opinion of the court noted that the *homeowner acknowledged that none of those required steps were taken*. The insurer's position on this issue was that this endorsement language is consistent with the Valued Policy Law, and assuming for the purposes of the argument in that case that there was a total loss (which was not established), the coverage had not been triggered, and the endorsement coverage was not yet applicable. The court agreed as to the dwelling claim endorsement that the provision on the policy *does not*

offend the VPL, but rather, it satisfies the requirement of §627.702(8) Fla.Stat. *Langhorne,* "Dwelling" at opinion pages 2-3. Hence, the concept of automatic *entitlement* was squarely rejected.

Although this is a very recent decision, follows a line of cases in which the courts of this state have addressed this type of issue. The Petitioners cite a case without discussion, which warrants some analysis. In the case of *Regency Baptist Temple v. Insurance Company of North America*, 352 So.2d 1242 (Fla. 1st DCA 1977), the court reviewed the entry of a directed verdict in favor of the insurer. In affirming the directed verdict on a roof collapse claim, the court pointed out that the amount to be paid was the **replacement cost** of the property damaged or destroyed at the time of the loss, without depreciation. This is precisely the position taken by Citizens in this matter. The **replacement cost** (expenses incurred) will be paid, upon presentation of evidence that such costs have been incurred.

This analysis is consistent with the holding in *State Farm Fire and Casualty Company v. Patrick*, 647 So. 2d 983 (Fla. 3rd DCA 1994), in which the court also reviewed a form of "additional insurance" in a matter involving a "replacement cost" benefit issue. In that matter, the insured homeowner attempted to save money by performing much of the repair work personally without incurring the typical overhead and costs incident to the

use of a contractor, but made a claim for the full amount. The court stated that, "Courts have almost uniformly held that an **insurance company's liability for replacement cost does not arise until the repair or replacement has been completed**." *Patrick*, at page 983. (Emphasis added).

The court held that the insureds had not incurred the additional costs and were not entitled to recover the same. "The Replacement Cost Endorsement is not of value to the plaintiffs **until they have expended an amount greater than what they could recover under the basic policy coverage**." *Patrick*, at page 984. (Emphasis added). This is the precise issue concerning the "additional insurance" coverages, as discussed in the homeowners policy which is at issue in this case.

Where there is no evidence in the record that this is a "covered claim", such that the specific "additional insurance" coverage is invoked, there is no entitlement to recovery. In *Greer v. Owners Insurance Company*, 2006 WL 1589815 (N.D. Fla., June 6, 2006), the court reviewed motions for judgment on the pleadings and for summary judgment in a case in which there was an issue as to whether there was a loss from windstorm or flood, similar to the concurrent cause issues in *Mierzwa*. While there was a determination in that case that there was not a total loss from a covered claim so as to invoke the

Valued Policy Law, the portion of the decision which is relevant to the analysis in this case is found on page 15 of that opinion, in which the court reviewed the ordinance or law endorsement. The court determined in that situation that there was not a covered loss, but in *dicta*, noted that the endorsement reveals that it would only apply to "increased costs incurred in repairing the …damaged parts of the house in order to meet a current ordinance or regulation. **There is no evidence in the record to render this endorsement applicable to the plaintiff's claim."** (Emphasis added). The court went on to deny the plaintiffs' motion for summary judgment on that basis.

In *Davis v. Allstate Insurance Co.*, 781 So.2d 1143 (Fla. 3rd DCA 2001), the insured attempted to rebuild a bigger structure on another property. The court dealt with the "additional insurance" issue of "replacement cost coverage" and the absence of depreciation, and determined that the value of the claim was not the increased costs due to the relocation, but rather the loss would be measured by what it would cost to replace the preexisting structure. While this is admittedly not a VPL case, it is an example of the treatment given to such "additional insurance" clauses, and the requirement that the costs be related to the actual expense. In this case, payment of the stated dollar value of the loss was made, while there

was never any indication in the record of any increased costs (replacement costs) upon which any further payments would be warranted under the ordinance or law endorsement.

Once the total loss is declared, however, it may open the door to payment of the ordinance or law *coverage*, and payment if the claim is presented properly. The *value* of that payment is what **the increase is in costs which have been incurred, in order to reconstruct the property**. Otherwise, if the property is not to be reconstructed, there is no increase in cost as a result of the application of ordinances or laws. Therefore, this would not even be a covered claim so as to fall within the minimal test of whether VPL is even available. §627.702(1) Fla.Stat. (2004).

To interpret the VPL otherwise is to reward insureds for not having incurred this loss and encourages them not to rebuild their properties with the coverage available. Furthermore, this will lead to a result which would only serve to end the availability of property insurance in this state. The interpretation of insurance policies, in the words of this court, should not be construed to reach such an absurd result. *Deni Associates of Florida, Inc. v. State Farm Fire and Casualty Insurance Co.*, 711 So2d 1135, 1140 (Fla. 1998).

The Citizens homeowner insurance policy provides a value for the loss which occurs to the property. This is the agreement reached at the inception of the policy which has been discussed at length by the Petitioners and above. The valued policy amount is the "pre-argreed indemnification" as stated in a dollar amount on the declarations page of the policy. The homeowner insurance policy does not provide a value for cost of the reconstruction and the affect of future potential ordinance and law changes thereon. The ordinance or law endorsement value falls into the category of "to be determined", if indeed the insured ever does intend to rebuild. This cannot be determined at the inception of the policy and is not reflected in a dollar amount.

VPL does not increase the limit of liability of any policy, nor does ordinance or law coverage. That the Petitioners and the *Amicas Curiae* can contend that the VPL "mandates" (Petitioners' brief, page 6) an insurer to pay for any and all possible coverages for which a premium had been paid *regardless of whether the insured actually incurs the expense of rebuilding,* is an obvious request for unfettered access to insurance proceeds.

If the purpose of the VPL is for the protection of insured property owners of the state of Florida, as the Petitioners and the *Amicus Curiae* would have this court believe, the result of their argument would be to allow

homeowners to walk away and leave properties in disrepair, while they pocket as much as 135% (ordinance or law, debris removal and landscape repair) of every stated dollar value total loss claim. How much will be paid to insureds such as the petitioners herein, who have no intention of rebuilding, only to walk away from the damaged property with free money from the insurer, leaving the property to others to repair? Huge payouts are being sought from insurers based on the claims for ordinance or law coverage, while the property is either razed, or is to be sold "as is" and left unrepaired. This ultimately has the potential to affect mortgage or other lienholder interests as a threat to their security, as well.

This is just as applicable to a claim for damages to a home which is newly completed or renovated and destroyed, leaving the reconstruction to be pursuant to the same ordinances and laws under which it was built. There would effectively be no "increased costs incurred for as a result of the application of ordinance or law". Under the logic of the argument presented by the Petitioners and *Amicus Curiae*, they are entitled to 125% of the face value of the policy. The result is a windfall of money to the insured who does not otherwise have a covered claim to ordinance or law benefits.

It is easy to understand the motivation of the Petitioners and others similarly in a position to take advantage of this situation. This is their

opportunity to profit at the expense of the insurers and general public who pay their premiums. Surely, this is not in the best interests of the public or the homeowners of Florida who are desperately seeking coverage for their properties.

CONCLUSION

Citizens Property Insurance Corp. respectfully requests that this honorable court to decline jurisdiction as a result of the lack of conflict between the decision of the Third DCA appealed from with the *Mierzwa* decision or in the alternative, approve the decision of the Third District Court of Appeal for the above and foregoing reasons.

CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned attorney hereby certifies that this brief was prepared using a 14 point Times New Roman proportionally spaced font in accordance with Rule 9.210(a)(2), Fla.R.App.P.

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JAMES M. FISHMAN
Fla. Bar No. 291201
JAMES M. FISHMAN, P.A.
9655 South Dixie Highway
Suite 102
Miami, Florida 33156
(305)661-1680
(305)661-1606
jmflaw@aol.com

Counsel for Citizens Property Insurance Corporation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished to Lauri Waldman Ross, Esq., Lauri Waldman Ross, P.A., Two Datran Center, Suite 1612, 9130 Dadeland Blvd., Miami, FL 33156, and Keith A. Truppman, Esq., Mintz and Truppman, P.A., 1700 San Souci Blvd., N. Miami, FL 33181, attorneys for Petitioners, and Louis K. Rosenbloom, Esq., Louis K. Rosenbloom, P.A., 4300 Bayou Blvd., Suite 36, Pensacola, FL 32503, attorney for Academy of Florida Trial Lawyers, *Amicus Curiae,* by US Mail, this 25th day of July, 2006.

JAMES M. FISHMAN
Fla. Bar No. 291201
JAMES M. FISHMAN, P.A.
9655 South Dixie Highway
Suite 102
Miami, Florida 33156
(305)661-1680
(305)661-1606
jmflaw@aol.com

Counsel for Citizens Property Insurance Corporation