SUPREME COURT OF FLORIDA

CASE NO. SC06-2494

FLORIDA FARM BUREAU CASUALTY INSURANCE COMPANY,

Petitioner,

vs.

EUGENE A. COX and DEBRA COX,

Respondents.

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, FIRST DISTRICT CASE NO. 1D05-4111

BRIEF OF AMICUS CURIAE, HELPING HANDS LEGAL CENTER, IN SUPPORT OF THE RESPONDENTS

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THE IDENTITY OF THE AMICUS AND ITS INTEREST

Helping Hands Legal Center is a non-profit association established approximately ten years ago by the Pensacola law firm of Kerrigan, Estess, Rankin, McLeod & Thompson to provide free legal services for panhandle residents who could not otherwise qualify for free legal aid. Following the devastation caused to the panhandle by Hurricane Ivan in September 2004, Helping Hands established a hotline to assist individuals impacted by the hurricane in obtaining legal assistance. More than 70 attorneys in the Pensacola Bay area assisted with the project and provided free legal counsel for well over 2,100 individuals who called the hotline. See generally "Area Lawyers Respond to Thousands of Calls to Free Hot Line," *Pensacola Business Journal* (Feb. 2005).

A substantial number of the calls to the hotline raised insurance questions, and many were from individuals whose homes had been destroyed by Hurricane Ivan, but whose insurers were refusing to abide by the Valued Policy Law, § 627.702, Fla. Stat., or the decision in Mierzwa v. Florida Windstorm Underwriting Ass'n, 877 So. 2d 774 (Fla. 4th DCA 2004) that Farm Bureau challenged below. As demonstrated by the briefs submitted in this case by both Farm Bureau and the amici supporting its position, those same insurers have similarly refused to follow the district court's decision below. Thus, the decision in this case will undoubtedly directly impact the claims of clients assisted by Helping Hands. Helping Hands

submits this brief to give a voice to the Gulf Coast residents whose homes were rendered a total loss by Hurricane Ivan, yet who have still not received the liquidated damages required by the statute, two and one-half years after the storm.

SUMMARY OF ARGUMENT

This Court should approve the district court's decision below and the Fourth District Court of Appeal's decision in Mierzwa v. Florida Windstorm Underwriting Ass'n, 877 So. 2d 774 (Fla. 4th DCA 2004), because they are consistent with decades of Florida cases refusing to create judicial exceptions to the Valued Policy Law ("VPL"), § 627.702, Fla. Stat. (2004).

From its inception more than a century ago, insurers have asked Florida courts to create defenses and impose limitations on the VPL to avoid paying the face value of policies after total losses. Florida courts have consistently and repeatedly rejected these efforts. For example, Florida courts have refused to permit insurance companies to argue that the value of a building had depreciated since the policy was issued, even when the depreciation was caused by perils excluded by the policy. Similarly, Florida courts have refused to permit insurers to prorate payments with other insurance companies in the event of a total loss and, instead, have required payment of the face value of all of the policies—even when it results in a windfall for the insured. Finally—and perhaps most important—Florida courts have held that insurers are responsible for the face value of

insurance policies when the total loss was caused partially by a covered peril and partially by enforcement of a government ordinance, even when the policy specifically excludes losses caused by government ordinances.

In rejecting these arguments, Florida courts have observed that any changes or limitations in the VPL should come from the legislature, not the courts. And the legislature has, over the century that the VPL has been in place, created several defenses and limitations to the VPL. But prior to the 2005 legislative session, the legislature had never limited the scope of the VPL to allow insurers to prorate their liability under the statute when more than one peril contributed to the total loss.

While the legislature in 2005 enacted sweeping changes to the VPL to limit its applicability to total losses caused by covered perils, it expressly provided that these changes were not to be applied retroactively. Thus, by arguing that the Court should limit its liability under the VPL to damages caused by covered perils—as the 2005 amendments provide—Farm Bureau is asking this Court to ignore both the plain language of the VPL as it existed in 2004 and the clearly expressed intent of the legislature when it amended the statute in 2005. The Court should decline this invitation. Instead, the Court should reaffirm the long and consistent line of Florida cases—of which Cox and Mierzwa are but the latest—refusing to create public policy exceptions to the plain and unambiguous requirements of the VPL.

ARGUMENT

Farm Bureau asks this Court to do nothing less than create a judicial exception to the VPL under the guise of public policy. While attempting to couch its argument in "plain language" terms, Farm Bureau cannot escape the plain language of the VPL as it existed in 2004 which—as both district courts to have examined the issue agreed—unambiguously requires Farm Bureau to pay the face value of its policy to the Coxes. See Florida Farm Bureau Cas. Ins. Co. v. Cox, 943 So. 2d 823, 829 (Fla. 1st DCA 2006). See also Mierzwa v. Florida Windstorm Underwriting Ass'n, 877 So. 2d 774, 775-76 (Fla. 4th DCA 2004). Thus, Farm Bureau and its amici are left to complain about the costs the decisions will allegedly "inflict on Florida's citizenry," and about how they will "wreak[] havoc on Florida's insurance industry," and "could drive insurers from Florida." *Farm Bureau's brief at 2, 4; Citizens' brief at 10.* In short, their briefs gain whatever strength they can muster from classic public policy arguments.

Naturally, this is not the first time insurers have asked courts to create judicial exceptions to Florida's VPL on public policy grounds. Florida has had a VPL in place since the first version was passed by the legislature in 1899. See Millers' Mut. Ins. Ass'n of Illinois v. La Pota, 197 So. 2d 21, 24 (Fla. 2d DCA 1967). And for most of the more than 100 years that the law has been on the books, insurers have been asking Florida courts to create judicial limitations to its

application. See, e.g., Hartford Fire Ins. Co. v. Redding, 37 So. 62 (Fla. 1904) (rejecting insurer's challenge to the constitutionality of the original VPL). Florida courts have refused to do so and instead have consistently applied the statute as written and deferred to the legislature to create defenses and exceptions to the VPL. The legislature, for its part, has periodically revised the VPL to add new defenses and limitations. But until 2005—after the cause of action arose here—the legislature had never created a limitation allowing an insurer to prorate its liability under the statute.

Far from being the anomaly urged by Farm Bureau, the decision below is entirely consistent with the long-standing policy of Florida courts to defer to the legislature in defining the reach of the VPL. When viewed in their proper historical context, Cox and Mierzwa are just the latest in a long line of Florida cases refusing to provide insurers a judicially created exception to the statutory obligation to pay the face value of the policy in the event of a total loss.

I. The Valued Policy Law is a liquidated damages statute designed to avoid the type of litigation Farm Bureau started in this case

From its inception, this Court has held that the VPL prohibits insurers from challenging the measure of damages in the case of a total loss. See Redding, 37

So. at 65.[1] Thus, Florida courts have repeatedly observed that the VPL is, in essence, a liquidated damages statute that establishes the amount an insurance company is required to pay in the event of a total loss. See, e.g., Underwriters Ins. Co. v. Kirkland, 490 So. 2d 149, 153 (Fla. 1st DCA 1986). Florida courts have aligned their interpretation of Florida's VPL with the view of the majority of jurisdictions in holding that an insured does not need to prove any pecuniary loss to recover the damages required by the statute. See Springfield Fire and Marine Ins. Co. v. Boswell, 167 So. 2d 780, 782 (Fla 1st DCA 1964). Instead, all that is required is a total loss caused—at least in some part—by a peril covered under the policy. See § 627.702, Fla. Stat. (2004). See also Cox, 943 So. 2d at 828; Mierzwa, 877 So. 2d at 775-76.

Ironically, a primary purpose of the VPL is to avoid the very type of litigation that Farm Bureau started in this case by suing its own insureds. Indeed, as the district court observed below:

> An important purpose of the VPL is to reduce administrative costs. Insurance companies need not incur expenses for experts to pick through rubble to ascertain, for example, whether hurricane damage was done by wind-driven surface water spray, on one hand, or rainfall in a windstorm, on the other; nor, when experts disagree on such questions, does the VPL require the parties to bear the additional expense of litigation.

[1] Of course, an insurer can always plead and prove standard policy defenses—such as cancellation of the policy—as long as those defenses are not inconsistent with the VPL.

Cox, 943 So. 2d at 832. See also Springfield Fire, 167 So. 2d at 874 (noting that "an important object of the statute is also to simplify and facilitate prompt settlement of insurance claims when a total loss occurs," especially because "[t]he value specific property had is hard to ascertain after its destruction because the usual evidence relied upon for such assessment is unavailable"). Thus, by establishing the amount of damages at the inception of the policy, rather than at the time of the loss, the VPL is designed to avoid "haggling over the measure of liability"—exactly what Farm Bureau proposes to do here. Id.

Because it is statutory, this Court recognized more than 80 years ago that the terms of the VPL are considered to be a part of all insurance policies issued in Florida and that any provisions in insurance policies that conflict with the statute must give way to the statute. See, e.g., Martin v. Sun Ins. Office of London, 91 So. 363, 329 (Fla. 1922). Thus, any limitations to the scope of the VPL must come from the legislature, not from language in the policy itself—and certainly not from limitations imposed by judicial fiat.

II. Florida courts have consistently rejected efforts to create judicial limitations on the Valued Policy Law

The decision below is simply the most recent in an unbroken string of Florida cases rejecting efforts by insurance companies to create judicial limitations to the scope of the VPL. A review of some of those decisions is instructive.

For example, more than 70 years ago, this Court rejected an insurance company's effort to reduce the damages available after a total loss because the property had depreciated in value due to damage that had occurred after the policy was issued. See American Ins. Co. of Newark, N.J. v. Robinson, 163 So. 17 (Fla. 1935). In Robinson, the insurance company argued that the property had depreciated in value due to termites and dry rot that attacked the property after the insurance policy was first issued. This Court, however, flatly rejected the effort to limit the liquidated damages required by the statute:

> The law is 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 in value caused by use, decay, accident, casualty, or otherwise, or such change arises from a supervening cause occurring subsequent to the issuance of the policy, and the allowance of such reduction will not amount to a change of the value fixed by the parties pursuant to the statute at the time the contract of insurance was issued.

Id. at 19-20 (emphasis added). Thus, the Court established a firm rule that damages occurring after the policy is issued—even damages from other casualties or damages otherwise excluded by the policy—cannot be used by the insurance company as justification for limiting its liability under the VPL.

The facts in Robinson are directly analogous to the facts in both this case and Mierzwa. While the insurance policy issued by Farm Bureau to the Coxes apparently did not contain an exclusion for dry rot, many insurance policies do

contain a specific exclusion for dry rot, often directly alongside the exclusion for flood advanced by Farm Bureau here. See, e.g., State Farm Fire and Cas. Co. v. Licea, 685 So. 2d 1285, 1288 (Fla. 1996) (referencing policy provision excluding dry rot from a homeowner's policy). Thus, under the logic adopted by this Court in Robinson, the result would have been the same had the word "flood" been substituted in the opinion for "termites and dry rot." If the excluded damage caused by termites and dry rot after a policy is issued cannot decrease an insurer's liability, how can damage caused by the similarly excluded peril of flood lead to a different result?

More recently, Florida courts have rejected efforts by insurance companies to limit their obligations under the VPL to their pro rata share of liability when more than one insurance policy was issued on a building. See Springfield Fire, 167 So. 2d 780 (Fla. 1st DCA 1964). In Springfield Fire, the insureds had procured a $6,000 fire insurance policy on a building, then entered into a contract to sell the building for $12,500, with $12,000 of the sale price to be paid in monthly installments. The purchasers procured their own policy of insurance on the building in the amount of $15,000. After the building was totally destroyed by fire, the purchasers received the face value of their $15,000 insurance policy and used that money to pay the balance of $12,000 owed on the purchase price. The insured

sellers, however, submitted a claim to their own insurance carrier and demanded that the insurer pay them the $6,000 face value of that policy as well.

The district court recognized the public policy concerns raised by the insurance company and noted the likelihood that the insureds would "enrich themselves by some several thousand dollars beyond what they would have received from the property if the fire had not occurred." Id. at 73. But the court refused to create a judicial exception to the plain language of the statute:

> 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 its premium charges on the extent of its 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. When multiple policies are permissible, as here, the same principles apply. The aggregate liability is the total of the various values specified and for which an appropriate premium has been paid.

Id. Thus, the district court permitted the insureds to recover what amounted to a $6,000 windfall because the result was required by the VPL.

The same result was reached a few years later by the Second District Court of Appeal in Millers' Mut. Ins. Ass'n of Illinois v. La Pota, 197 So. 2d 21 (Fla. 2d DCA 1967). In La Pota, as in Springfield Fire, the insurance company argued that is was entitled to prorate its liability for a total loss with the liability of a second insurance company that had also issued a policy on the property. The court in La

Pota rejected that argument, holding that once the insurer had admitted that the policy itself was valid, the matter was resolved:

> The company does not deny liability vel non but merely contends it is not liable for the full amount of the policy. There being thus no question as to liability under the policy but only a dispute as to the amount due, the valued policy statute is operative and controls.

Id. at 23. Equally important to the facts of this case, the court noted that "the Florida Valued Policy statute does not provide for any prorating." Id. at 23 n.2.

Finally—and perhaps closest to the facts of this case—Florida courts have also rejected insurers' efforts to limit the company's liability to the actual damage caused to a building by an insured peril even when the building would not have been a total loss but for the enforcement of a local ordinance. In Netherlands Ins. Co. v. Fowler, 181 So. 2d 692 (Fla. 2d DCA 1966), an insured building was substantially damaged by fire, and the city refused to allow the building to be repaired due to a city ordinance. The insurance company appraised the damage caused by the fire at $4,619.69 and tendered that amount to the insured, as opposed to the $10,000 face value of the policy. The insurer defended against the application of the VPL, arguing that "the total destruction of the building was caused by operation of city building codes rather than the fire" and the additional damages caused by the enforcement of the ordinance were excluded by a policy

provision excluding liability for losses occasioned by ordinance and laws regulating construction. Id. at 693.

In affirming a judgment for the insured, the district court noted that, under the VPL, only two questions were relevant: (1) whether "the insured had sustained a loss as a result of the fire," which was an insured peril under the policy, and (2) whether "the loss to the insured was total." Id. (emphasis added). See also Mierzwa, 877 So. 2d at 775 (interpreting the VPL similarly). Notably, the court did not find it necessary to decide whether the fire itself was the proximate cause of the total loss or to ascertain the percentage of the loss caused by the fire. Instead, it was sufficient that the insured had sustained "a" covered loss and that the covered loss together with the enforcement of the ordinance—though excluded by the policy—caused a constructive total loss. Id. See also Regency Baptist Temple v. Insurance Co. of North America, 352 So. 2d 1242, 1244 (Fla. 1st DCA 1977) (agreeing with the rule announced in Fowler and distinguishing it from cases involving a partial loss).

Upon closer examination, therefore, the insurer's argument in Netherlands is indistinguishable from the argument raised here by Farm Bureau. Farm Bureau's policy specifically excludes losses caused both by the enforcement of any ordinance or law regulating construction or repair of property and by flood. *R-I 25.* (Indeed, the exclusions are found on the same page in the same section of the

policy). As in Netherlands, Farm Bureau argues here that, but for an excluded event—flood here, enforcement of the ordinance in Netherlands—the property would not have been rendered a total loss. Yet, the district court in Netherlands—like the district courts in Cox and Mierzwa—found this argument unpersuasive, irrelevant, and contrary to the plain language of the VPL.

III. Since its inception, the legislature, not the judicial branch, has imposed limitations on the application of the Valued Policy Law

The court in Springfield Fire raised an important point about the VPL and its enforcement by courts. After acknowledging the "unwholesome aspects" of overvaluation of insurance coverage, the court observed that "[p]erhaps it would be wise to enact laws to prevent it, but that is a matter for the legislature and not the courts." Springfield Fire, 167 So. 2d at 785. Thus, Florida courts have long recognized that it is the exclusive province of the legislature to provide limitations and defenses for the VPL. And a review of the long history of the VPL demonstrates the legislature has, when appropriate, done just that.

For example, the original VPL first passed in 1899 contained two important limitations. First, the original VPL applied only to losses from fire or lightning. Ch. 4677, p. 33, Laws of Fla. See also Hartford Fire Ins. Co. v. Redding, 37 So. 62, 64 (Fla. 1904) (quoting statute). Second, the legislature included in this initial enactment an exception holding that the VPL would not apply in the event of "any change increasing the risk without the consent of the insurers." Id. When the first

"modern" version of the VPL was enacted in 1959 as part of the Florida Insurance Code, those limitations remained the only ones included in the statute. Ch. 59-205, § 606, Laws of Fla.

The statute remained virtually unchanged for the next two decades until 1979, when the legislature added mobile homes and factory-built housing (now known as manufactured buildings) to the reach of the statute. In adding these new provisions, however, the legislature was careful to craft a specific exception to the VPL that applied only to mobile homes and factory-built housing. This exception allowed an insurance company to offer policies on mobile homes that would not be adjusted under the stated value in the policy so long as the insurance company provided a full disclosure to the insured as to the difference in premiums between the various types of policies. See § 627.702(5), Fla. Stat. (1979).

The most sweeping changes to the VPL took place in 1980. In that revision, the legislature provided five new defenses and limitations on the scope of the VPL. First, the legislature added language providing the VPL would apply only "in the absence of fraudulent or criminal fault on the part of the insured or one acting in his behalf." Ch. 80-326, § 1, Laws of Fla. Second, the legislature held that the statute would not apply where "two or more buildings . . . are insured under a blanket form for a single amount of insurance." Id. Third, the revisions stated that the VPL would not apply when "the completed value of a building . . . is insured

under a builder's risk policy." Id. Fourth, the legislature provided a specific exception to the VPL for situations in which the insurance company believed it could repair or replace the damaged property for less than the face value of the policy. Specifically, this new provision provided that "nothing herein shall be construed as prohibiting an insurer from repairing or replacing damaged property at its own expense and without contribution on the part of the insured." Id.

With the fifth new defense, the legislature apparently took to heart the concerns the district court expressed in Springfield Fire and amended the statute to discourage overinsuring of property. Under this new provision, the VPL does not apply when "insurance policies are issued or renewed by more than one company insuring the same building . . . and the existence of such additional insurance was not disclosed by the insured to all insurers issuing such policies." Id. Thus, this public policy defense to the VPL was added—as it should have been—by the legislature, not the courts.

Finally, in 1982, the legislature amended the VPL once again, but this time to expand the scope of the statute, not to limit it. Specifically, in 1982, the legislature struck the long-standing limitation that the VPL only applied to losses from fire or lightning and amended the statute so that it would apply to all perils covered by the insurance policy. Ch. 82-243, § 539 Laws of Fla.

In short, over the past century, the legislature has demonstrated time and time again that it knows how to add defenses and limitations to the VPL when it deems them appropriate. Yet, while there have been a handful of further minor amendments to the VPL over the years, the statute in effect at the time of Hurricane Ivan was largely the same as the statute in effect after the 1982 revisions. Compare § 627.702, Fla. Stat. (2004) with § 627.702, Fla. Stat. (1982). Notably, over that 20-year period, the legislature did not add any additional defenses for insurance companies or in any way limit when the liquidated damages required by the VPL are owed. More specifically, at no time prior to the 2005 legislative session—and certainly not before the 2004 hurricane season—did the legislature ever enact changes to the VPL permitting an insurer to prorate its liability when more than one peril contributed to the total loss.

Seen in this context, the district court's decision below is the very model of judicial restraint. It would have been easy for the district court, out of public policy concerns, to take Farm Bureau's bait and overlook the critical phrase "if any"—which by its terms makes the damages owed by an insurer in a total loss case an "all or nothing" proposition. Indeed, it is apparent that the majority was tempted to do just that. Cox, 943 So. 2d at 867. But the majority instead interpreted the statute exactly as it was written and declined the invitation to

intrude upon the legislature's exclusive province to create exceptions to the laws it has enacted. Id. at 867-68. This Court should also decline that invitation.

IV. The legislature created the limitation sought by Farm Bureau in 2005, but directed that it should not be applied retroactively

Tellingly, the limitations Farm Bureau asks this Court to apply to the 2004 version of the VPL were adopted by the legislature in 2005, demonstrating yet again the proper separation of powers in this state. These sweeping amendments confirm unequivocally that both Cox and Mierzwa were correct in their analysis of the statute in effect in 2004.

In its 2005 revisions to the VPL, the legislature struck from the statute the critical phrase "if any" and added instead language providing that "the insurer's liability under the policy for such total loss, if caused by a covered peril, shall be in the amount of money for which such property was so insured." Ch. 2005-111, § 16, Laws of Fla. (2005) (emphasis added). Thus, under the new version of the VPL, an insurance company is permitted to avoid the reach of the VPL by arguing that a portion of the damage was caused by perils excluded by the policy, which is precisely the way Farm Bureau asks this Court to interpret the 2004 version of the statute.

Importantly, the legislature in 2005 directed that the amendments to the VPL "shall not be applied retroactively and shall apply only to claims filed after the effective date of such amendment." Ch. 2005-111, § 16 Laws of Fla. (emphasis

added). Thus, the legislature by its own words has specifically directed courts not to apply these revisions to claims pending from the 2004 hurricane season. Indeed, the legislature declined to adopt an earlier version of the bill that attempted to classify the changes as remedial and to make them retroactive. See SB 1488, § 24, Leg. (Fla. 2005).

The implications of the 2005 amendments to this case can scarcely be more clear. If the statute already provided the limitation on the VPL that Farm Bureau seeks from this Court, the 2005 amendments would have been entirely unnecessary. And—more to the point—any effort to apply the limitation requested by Farm Bureau to a claim arising before the 2005 amendments took effect would effectively thwart the clear, unequivocal directions of the legislature that the changes not be applied retroactively. To do so would permit insurance companies like Farm Bureau to have their cake—in the form of a more favorable VPL—and eat it too—by applying the more favorable VPL retroactively.

CONCLUSION

In the end, the issue is not whether the result reached by the district court below is fair or whether the VPL as it existed prior to 2005 made for sound public policy. While the Amicus believes the answer to both is yes, issues of public policy are always subject to reasoned debate. But the proper forum for this debate is the legislature, not the courts. It is not the court's function to rewrite legislation based

upon the court's own public policy views. See Rawlins v. Pizzarelli, 761 So. 2d 294, 299 (Fla. 2000). Instead, when statutory language is plain and unambiguous—as it is here—the court is required to enforce the plain terms of the statute. Id. That is precisely what the district court did below and what the Fourth District did in Mierzwa. Because both decisions are consistent with more than a century of Florida cases strictly enforcing the VPL and refusing to adopt judicially-imposed limitations on it, this Court should approve the decision below.

Respectfully submitted:

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CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned attorney hereby certifies that this brief was prepared using a 14-point Times New Roman font in accordance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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