THE FLORIDA SUPREME COURT

CASE NO.: SC06-1088

LT. CASE NO.: 3D05-2259

JUAN CEBALLO AND
JACQUELINE CEBALLO,

Petitioners,

vs.

CITIZENS PROPERTY INSURANCE
CORPORATION

Respondent.
_________________________/

PETITIONERS' INITIAL BRIEF ON THE MERITS

Respectfully submitted,

Lauri Waldman Ross, Esq.
LAURI WALDMAN ROSS, P.A.
Two Datran Center, Suite 1612
9130 S. Dadeland Boulevard
Miami, Florida 33156
(305) 670-8010

And

Keith A. Truppman, Esq.
MINTZ AND TRUPPMAN, P.A.
1700 Sans Souci Blvd.

North Miami, FL 33181

TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OTHER AUTHORITIES v

PREFACE.................................... 1

STATEMENT OF THE CASE AND FACTS.................................... 1

JURISDICTION 4

STANDARD OF REVIEW 5

SUMMARY OF THE ARGUMENT 5

ARGUMENT.................................... 7

FLORIDA'S VALUED POLICY LAW, §627.702, FLA. STAT. (2005) LIQUIDATES THE AMOUNT DUE ON A TOTAL PROPERTY LOSS TO INCLUDE THE PRE-ESTABLISHED AMOUNT FOR "LAW AND ORDINANCE" FOR WHICH INSUREDS ARE CHARGED AND PAID A PREMIUM 7

A. The Origin and Nature of "Valued Policy" Statutes.................................... 7

B. Florida law 12

C. Florida's Valued Policy Statute and the Inter-district Conflict.................................... 17

CONCLUSION.................................... 22

CERTIFICATE OF SERVICE 22

CERTIFICATE OF TYPE SIZE AND FONT.................................... 23

TABLE OF AUTHORITIES

American Ins. Co. of Newark N.J. v. Robinson,
120 Fla. 674, 163 So. 17 (Fla. 1935) 14

Auto-Owners Ins. Co. v. Above All Roofing, LLC,
924 So. 2d 842 (Fla. 2nd DCA 2006) 5

Barnier v. Rainey,
890 So. 2d 357 (Fla. 1st DCA 2004) 5

Borden v. East European Ins. Co.,
921 So. 2d 587 (Fla. 2006) 17

Citizens Ins. Co. v. Barnes,
98 Fla. 933, 124 So. 722 (Fla. 1929) 9, 14

Citizens Property Ins. Corp. v. Ceballo,
_ So. 2d _, 31 Fla. L. Wkly D1310 (Fla. 3d DCA 2006) .. 1, 3, 21

City of New York Fire Ins. Co. v. Chapman,
76 F. 2d 76 (7th Cir. 1935) 12

Clay Elec. Co-op, Inc. v. Johnson,
2003 WL 22966277, 28 Fla. L. Wkly. S866 (Fla. 2003) 5

Continental Casualty Co. v. Curl,
721 So. 2d 431 (Fla. 3d DCA 1998) 7

DeCespedes v. Prudence Mutual Casualty Co.,
193 So. 2d 224 (Fla. 3d DCA 1966), aff'd,
202 So. 2d 561 (Fla. 1967) 7

Dinneen v. American Ins. Co.,
98 Neb. 97, 152 N.W. 307 (Neb. 1915) 11

Dugan v. Metropolitan Property & Liability Ins. Co.,
853 F. Supp. 1103 (E.D. Ark. 1994) 12

Fidelity & Guaranty Ins. Corp. v. Mondzelewski,
49 Del. 306, 115 A. 2d 697 (Del. 1955) 11

Fleischman v. Dept. of Professional Regulation,
441 So. 2d 1121 (Fla. 3d DCA 1983) 17

Florida Power & Light Co. v. Bell,
113 So. 2d 697 (Fla. 1959) 4

Forsythe v. Longboat Key Beach Erosion Control Dist.,
604 So. 2d 452 (Fla. 1992) 17

Golf Channel v. Jenkins,
752 So. 2d 561 (Fla. 2000) 17

Hart v. North British & Mercantile Ins. Co.,
182 La. 551, 162 So. 177 (La. 1935)......................... 11

Hartford Fire Ins. Co. v. Redding,
47 Fla. 228, 37 So. 62 (Fla. 1904).......................... 13

Heady v. Farmers Mutual Ins. Co.,
217 Neb. 172, 349 N.W. 2d 366 (Neb. 1984) 7

Liverpool & London & Globe Ins. Co. of Liverpool, England v. Nebraska Storage Warehouses,
96 F. 2d 30 (8th Cir. 1938) 12

Major League Baseball v. Morsani,
790 So. 2d 1071 (Fla. 2001) 5

Meyer v. Hutchinson,
861 So. 2d 1185 (Fla. 5th DCA 2003)......................... 5

Mierzwa v. Florida Windstorm Underwriting Ass'n.,
877 So. 2d 774 (Fla. 4th DCA 2004) 1, 3-5, 18, 20-22

Millers Mutual Ins. Ass'n of Illinois v. LaPota,
197 So. 2d 21 (Fla. 2nd DCA 1967) 15, 21

Nathan v. St. Paul Mutual Ins. Co.,
243 Minn. 430, 68 N.W. 2d 385 (Minn. 1955) 7, 8

Netherlands Ins. Co. v. Fowler,
181 So. 2d 692 (Fla. 2nd DCA 1966) 15

New Orleans Real Estate Mortgage & Securities Co. v. Teutonia Ins. Co. of New Orleans,
128 La. 45, 54 So. 466 (La. 1910)........................... 12

Nielsen v. City of Sarasota,
117 So. 2d 731 (Fla. 1960) 4

Orient Ins. Co. v. Daggs,
172 U.S. 557, 19 S.Ct. 281, 43 L.Ed. 552 (1899) 7, 10

Palatine Ins. Co. v. Nunn,
99 Miss 493, 55 So. 44 (Miss. 1911)..................... 11, 12

Queen Ins. Co. v. Leslie,
47 Ohio St. 409, 24 N.E. 1072 (Ohio 1890) 9

Regency Baptist Temple v. Ins. Co. of North America,
352 So. 2d 1242 (Fla. 1st DCA 1977) 16

Rutherford v. Royal Ins. Co.,
12 F. 2d 880 (4th Cir. 1926) 12

Security Ins. Co. v. Rosenberg,
235 Ky. 419, 31 S.W. 2d 625 (Ky. 1930)...................... 12

Seigel v. Aetna Casualty & Surety Co.,
785 F. 2d 922 (11th Cir. 1986) 16

Smith v. Nationwide Mutual Fire Ins. Co.,
564 F. Supp. 350 (N.D. Fla. 1983)........................... 10

Smith v. Nationwide Mutual Ins. Co.,
564 F. Supp. 350 (N.D. Fla. 1983)........................... 16

Springfield Fire & Marine Ins. Co. v. Boswell,
167 So. 2d 780 (Fla. 1st DCA 1964) 8, 10

Stahlberg v. Travelers Indemnity Co.,
568 S.W. 2d 79 (Mo. Ct. App. 1978).......................... 12

State Farm Florida Ins. Co. v. Mix,
928 So. 2d 488 (Fla. 1st DCA 2006) 20

United States Fire Ins. Co. v. Sullivan,
25 F. 2d 40 (8th Cir. 1928) 7, 9, 10

Western Assur. Co. of Toronto v. Phelps,
77 Miss. 625, 27 So. 745 (Miss 1900) 9

OTHER AUTHORITIES

Florida Constitution art. V, §3(b)(4) 1

Laws of Florida, Chapter 4677 (1899)...................... 12, 13

Laws of Florida, Chapter 82-243.............................. 13
Note, Valuation & Measure of Recovery under Fire Ins. Policies,
49 Col. L. Rev. 818 (1949) 8, 10

Patterson, Essentials of Ins. Law §33,
pp. 146-47 (2nd Ed. 1955) 8, 9

Richards, Florida's Valued Policy Act,
79 Florida Bar Journal 18 (Dec. 2005)........................ 13

Rule 9.030, Florida Rule Appellate Procedure 1

§627.702, Florida Statutes, (2004).......1, 3, 6, 13, 18, 19, 21

§92.23, Florida Statutes, (2005)......................... 18, 21

PREFACE[1]

Insured property owners sought "law and ordinance" coverage under their homeowners policy, after their dwelling was declared a total loss. In Citizens Property Ins. Corp. v. Ceballo, __ So. 2d __, 31 Fla. L. Wkly D1310 (Fla. 3d DCA 2006), 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. It also held that Florida's Valued Policy law (VPL), §627.702, Fla. Stat. (2004) did not change this result. In contrast, the Fourth District determined that Florida's VPL controlled the result, and required payment of a liquidated amount for "law and ordinance" coverage by virtue of a total loss. Mierzwa v. Florida Windstorm Underwriting Ass'n., 877 So.2d 774, 779-80 (Fla. 4th DCA 2004) ("Mierzwa"). This Court has jurisdiction to resolve the certified inter-district conflict. Fla. Const. art. V, §3(b)(4); Fla. R. App. Proc. 9.030(a)(2)(A)(vi).

STATEMENT OF THE CASE AND FACTS

Juan and Jacqueline Ceballo ("insureds") were insured under a homeowners policy with Citizens Property Ins. Corp. ("Citizens" or "insurer"). Their home was built in 1959 (App. 3), and was damaged in a fire on August 30th, 2004. (R. 1-4). Citizens

[1] All references are to the Index prepared by the trial court clerk (R.), and the appendix supplied by Citizens in the court below. (App.).

declared the home a total loss, and paid the insureds $125,000, or the amount listed on the Declarations page under "Coverage A – Dwelling." The insureds filed suit for breach of contract to recover on the policy's "Additional Coverages," which Citizens declined to pay. (R. 2-4).

The pertinent policy provisions are as follows:

COVERAGE A – DWELLING

We cover:

1. The dwelling on the residence premises shown in the Declaration, including structures attached to the dwelling .... (App. 1).

SECTION 1 – ADDITIONAL COVERAGES

* * *

11. Ordinance or Law.

A. You may use up to twenty five percent (25%) of the limit of liability that applies to COVERAGE A for the increase costs you incur due to the enforcement of any ordinance or law which requires or regulates:

(1) The construction, demolition, remodeling, renovation or repair of that part of a covered building or other structure damaged by a PERIL INSURED AGAINST; or

(2) The demolition and reconstruction of the undamaged part of a covered building or other structure, when that building or other structure must be totally demolished because of damage by a PERIL INSURED AGAINST to another part of that covered building or other structure; or

(3) The remodeling removal or replacement of the portion of the undamaged part of a covered building or other structure necessary to complete the remodeling, repair or replacement of that part

of the covered building or other structure damaged by a PERIL INSURED AGAINST.

* * *

This coverage is additional insurance. (App. 25-26, emphasis added

Citizens answered the complaint, asserting *inter alia* that "losses must be incurred in order for these provisions of the homeowners insurance policy to be applicable." It also claimed a failure of "conditions precedent" in that the insureds had yet to incur any such costs. (R. 17).

The legal issue was joined when the insureds moved for partial summary judgment, based on Florida's VPL, §627.702(1), Fla. Stat. (2005), and Mierzwa. The insureds claimed an additional 25% of the face value of the policy (minus a deductible) for the increased costs necessary to bring the damaged dwelling up to current building codes. (R. 59-66). This totaled $31,250.(R. 59-66).[2] The trial court sided with the insureds, and entered partial final judgment in this amount. (R. 79). It denied the insureds' motion for summary judgment as to separate items of debris removal and landscaping, which are not at issue here. (R. 67).

On appeal, the Third District agreed that the insureds were "entitled to additional coverage for which they were charged and paid a premium." Ceballo, 2006 WL 1331504 *1. It disagreed that

[2] $32,250. minus a $1000 deductible.

the insureds were entitled to a summary judgment. It relied on the policy provision which authorized the owners to use "**up to** twenty five (25%) percent of the limit of liability that applies to Coverage A for the increased costs" they incurred due to enforcement of any law or ordinance. Id. (emphasis added). The Third District concluded that this placed a ceiling, not a floor, on the amount of the insureds' recoverable costs. And, in the absence of proof that the insureds actually incurred the covered expenses, payment gave the insureds "a windfall." Id. The Third District added that "Florida's Valued Policy Law does not alter this conclusion." Id. It reversed the summary judgment, and remanded for the insureds to present "proof of incurred expenses consistent with the policy," certifying its decision conflicted with Mierzwa.

JURISDICTION

This Court has jurisdiction based on the Third District's certification of conflict with Mierzwa v. Florida Windstorm Underwriting Association, 877 So. 2d 774 (Fla. 4th DCA 2004). See Fla. R. App. Proc. 9.030(a)(2)(A)(vi).

The competing district court decisions are patently irreconcilable. See Nielsen v. City of Sarasota, 117 So. 2d 731 (Fla. 1960); Florida Power & Light Co. v. Bell, 113 So. 2d 697 (Fla. 1959). The Third District held that the policy provisions control over Florida's VPL, and only require reimbursement of

rebuilding costs, once they are actually expended. The Fourth District held that the VPL controls over the policy, and requires the payment of a liquidated amount for rebuilding, once there is a "total loss" under the policy.

STANDARD OF REVIEW

The interpretation of an insurance policy to determine coverage is a matter of law subject to *de novo* review. Auto-Owners Ins. Co. v. Above All Roofing, LLC, 924 So. 2d 842 (Fla. 2nd DCA 2006); Meyer v. Hutchinson, 861 So. 2d 1185, 1187 (Fla. 5th DCA 2003); Barnier v. Rainey, 890 So. 2d 357, 359 (Fla. 1st DCA 2004). This case likewise arises on summary judgment, implicating the same standard of review. See Clay Elec. Co-op, Inc. v. Johnson, 873 So. 2d 1182, 1185 (Fla. 2003); Major League Baseball v. Morsani, 790 So. 2d 1071 (Fla. 2001).

SUMMARY OF THE ARGUMENT

This seemingly small case raises an important legal issue affecting insureds and insurers alike in this hurricane-prone state. When property owners pay a premium for "law and ordinance coverage" in the event their property is totally destroyed, do they recover a liquidated amount to cover rebuilding under Florida's VPL, or only the actual costs expended, as provided by the policy. The Fourth District concluded that the VPL controlled, and the insureds were entitled to a pre-established, liquidated amount. The Third District concluded that the policy

controlled, and the insureds could only recover the actual costs they expended. These decisions are patently irreconcilable, warranting resolution by this court.

Florida's VPL, its underlying purpose, and history, all favor the Fourth District's Mierzwa decision. A "valued policy" is one in which the value of the property to be insured and the amount to be paid in the event of a loss, is liquidated by agreement of the parties. VPL statutes have the legal effect of converting unvalued policies into valued policies, and providing a specified amount in the event of a total loss. They supercede and control inconsistent policy provisions.

There are only two essentials to recovery under Florida's VPL: (1) that the building be insured by the insurer as to a covered peril; and (2) that the building be a total loss. §627.702(1), Fla. Stat. (2004). Once the statutory criteria are met, the VPL mandates payment in the total amount for which the property was insured. Here, the property was insured for $125,000., **plus** 25% for "law and ordinance" coverage. The parties contemplated, in advance, that the insureds would be unable to meet existing building codes in the event of a total loss. The insurer assessed, and the insured paid, a premium for this additional coverage. Under the VPL, the insureds were entitled to a liquidated amount to cover rebuilding, based on the premium paid.

The Third District's decision holds that the policy provisions control over the statute, and guts the purpose of the VPL. It is erroneous and should be quashed.

ARGUMENT

FLORIDA'S VALUED POLICY LAW, §627.702, FLA. STAT. (2005) LIQUIDATES THE AMOUNT DUE ON A TOTAL PROPERTY LOSS TO INCLUDE THE PRE-ESTABLISHED AMOUNT FOR "LAW AND ORDINANCE" FOR WHICH INSUREDS ARE CHARGED AND PAID A PREMIUM

A. The Origin and Nature of "Valued Policy" Statutes.

Insurance policies generally fall into two categories: valued and non-valued. A non-valued policy is based on principles of indemnity. See DeCespedes v. Prudence Mutual Casualty Co., 193 So. 2d 224 (Fla. 3d DCA 1966), aff'd, 202 So. 2d 561 (Fla. 1967). In contrast, a valued policy is one in which the value to be insured is settled by prior agreement in the event of a loss. See Continental Casualty Co. v. Curl, 721 So. 2d 431 (Fla. 3d DCA 1998); Orient Ins. Co. v. Daggs, 172 U.S. 557, 19 S.Ct. 281, 43 L.Ed. 552, 566 (1899).

Valued policy statutes were originally enacted to cure a host of societal evils. See United States Fire Ins. Co. v. Sullivan, 25 F. 2d 40 (8th Cir. 1928); Nathan v. St. Paul Mutual Ins. Co., 243 Minn. 430, 68 N.W. 2d 385 (Minn. 1955); Heady v. Farmers Mutual Ins. Co., 217 Neb. 172, 349 N.W. 2d 366, 370 (Neb. 1984). Insurance companies were writing policies at any value earmarked by the insured, without advance investigation. They relied on the

"natural impulse of the insured" to procure "amply sufficient or even over valuation." United States Fire Ins. Co. v. Sullivan, 25 F. 2d at 41. If there was no loss, the insurer benefitted because higher premiums were paid for the higher values.[3] If a loss occurred, insurers simply contested the property value. Thus, an honest insured could recover less than the policy's stipulated value even though he or she had honestly estimated the property's value, and paid premiums on the bases of this estimate. Id. at 41. Overvaluation was a temptation to arson by dishonest insureds, thereby endangering lives and other property. Id. "This situation produced dissatisfaction and litigation." Id.

Insurance companies still found it more economical to pay excessive claims than to conduct property appraisals. Nathan v. St. Paul Mutual Ins. Co., 243 Minn. 430, 68 N.W. 2d at 388; Patterson, Essentials of Ins. Law §33, pp. 146-47 (2nd Ed. 1955).

Valued policy statutes thus served a dual purpose: (1) they prevented over-insurance by requiring prior valuation by the insurer; and (2) they avoided litigation by prescribing definite standards of recovery in the event of a total loss. Nathan, 68 N.W.2d at 388-39; Springfield Fire & Marine Ins. Co. v. Boswell, 167 So. 2d 780, 784 (Fla. 1st DCA 1964); Patterson, Essentials of Ins. Law at §33, pp. 146-47; Note, "Valuation & Measure of

[3] Insurance agents likewise benefitted from higher commissions obtained from the larger premiums. See Nathan v. St. Paul Mutual Ins. Co., 68 N.W. 2d at 388.

Recovery under Fire Ins. Policies," 49 Col. L. Rev. 818, 825 (1949). Couch on Ins. (3d), §175:103 (2006) ("The purpose of a valued policy law is to protect the insured by relieving him or her of the burden of proving the full value of his or her property after total destruction, and to prevent insurers from receiving premiums on overvaluations but thereafter repudiating their contracts when it becomes to their interest to do so.")

Because these statutes were enacted to serve public policy, they are read into every policy of insurance, and cannot be waived. United States Fire Ins. Co. v. Sullivan, 25 F. 2d at 41; see Citizens Ins. Co. v. Barnes, 98 Fla. 933, 124 So. 722, 724 (Fla. 1929); see also Western Assur. Co. of Toronto v. Phelps, 77 Miss. 625, 27 So. 745, 757 (Miss 1900) (policy provisions contrary to statute are rendered "nugatory" and ineffective, because a VPL statute supercedes all polices issued under it, and writes out inconsistent stipulations); Queen Ins. Co. v. Leslie, 47 Ohio St. 409, 24 N.E. 1072, 1074 (Ohio 1890) (statute cannot be treated as conferring personal privilege on insured, but "has a broader scope" based on public policy, molding obligation of contract into conformity with its provisions).

A "valued policy" statute represents an **exception** to the general law of indemnity. Patterson at §32 pp. 138-39.

> These laws have the legal effect of turning unvalued policies, in which the amount of insurance specified is the **upper limit** of the

> insured’s recovery, into a specified amount on the insureds proof of a total loss.

Id. at §33, pp. 146-47 (emphasis added).

The method of VPL statutes is to liquidate the value of the property by agreement and to remove it from dispute. United States Fire Ins. Co. v. Sullivan, 25 F. 2d at 41; Springfield Fire & Marine Ins. Co. v. Boswell, 167 So. 2d at 784.

The amount of the policy represents “liquidated damages” agreed to by the insurer and insured when the policy was issued, and the amount of the premiums, determined. Smith v. Nationwide Mutual Fire Ins. Co., 564 F. Supp. 350, 351 (N.D. Fla. 1983). The statutes are confined to real property because values are relatively fixed and certain. United States Fire Ins. Co. v. Sullivan, 25 F. 2d at 41. Such statutes accord the parties “absolute freedom” of contract to fix the property’s valuation but ascribes an estoppel after the fact to contest such valuation. See Orient Ins. Co. v. Daggs, 172 U.S. 557, 19 S.Ct. 281, 43 L.Ed. 552, 566 (1899) (rejecting attacks on Missouri statute’s constitution-ality under the due process and equal protection clauses).

> This is not an unfair scheme, as the insured is stating the limits of his recovery, and at the same time the insurer is basing his premium charges on the extent of his maximum exposure. When the total loss occurs neither can contend the value of the destroyed property is any different from what they had previously specified.

Springfield Fire & Marine Ins. Co. v. Boswell, 167 So. 2d at 784.

Almost from inception, valued policy statutes were criticized for undermining principles of indemnity. See Note, 49 Col. L. Rev. at 825. Insurers argued over whether a fire caused a total loss, or whether the fire was only partially responsible, where a municipal code or ordinance kept the property owner from rebuilding. In Dinneen v. American Ins. Co., 98 Neb. 97, 152 N.W. 307 (Neb. 1915), for example, property was damaged by fire, and the City of Omaha, pursuant to ordinance, prevented its repair, and required its demolition. The insurer invoked a policy exclusion which purported to preclude liability "for loss beyond the actual value destroyed by fire for loss occasioned by ordinance or law regulating construction or repair of buildings." The trial court enforced this policy exclusion.

The insured argued on appeal, that Nebraska's valued policy statute prohibited these policy exclusions from being given full force and effect. The Nebraska Supreme Court **agreed**. Accord Hart v. North British & Mercantile Ins. Co., 182 La. 551, 162 So. 177 (La. 1935) (invalidating policy exclusions because "Any attempt to limit the insurer's liability in conflict with the valued policy statute cannot be of any avail"); Palatine Ins. Co. v. Nunn, 99 Miss 493, 55 So. 44, 45 (Miss. 1911) (effect of valued policy law was to write this exemption clause out of the insurance contract, as a matter affecting the public policy of the state).

Similarly, in Fidelity & Guaranty Ins. Corp. v. Mondzelewski, 49 Del. 306, 115 A. 2d 697, 699 (Del. 1955), the insurance policy attempted to apportion between the "actual cash value" of the property at the time of the loss, "without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair." Id. at 699.

The insurer argued that its policy provision was a valid limitation on the risk it assumed, and was not concerned with valuation as prescribed by the statute.[4] The Delaware Supreme Court **disagreed**, concluding that "[T]he valued policy statute is concerned not only with valuation but also with the measure of the insurer's liability in cases of total loss...". Id. at 700. Whether the loss was total in law, or in fact, "the statute applies and the insurer must pay the face amount of the policy." Id. Accord Rutherford v. Royal Ins. Co., 12 F. 2d 880 (4th Cir. 1926); City of New York Fire Ins. Co. v. Chapman, 76 F. 2d 76 (7th Cir. 1935); Liverpool & London & Globe Ins. Co. of Liverpool, England v. Nebraska Storage Warehouses, 96 F. 2d 30 (8th Cir. 1938); Dugan v. Metropolitan Property & Liability Ins. Co., 853 F. Supp. 1103, 1105 (E.D. Ark. 1994); Security Ins. Co. v. Rosenberg, 235 Ky. 419, 31 S.W. 2d 625 (Ky. 1930); New Orleans Real Estate Mortgage & Securities Co. v. Teutonia Ins. Co. of New Orleans, 128

[4] The Court rejected the insurer's argument which was built on the note in Columbia Law Review.

La. 45, 54 So. 466 (La. 1910); Palatine Ins. Co. v. Nunn, 99 Miss 493, 55 So. 44 (Miss. 1911); Stahlberg v. Travelers Indemnity Co., 568 S.W. 2d 79 (Mo. Ct. App. 1978).

B. Florida law

Florida's legislature first enacted a valued policy statute in 1899. Laws of Fla., Chap. 4677 (1899). Entitled "An Act to regulate contracts of insurance of buildings and structures in this State to fix a measure of damage in case of loss and to prescribe a rule of evidence therein," the statute contained language limiting its application to loss or damage due to fire or lightening. Id. at §§1, 4. It was amended in 1982 to include all covered perils. Laws of Fla., Chap. 82-243; §627.702(1), Fla. Stat. (1982). Although there were a host of other legislative amendments, the provision for "total loss" survived intact until recently. See §627.702(1), Fla. Stat. (2003); Richards, Florida's Valued Policy Act, 79 Fla. Bar. J. 18 (Dec. 2005).[5]

Florida cases followed the national pattern. In Hartford Fire Ins. Co. v. Redding, 47 Fla. 228, 37 So. 62, 63 (Fla. 1904), the policy purported to insure Redding's building against direct loss or damage from fire "except as hereinafter provided to an

[5] A statutory amendment to the "total loss" provision went into effect on June 1, 2005. Laws 2005, c. 2005-111. It does not apply to this pre-existing dispute. See State Farm Mutual Auto Ins. Co. v. LaForet, 658 So. 2d 55 (Fla. 1995) (statutory amendment effective substantive rights applies prospectively absent clear legislative intent); Arrow Air, Inc. v. Walsh, 645 So. 2d 422, 425 (Fla. 1994).

amount **not exceeding** fifteen hundred dollars." However, it contained an endorsement fixing the building's insurable value at $3000.

This Court rejected the insurer's attack on the statute's constitutionality reasoning that:

> 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. Id. at 235.

It **also** held that the statute's provisions adversely affected "the three-fourths value and arbitration clauses, as well as other clauses in the policy...". Id. It declined to decide whether the insurer was entitled to show that the property had depreciated between the date the policy issued and the loss, but indicated that "if the statute does deprive the insurer of that right, it will not be unconstitutional for that reason." It reasoned that the insurer could protect itself by taking depreciation into account at the time it fixed the property insurable value. Id.

In American Ins. Co. of Newark N.J. v. Robinson, 120 Fla. 674, 163 So. 17, 19 (Fla. 1935), this Court subsequently concluded

that "valued policy statutes, such as ours, will not permit a reduction of the amount of insurance specified in the policy by reason of depreciation" between the time the policy was issued and the loss.

In Citizens Ins. Co. v. Barnes, 98 Fla. 933, 124 So. 722 (Fla. 1929), the policy insured what was described as a "frame building." The building was damaged by fire, but a town ordinance precluded repair. The insurer contended that there was no total loss under the Valued Policy statute, because part of the loss was attributable to the ordinance, and not the fire.

The trial court disagreed, and this Court affirmed, concluding that this was a constructive total loss. Moreover, once the insurer accepted the premium, based on its classification of a frame building, it was estopped to contest the property's value. Accord Palatine Ins. Co. v. Barnes, 98 Fla. 940, 124 So. 724 (Fla. 1929).

In Millers Mutual Ins. Ass'n of Illinois v. LaPota, 197 So. 2d 21 (Fla. 2nd DCA 1967) the insured's residence was totally destroyed in a fire. The insurer **agreed** that the building was a total loss, but claimed it could not be forced to pay more than its own proportionate liability, under its *pro rata* policy provision. The insured urged that this contractual provision violated Florida's Valued Policy statute. The trial court sided with the insured. The Second District **affirmed**, concluding that

"The Valued Policy law is founded upon the theory of 'calculated risk' while the *pro rata* insurance clauses are based upon the theory of indemnity."

In Netherlands Ins. Co. v. Fowler, 181 So. 2d 692 (Fla. 2nd DCA 1966), the insured building was severely damaged by fire, but the City refused to allow its repair. The policy at issue attempted to limit coverage "to the extent of the actual cash value at the time of the loss ... without any allowance for increased cost of repair or construction by reason of any ordinance or law regulating construction or repair." The insurer urged that it was only required to pay the insured for that portion of the loss attributable to the fire, citing this policy provision. The Second District disagreed, holding that the Valued Policy statute invalidates this policy provision. See also Regency Baptist Temple v. Ins. Co. of North America, 352 So. 2d 1242, 1244 (Fla. 1st DCA 1977).

In Smith v. Nationwide Mutual Ins. Co., 564 F. Supp. 350 (N.D. Fla. 1983), property destroyed by fire was co-owned by two insureds, one of whom was ostensibly blameless as to the loss. The insurer urged that this insured could only recover up to the extent of her insurable interest in the property.

Since there was no Florida case directly on point, Chief Judge Stafford gave effect to the theories behind the VPL. Disagreeing with the insurer, he concluded that the innocent co-

insured was entitled to recover the full, face value of the policy, even though her actual interest was less than the amount of insurance. The "face value" rule was simply more consistent with treating the insurance policy as a contract for liquidated damages, rather than indemnity, and thus more "faithful to the spirit of Florida's valued policy law." Id. at 351-52. See also Seigel v. Aetna Casualty & Surety Co., 785 F. 2d 922, 925 (11th Cir. 1986) (insureds were not "unjustly enriched" by insurer, merely because they pursued their contractual rights to recovery, independent of subsequent purchaser's payments and repairs of property).

In sum, insurers have **always** argued that their insurance provisions are based on principles of indemnity, control over the statute, and that the insured is necessarily obtaining a "windfall" under the VPL. Those arguments have been consistently rejected by Florida courts.

C. Florida's Valued Policy Statute and the Inter-district Conflict

Legislative intent is the "polestar" that guides statutory interpretation. Borden v. East European Ins. Co., 921 So. 2d 587, 595 (Fla. 2006). It is gleaned "primarily" from the actual language used by the legislature, and principles of construction if the language is ambiguous. See Golf Channel v. Jenkins, 752 So. 2d 561, 564 (Fla. 2000). All parts of the statute are to be read *in pari materia* to achieve a consistent whole. Borden, 921

So. 2d at 595; Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So. 2d 452, 455 (Fla. 1992). Where possible, courts must give full effect to all statutory provisions in harmony with one another. See Fleischman v. Dept. of Professional Regulation, 441 So. 2d 1121, 1123 (Fla. 3d DCA 1983) ("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). Courts are also required to avoid readings which render any part of a statute meaningless. Borden, 921 So. 2d at 595 (legislature does not intend to enact useless provisions).

The total loss provision of the VPL statute at issue here provides that:

> 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(1), Fla. Stat. (2004)(emphasis added).

Another statute, derived from the original Valued Policy Act of 1899, specifies the "Rule of Evidence in suits on fire policies for loss or damage to building." It separately provides that:

> In all suits or proceedings brought upon policies of insurance on buildings against loss or damage by fire, hereafter issued or renewed, **the insurer shall not be permitted to deny that the property insured was worth, at the time of insuring it by the policy, the full sum insured therein on such property.**

§92.23, Fla. Stat. (2005) (emphasis added).

In Mierzwa v. Florida Windstorm Underwriting Association, 877 So. 2d 774 (Fla. 4th DCA 2004), a home was substantially damaged in a hurricane. The building was effectively condemned by local authority, because: (1) a local ordinance required the building to meet a new building code if the total cost of repairs would exceed 50% of the building's value; and (2) a local building official calculated that the cost of repairs would be more than half the value of the building before the loss.

The owner had a wind insurance policy with FWUA in the face amount of $281,000. This policy contained an "anti-concurrent cause" provision, and an exclusion for flood damage. The owner also purchased a separate policy of flood insurance.

FWUA attempted to apportion between damage due to wind and flood damage, and tendered the apportioned amount, minus deductibles. Its insured contested this apportionment under the VPL. The trial court disagreed and entered summary judgment

favoring FWUA. The Fourth District reversed, applying the same logic to both issues.

It had no trouble determining that FWUA's anti-concurrent clause and policy exclusion fell afoul of Florida's Valued Policy law. Like the other courts which came before, it rejected the insurer's assertion that its attempt to apportion between risks was a matter of causation, not damages. Id. at 777-78. It also addressed the trial court's failure to enforce the "Ordinance of Law Coverage" provision in the policy, at issue here.

The Fourth District concluded that there are only two essentials for recovery under Florida's VPL: (1) that the building be "insured by [an] insurer as to a [e.s.] covered peril;" and (2) that the building be a total loss. §627.702(1), Fla. Stat. 2004). "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 [were] involved as the costs of repair or replacement." Mierzwa, 877 So. 2d at 775.

Mierzwa paid a premium for an additional amount of insurance – 25% in excess of the face amount of insurance – to cover the instance when the building was deemed a total loss and had to be rebuilt. Its purpose was "to cover the increased costs of reconstruction caused by changes in local building codes adopted after the original construction of the building." Id. at 780. However, under the Valued Policy, this was a set amount, based on

the pre-established value of the property. Id. at 777, 779. Once Mierzwa established that the building was destroyed by a covered peril, and was a total loss, he was entitled to the additional 25% as a matter of law. Id. at 779. This interpretation gave full force and effect to the VPL's language and underlying purpose. See also State Farm Florida Ins. Co. v. Mix, 928 So. 2d 488 (Fla. 1st DCA 2006) (dismissing appeal, but citing Mierzwa for the proposition that resolution of an Ordinance or Law covering claim under a windstorm policy is related to the decision on the Valued Policy Law).

In the instant case, these insureds sustained a "total loss" of their property. They were charged and paid a premium for the value of their dwelling, plus 25% in excess of the face amount of insurance for a "law and ordinance" endorsement. Per the policy, this gave them additional insurance. The parties contemplated, in advance, that new building codes would render it more expensive for the insureds to rebuild. The VPL made this a liquidated amount, because it was an additional "amount of money for which the property was so insured as specified in the policy and for which a premium has been charged and paid." §627.702(1), Fla. Stat. (2004). The insurer was likewise not permitted to deny that the property was worth "the **full sum**" for which it was insured. §92.23, Fla. Stat. (2005) (emphasis added).

Here, the Third District gave precedence to the indemnity feature of the policy provision, over the controlling statute. Citizens Property Ins. Corp. v. Ceballo, 2006 WL 1331504 at *1. It held that these owners could receive "**up to** a maximum of 25% of the limit of liability" based on the amount they actually expended, and that "Florida's Valued Policy Law does not alter this conclusion." Id. This ignored the history, express language and underlying purpose of the VPL, which renders the amount due on the policy liquidated, in event of a total loss. It likewise contravenes §92.23, because it enables the insurer to deny that the property was the "full sum" for which it was insured. The Third District turned an insurance policy (which incorporated the VPL) and was founded on a theory of "calculated risk," into one based on a theory of indemnity. This violates the Valued Policy statute. See Millers Mutual Ins. Ass'n. of Illinois v. LaPota, 197 So. 2d at 24-25; Mierzwa.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should: (1) accept jurisdiction; (2) approve the Fourth District's decision in Mierzwa; and (3) quash the Third District's decision.

Respectfully submitted,

Lauri Waldman Ross, Esq.
LAURI WALDMAN ROSS, P.A.
Two Datran Center, Suite 1612
9130 S. Dadeland Boulevard

Miami, Florida 33156
(305) 670-8010

And

Keith A. Truppman, Esq.
MINTZ AND TRUPPMAN, P.A.
1700 Sans Souci Blvd.
North Miami, FL 33181

By:
Lauri Waldman Ross, Esq.
(Fla. Bar No.: 311200

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. Mail this ___ day of July, 2006 to:

James M. Fishman, P.A.
9655 S. Dixie Highway
Suite 102
Dadeland Professional Building
Pinecrest, FL 33156
(305) 661-1680

Louis K. Rosenbloum, Esq.
Louis K. Rosenbloum, P.A.
4300 Bayou Blvd., Suite 36
Pensacola, FL 32503

By:
Lauri Waldman Ross, Esq.

CERTIFICATE OF TYPE SIZE AND FONT

I hereby certify that the Type Size and Font utilized in this brief is Courier New, 12pt.

By:
Lauri Waldman Ross, Esq.