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' REPLY BRIEF ON THE MERITS

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JURISDICTION[1]

This Court has discretionary jurisdiction to resolve certified inter-district conflict. Fla. Const. art V, §3(b)(4); Fla. R. App. Proc. 9.030(a)(2)(A)(vi). There is such conflict between the Third and Fourth District, certified below, limited to the application of Florida's Valued Policy Statute, §627.702, Fla. Stat. (2004) to "law and ordinance" coverage, the issue squarely presented here. See Citizens Property Ins. Corp. v. Ceballo, __ So. 2d __, 2006 WL 1331504, 31 Fla. L. Wkly. D1310 (Fla. 3d DCA 2006), certifying conflict with Mierzwa v. Florida Windstorm Underwriting Ass'n, 877 So. 2d 774, 779-80 (Fla. 4th DCA 2004) ("Mierzwa").

Contrary to suggestion (A.B. p. 8), there is no way to reconcile or distinguish the cases. Citizens' own amicus **agrees** that "The issue as to which conflict was certified involves the interplay between Florida's Valued Policy Law, §627.702 (hereinafter "VPL") and the Law and Ordinance coverage provision of the Citizen's policy in cases where the insured structure has suffered damage rendering it a total loss. The Third District and Fourth District **have reached conflicting decisions** based on

[1] All references are to the Record prepared by the trial court clerk (R.), and the appendix supplied by Citizens in the court below. (App.), and Citizen's Answer Brief. (A.B. p.). Amicus State Farm's brief is1denoted (S.F. p.).

their respective analyses of the VPL and Florida insurance contract law." (S.F. p. v, emphasis added).

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. Citizen's Position

The parties **agree** that the insureds sustained a "total loss" of their home in a fire, that Citizen's policy provides "law and ordinance" coverage as "additional insurance," and that Florida's Valued Policy Law ("VPL"), §627.702(1), Fla. Stat. (2004) was intended "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 amount to be paid. (A.B. p. 12). They **disagree** on whether Florida's VPL is limited to dwelling damage (A.B. pp. 9, 19), whether "documentation" of repair and replacement costs is required in the case of a totally destroyed 1959 home, which must be rebuilt to meet current building codes, (A.B. pp. 5-7), and whether requiring such documentation fulfills the VPL's purpose of making total loss adjustments "easier and less complicated." (A.B. p. 12).

Citizens attempts to draw a distinction between "the loss

suffered by the insured structure" and the additional costs incident to repair or replace to bring a building up to code. (A.B. p. 9). It argues that only the first is contemplated by the VPL, and the second is not "or the statute would so state." (A.B. p. 9). The statute **does** state, by the absence of limitation. It provides that where there is a "total loss" of a building or structure, the VPL sets the insurer's liability under the policy for a total loss as "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).[2] The amount of money for which this property was insured and for which a premium was charged and paid was $125,000, **plus** the 25% mandated by statute for law and ordinance coverage. See Mierzwa, 877 So. 2d at 779-80; §627.7011, Fla. Stat. (eff. 1993). In the context of a total **fire** loss, the insurer is further prohibited from denying "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. (2004) (emphasis added). The "full sum insured therein on such property" includes $125,000 **plus** 25% to

[2] The term "stated dollar value" is used vociferously by Citizens, (A.B. p. 12, 13), but is **not** found in the VPL. §627.702, Fla. Stat. (2004). It reflects Citizen's interpretation of the statute.

rebuild. Citizens' statutory analysis ignores §92.23, Fla. Stat. (2004) altogether.

Citizens relies on Regency Baptist Temple v. Insurance Co. of North America, 352 So. 2d 1242 (Fla. 1st DCA 1977) and State Farm Fire and Cas. Co. v. Patrick, 647 So. 2d 983 (Fla. 3d DCA 1994). These cases involve **partial**, not total losses. Thus, §627.702(1), Fla. Stat. did not apply at all. Moreover, subsection (2) of the statute, applied to partial losses, but only those caused by "fire or lightening."[3]

Regency dealt with the partial collapse of a roof under standing water, an insurance policy which called for "the replacement cost of the property damaged or destroyed at the time of loss with deduction for depreciation," as well as a policy exclusion for loss occasioned directly or indirectly by enforcement of laws or ordinances. The contractual provisions were deemed valid because **neither** subsection of the statute applied. As the First District noted, the policy exclusion did "not conflict with any statute to which our attention has been called" and "similar provisions have been upheld **in the case of partial loss.**" Id. at 1244. It observed further that "The rule is otherwise when, in the case of loss by fire or lightening,

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[3] Subsection 1 of the VPL was amended in 1992 to encompass all "covered perils," but subsection (2) remains limited to

such a provision conflicts with Florida's valued policy law" or a law/ordinance prevented repair. "In those cases, courts have declared the building a 'constructive total loss' and held the insurers liable for the building's entire value.'" Id.

Similarly, State Farm Fire and Cas. v. Patrick, 647 So. 2d at 983, dealt with a **partial** loss from windstorm, which implicated neither subsection (1) nor (2) of §627.702. As the Third District observed, "[S]ection 627.702(2) is not applicable because it covers only partial loss from fire or lightening." In the absence of any specific prohibition, "the language of the contract is controlling." State Farm, 647 So. 2d at 974.

Nor is Greer v. Owners Ins. Co., 434 F. Supp. 2d 1267 (N.D. Fla. 2006) any more on point. Greer held that Florida's VPL was preempted by Federal law, because it involved a Standard Flood Insurance Policy (SFIP) issued through the National Flood Insurance Program, 42 U.S.C. §4001, *et seq.* Even absent preemption, Florida's VPL only applied in event of a "total loss," the parties **disputed** whether the loss was total, and the trial court ruled it was not. Greer, 434 F. Supp. 2d at 1278-81. According to the federal court, "the undisputed record evidence establishes that the damage to the Plaintiffs home

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partial losses "by fire or lightning," to date. See §627.702(2), Fla. Stat. (2005).

constituted a partial loss, rather than a total loss. Id. at 1283.

In contrast, this case deals with a total loss of the property, controlled by the VPL, §627.702(1), Fla. Stat. Plaintiffs thus not only suffered an "actual loss" (A.B. p. 9), they suffered a **stipulated** "total loss."

Citizens suggests that the Mierzwa court had evidence before it determining value, i.e., the costs that the insureds incurred. Thus, "it was only addressing its comments to the coverage issue." (A.B. p. 21). We beg to differ.

In Mierzwa, 877 So. 2d at 774, an ordinance where the home was located provided that "when repairs and alterations amounting to more than 50% of the value of the existing building are made during any 12 month period, the building or structure shall be made to conform [to building code rules] applicable at the time of the repairs." City of Ft. Lauderdale Ordinance section 104.3(e). A local code official determined that the total cost of repairs would exceed half of its value, but the record did not establish what he used for value. Mierzwa, 877 So. 2d at 776-777. By virtue of the total loss, the Fourth District held that the carrier was liable for the face of the policy "no matter what other facts are involved as to the costs of repair and replacement." Id. at 776. This included an

additional 25% in Law and Ordinance Coverage when the building was deemed a total loss and had to be rebuilt. Id. at 779.

The insureds agree that there is nothing in the record regarding changes in local building codes, or increased costs of reconstruction. The parties simply **assumed** this to be the case. (A.B. p. 16-17). This was a valid assumption, given the fact that Plaintiffs' home was built in Miami-Dade County in 1959 – almost half a century ago – and prior to the passage of **any** statewide building code (which took place in the early 1970's), as well as the Florida Building Code promulgated long afterwards, and presently in effect.

Section 3401.7.26 of the Florida Building Code, applied statewide, is identical to the Broward County ordinance in Mierzwa. It provides:

> When repairs and alterations amounting to more than 50% of the value of the existing building are made during any 12 month period, the building or structure shall be made to conform to the requirements for a new building or structure or be entirely demolished.

A remand, if required, should thus be limited to whether the cost to rebuild these insureds' 1959 home exceeds more than 50% of its value, not the presentation of "documentation" for repairs. (A.B. pp. 5, 6, 7).

Citizens takes issue with characterizations of the VPL as

an "exception to indemnity," and the payment of "liquidated damages." (A.B. p. 26). These are not the characterizations of the insureds, but those of other courts, and experts on insurance law. See U.S. Fire Ins. Co. of City of New York v. Sullivan, 25 F. 2d 40, 41 (8th Cir. 1928) (method of the VPL is "to have the value liquidated in the policy by the parties to the contract and removed by dispute"); Smith v. Nationwide Mutual Fire Ins. Co., 564 F. Supp. 350, 351 (N.D. Fla. 1983) (insured was entitled to the full value of policy in the event of total loss, because "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"); Millers' Mutual Ins. Assn of Ill. v. La Pota, 197 So. 2d 21, 25 (Fla. 2d DCA 1967) (VPL is founded on a theory of "calculated risk," as opposed to indemnity); Mierzwa, 877 So. 2d at 780 (Gross, J, concurring specially); Patterson, "Essentials of Ins. Law," §32, pp. 138-39; §33 pp. 146-47 (1955).

Citizen's resort to §627.702(5)&(8), Fla. Stat. (2004) is perplexing. Neither personal property, nor "appurtenant structures" are at issue in this case. §627.702(5), Fla. Stat. (2004). Likewise, subsection (8) has nothing to do with "law and ordinance" coverage. §627.702(8), Fla. Stat. This subsection authorizes a property insurer to issue an appropriate rider or

endorsement "indemnifying the insured for the difference between the insurable value of the insured property at the time loss or damage occurs, and the amount actually expended to repair, rebuild or replace" the damaged or destroyed property. This enables a property insurer to offer **extended** replacement cost coverage, based on actual out-of-pocket expenses, as the very case on which Citizens relies, reflects. See Langhorne v. Fireman's Fund Ins. Co., 432 F. Supp. 2d 1274, 1279 (N.D. Fla. 2006).

Under subsection (8), the "insurable value" of the home for underlying coverage would be $125,000. plus 25%. Indeed, Langhorne distinguished Mierzwa on the basis *inter alia* that it only involved **underlying** coverage, "rather than, as here, extended replacement cost coverage." Langhorne, 432 F. Supp. 2nd at 1279 n.11.

The purpose of the VPL is to require an insurer's prior valuation and prevent over-insurance, and to **avoid** litigation by proscribing definite standards of recovery in the event of a total loss. Hartford Fire Ins. Co. v. Redding, 47 Fla. 228, 232, 37 So. 62 (Fla. 1904) (VPL's "principal object and purpose is to fix the measure of damages in case of loss, total or partial"); Springfield Fire & Marine Ins. Co. v. Boswell, 167 So. 2d 780, 784 (Fla. 1st DCA 1964). Any provisions of a policy

in conflict with a statute are invalidated. Martin v. Sun Ins. Office of London, 83 Fla. 325, 91 So. 363, 365 (Fla. 1922).

Citizen's interpretation would foment the type of haggling and negotiation that VPL's were intended to prevent. Following a total loss of what may be their only asset, from a catastrophic event, many homeowners do not have the means to rebuild. They are totally dependent on their insurance companies. Citizens' policy would require them to front the increased costs to rebuild, with limited or no resources, and then seek reimbursement. (A.B. pp. 5, 6, 7). Thus, if a cost is not "appropriately documented" in the determination of an insurer, homeowners will be left high and dry. They may seek judicial recourse during the rebuilding process, but rebuilding will grind to a halt and stagnate while each item of cost is litigated.

Citizens posits that homeowners may reap a "windfall" if they are paid in full to rebuild, and fail to do so, and then sell their property "as is." In other words, they may take the money and run. While this is certainly a possibility, a "windfall" assumes that an owner sells for full market value. That is unrealistic. In the case of a "total loss," the homeowner is left with raw land, and a destroyed structure, sold in "as is" condition. This is usually well **below** market value.

The market equalizes what the owner receives: the insurance proceeds for which the owner paid premiums to secure his or her home, and the depreciated value of the land.

Finally, Citizens asserts that the legal arguments advanced here "violate the public policy to have a viable insurance industry to help property owners to recover from their actual loss." (A.B. p. 9). It cites no authority supporting such public policy. The "viability" of the insurance industry is a matter for regulation consigned to the legislature. Citizens also cites "the public's right to be free from abuse of VPL statutes by allowing windfall payments to insureds." (A.B. p. 25). However, Citizens does not wear the mantle of public protector well. As an insurer, its eye is on **its** bottom line, **not** the welfare of this State's citizens. That role lies with our three branches of government, including this Court.

B. State Farm's Position

The term "amicus curiae" means a friend of the court, not a friend of a party.[4] See Ryan v. Commodity Futures Trading Commission, 125 F. 3d 1062, 1063 (7th Cir. 1997), adopted in Rathkamp v. Department of Community Affairs, 730 So. 2d 866 (Fla. 3d DCA 1999). While we are now well beyond the term's original meaning, there are still limits to amici participation.

[4] Or friend of the insurance industry.

Ryan 125 F. 3d at 1063. Amici do not have standing to raise issues unavailable to the parties, nor may they inject entirely new issues into a proceeding. See Michels v. Orange County Fire/Rescue, 819 So. 2d 158 (Fla. 1st DCA 2002); Acton v. Ft. Lauderdale Hospital, 418 So. 2d 1099, 1101 (Fla. 1st DCA 1982); see also Turner v. Tokai Financial Services, Inc., 767 So. 2d 494 (Fla. 2nd DCA 2000) (Issue raised by amici, but not the parties to appeal, was not properly before the appellate court).

In the instant case, State Farm has gone far beyond its role as amicus, injecting an entirely new and different issue it invites the Court to address. The issue certified for this Court's conflict review is whether the VPL, §627.702(1), required the insurer to pay an additional 25% for "law and ordinance" where the property constituted a total loss and had to be rebuilt in accordance with new building codes, absent proof of out of pocket expenses. This was the **second** issue presented in Mierzwa v. Florida Windstorm Underwriting Assn, 877 So. 2d 774, 779-80 (Fla. 4th DCA 2004).

The first issue in Mierzwa (not at issue here) was whether a windstorm insurer was required by the VPL to pay the face amount of its policy, where its policy excluded flood damage, and the owner obtained a flood policy from another insurer covering this risk. The flood insurance carrier attempted to

apportion the total loss and pay the amount of its risk, i.e., the damage due to windstorm. The Fourth District disagreed, and the 2005 legislature subsequently amended §627.702 to permit pro-rata adjustment of losses for claims between covered and non-covered perils. §627.702(1)(b), Fla. Stat. (2005); Ch. 2005-111, Laws of Fla. The legislature stated its express intent that its 2005 amendment to §627.702(1), Fla. Stat. (2005) "shall **not** be applied retroactively" and is applicable only to claims after the amendment effective date. State Farm has simply latched onto this appeal, as a vehicle to obtain a state-wide ruling applying the statutory amendment retroactively, in the guise that this was or should have been the law all along.

The apportionment of loss attributable to different concurrent risks (or carriers), is simply **not** an issue here. Nor could it be. This case involves one covered loss a total loss, due to fire, with no issue of apportionment raised or presented, below.

State Farm has no standing to inject this new issue into the proceedings. Indeed, its notice of supplemental authority indicates how far afield it has strayed. Leonard v. Nationwide Mutual Ins. Co., __ F. Supp. 2d __, 2006 WL 2353961 (S.D. Miss. Aug. 15, 2006, Case No. 1:05-CV475) does not deal with law and ordinance coverage or even application of Louisiana's Valued

Policy Law, but only the apportionment of losses between wind and water damage under Nationwide's policy. Likewise, Chauvin v. State Farm Fire & Cas. Co., __ F. Supp. 2d __, 2006 WL 2228946 (E.D. La., Aug. 2nd, 2006, Case No.: 05-6454), deals with the first issue in Mierzwa, which is **not** the subject of this appeal. The apportionment of losses attributable between concurrent risks is simply not an issue presented for this Court's review and State Farm has no standing to urge its resolution.

This Court should respectfully decline State Farms' invitation for such an advisory opinion. See Provident Management Corp. v. City of Treasure Island, 718 So. 2d 738, 740 (Fla. 1998)(where other issues raised by the city were not a basis for review, court would decline to entertain these, and would "eschew those claims not first subjected to the crucible of the appellate process").

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.

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