IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC06-2494

FLORIDA FARM BUREAU CASUALTY INSURANCE COMPANY,

Petitioner,

v.

EUGENE A. COX and DEBRA COX,

Respondents.

INITIAL BRIEF OF PETITIONER FLORIDA FARM BUREAU CASUALTY INSURANCE COMPANY

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT
OF APPEAL OF FLORIDA, FIRST DISTRICT

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INTRODUCTION

Petitioner Florida Farm Bureau Casualty Insurance Company (Florida Farm) wrote a windstorm policy for a residence owned by respondents Eugene A. Cox and Debra Cox (the Coxes) in Milton, Florida. The policy expressly excluded any losses caused, either directly or indirectly, by flood or water damage of any kind. The Coxes' home was rendered a total loss as a result of damage caused by Hurricane Ivan in September 2004.

The policy's limitation to windstorm damage, and its express *exclusion* of flood damage notwithstanding, the First District Court of Appeal held that Florida's Valued Policy Law (VPL), as that statute existed at the time the Coxes' claim accrued, obligated Florida Farm to pay out policy limits if *any* wind-related damage had been inflicted upon the residence – even if the damage was the equivalent of 1% of the total loss. The First District aligned itself with the Fourth District's decision in *Mierzwa v. Florida Windstorm Underwriting Association*, 877 So. 2d 774 (Fla. 4th DCA 2004), holding that the VPL requires an insurer to pay policy limits for total losses caused by *uncovered* perils.

Both *Mierzwa* and the First District's decision in this case overlook the VPL's purpose, the statute's plain language, and the clear recitation in the legislative history of 2005 amendments to the VPL – all of which show that the Fourth District simply got it wrong in *Mierzwa*. The pre-2005 VPL has no application to multiple-cause losses when an insurer's coverage is limited to a single peril only. *Mierzwa* and the First District's decision have stretched the VPL beyond its breaking point. This Court should overturn those decisions because the

courts should not – and, indeed, *cannot* – rewrite a plainly stated statutory provision to require an insurer to pay out policy limits for uncovered losses, and to inflict on Florida's citizenry the inevitable costs of providing coverage for uncovered perils.

STATEMENT OF THE CASE AND FACTS

I. THE COXES' CLAIM.

Florida Farm issued a homeowner's insurance policy to the Coxes for their residence, insuring the residence against windstorm and other identified perils, with policy limits of $65,000 for the dwelling, as well as coverage for other structures, personal property and loss of use. (R:9). Appendix ("A") 1. The policy expressly excludes water damage, including "[f]lood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind." (R:25). The Coxes carried no flood insurance on their residence. (R:1).

It is undisputed that the Coxes' residence suffered extensive damage when Hurricane Ivan struck Santa Rosa County on September 16, 2004. (R:2, 47). The residence was deemed a total loss due to flood damage; although wind contributed to the damage, the wind damage was "substantially less than fifty percent of the total damage to the home." (R:2, 47).

In response to the Coxes' demand for coverage (R:40), Florida Farm tendered $11,583.93 for windstorm damage, as well as payments for damage to other structures, and living expenses. (R:2-3). The Coxes declined Florida Farm's

tender and Florida Farm brought an action for declaratory judgment. (R:1-44). The Coxes answered and counterclaimed for damages. (R:45-50). The counterclaim sought, in part, "the full value of [the] policy" under the VPL, § 627.702, Fla. Stat. (2004). (R:48-49).

The Coxes filed a motion for judgment on the pleadings, relying on *Mierzwa v. Florida Windstorm Underwriting Association,* 877 So. 2d 774 (Fla. 4th DCA 2004). (R:103-06). The trial court granted a judgment on the pleadings, ruling that under *Mierzwa,* "if it is found that a carrier has any liability at all to the owner [of] a building damaged by a covered peril and deemed a total loss, that liability is for the face amount of the policy." (R:136-37).

II. THE FIRST DISTRICT'S DECISION.

The First District upheld the trial court's judgment. *Fla. Farm Bureau Cas. Ins. Co. v. Cox,* 943 So. 2d 823 (Fla. 1st DCA 2006). (A:2). The court held that "plain language in the 2004 version of the statute makes the insurer liable, if at all, … in the full amount for which the property was insured," *i.e.*, "[i]f an insurer has any obligation under the policy to pay on account of a covered peril, and the structure is a total loss, then the insurer is responsible for paying the total amount of the policy," even if uncovered perils contributed to the loss, because "[t]he insurer's responsibility to pay the full amount of the policy is triggered when a loss occurs and the insurer has 'any' liability for a covered peril." 943 So. 2d at 828.

The dissenting opinion takes the majority to task for applying the VPL to override the express exclusion for water damage, particularly because "the statute

only speaks to valuation and does not address causation at all." *Id.* at 839 (Polston, J., dissenting). As the dissent concluded:

> The unambiguous language of the policy excludes water damage. Pursuant to this exclusion, [Florida Farm] should not be held responsible for the damage to the Coxes' property caused by water. However, because the property is a total loss, the VPL still controls the valuation of the property. Therefore, because the property in this case is a total loss, the value of the property is set by the policy value of $65,000. The parties cannot dispute that this is the correct value of the property. Accordingly, this value, $65,000, should be used to determine the amount of losses caused by the wind, a covered peril. For example, if the wind caused 10% of the damage, then [Florida Farm] is liable for $6,500.

Id. at 839-40 (footnote omitted).

SUMMARY OF ARGUMENT

The VPL was enacted as a liquidated-damages statute, applicable to coverage for a single-peril event. The statute was intended to foreclose an insurer that had enjoyed payment of full premiums for a covered loss from avoiding liability for that loss. The Florida courts should not refashion the VPL to apply to a *multi-peril* loss, contrary to the statute's plain meaning and intent, a policy's express language, and the governing principles of contract law.

As construed by the First District in this case, and the Fourth District, *Mierzwa v. Fla. Windstorm Underwriting Ass'n*, 877 So. 2d 774 (Fla. 4th DCA 2004), the VPL would require payment of policy limits in the event of an actual or constructive total loss, regardless of policy exclusions. That construction cannot

be accepted without doing violence to the VPL's purposes and wreaking havoc on Florida's insurance industry.

Since its 1899 inception, and at least through amendments in 2005, Florida's VPL was a statutory liquidated-damages provision that was intended only to accomplish the twin purposes of preventing an insured from over-insuring property and, secondarily, ensuring that a property insurer would not value an insured's property, collect premiums based on that valuation, and then withhold payment of policy limits when the property was rendered a total loss. The VPL was never intended to address multiple-peril total losses, and the interpretation adopted by the First District from *Mierzwa* stretches the VPL far beyond its narrow scope.

The 2005 amendments, while significantly reshaping the VPL on a prospective basis, show, through extensive legislative history, that the First and Fourth Districts have misinterpreted the pre-2005 statute. The Legislature expressly declared that *Mierzwa* had misconstrued the VPL, and, of course, the courts are required to accord great difference to that declaration. The legislative history plainly shows that the pre-2005 VPL was never intended by the Legislature to require an insurer whose policy expressly excludes an identified peril to pay out policy limits beyond the damage caused by a covered peril when a property is rendered a total loss.

ARGUMENT

I. STANDARD OF REVIEW.

A judgment on the pleadings is subject to *de novo* review on appeal. *E.g.*, *Henao v. Prof'l Shoe Repair, Inc.*, 929 So. 2d 723, 725 (Fla. 5th DCA 2006). A *de novo* standard also applies to questions of statutory construction on appeal. *E.g.*, *Waste Mgmt., Inc. v. Mora,* 940 So. 2d 1105, 1107 (Fla. 2006).

II. THE VPL CANNOT BE CONSTRUED TO REQUIRE AN INSURER TO PAY POLICY LIMITS FOR TOTAL LOSSES CAUSED BY UNCOVERED PERILS.

A. The VPL.

Florida's VPL, as it existed when the Coxes' claims against Florida Farm accrued, provided, in pertinent part:

> In the event of the total loss of any building … insured by any insurer as to a covered peril … the insurer's liability, if any, under the policy for such total loss shall be in the amount of money for which such property was so insured as specified in the policy and for which a premium has been charged and paid.

§ 627.702(1), Fla. Stat. (2004).

Such "valued policy" laws, requiring an insurer to "fix the value of the property insured, which shall be conclusive and the amount recoverable in case of a total loss," are fairly common. 12 COUCH ON INS., § 175:103 (3d ed. 2005) (footnote omitted). Under such statutes, the policy limits "determine[] the amount of recovery in case of total loss, and the insured need not prove value." *Id.* at § 175:105. Valued policy laws are intended "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 over-valuations but thereafter repudiating their contracts when it becomes in their interest to do so." *Id.* at § 175:103.[1] In the case of multiple insurers of a single property, "the aggregate amount of insurance written is conclusive as to the value of the property," such that each insurer is liable for its policy's full amount. *Id.* at § 175:106.

Florida's VPL has existed, in one form or another, since 1899. *See Hartford Fire Ins. Co. v. Redding*, 47 Fla. 228, 37 So. 62, 64-65 (1904). In its first encounter with the VPL, this Court set forth its understanding of the statute's purpose:

> The statute requires the insurer to fix the insurable value of a 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…. 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.

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[1] In 1874, Wisconsin became the first state to adopt a valued policy law. *Seider v. O'Connell*, 236 Wis. 2d 211, 612 N.W.2d 659, 671-72 (2000). Other states' valued policy law statutes, like the original incarnation of Florida's VPL, were limited to fire insurance, having been motivated by a "growing number of incendiary fires on overinsured property," which had "prompted insurance companies to limit recovery amounts to the policyholder's actual loss." *Id.* at 671 (citations omitted). The statutes were born of legislatures' intentions "to discourage owners from over-insuring property while simultaneously thwarting insurers from collecting excessive premiums." *Id.* at 672.

Id. at 65. Because, as originally enacted, the VPL was limited to fire insurance, *id*. at 64, it was applied to require that "the value of a fire insurance policy, upon total loss by fire or lightning, must be paid to the insured." *Am. Ins. Co. of Newark, N.J. v. Robinson*, 120 Fla. 674, 163 So. 17, 19 (1935).

The rationale for valued policy laws was to provide a *de facto* liquidated-damages recovery for insureds who incurred a total loss:

> Undoubtedly an important object of the statute is also to simplify and facilitate prompt settlement of insurance claims when a total loss occurs. It serves to remove what would otherwise be a very troublesome and difficult issue to resolve either between the parties by negotiation or by the courts in litigation. This issue is the money loss sustained which the insured must indemnify. The value specific property had is hard to ascertain after its destruction because the usual evidence relied upon for such assessment is unavailable…. A solution to this is found in the statute which in effect requires the parties to ascertain and agree in advance what the value is and in the case of total loss by the insured peril this amount shall be paid as liquidated damages.

Springfield Fire & Marine Ins. Co. v. Boswell, 167 So. 2d 780, 784 (Fla. 1st DCA 1964) (footnote omitted); *accord, Hallcom v. Allstate Ins. Co.*, 654 So. 2d 245, 247 (Fla. 1st DCA 1995); *Underwriters Ins. Co. v. Kirkland*, 490 So. 2d 149, 153 (Fla. 1st DCA 1986); *Millers' Mut. Ins. Ass'n of Ill. v. La Pota*, 197 So. 2d 21, 23-24 (Fla. 2d DCA 1967).[2]

[2] As will be discussed at greater length in this brief, the VPL was amended in 1982 to expand its application to all covered perils. Ch. 82-243, § 539, Laws of Fla.

That overriding purpose informs the statute's application to multiple insurers that provided coverage for the same peril:

> When there are several permissible concurrent policies of fire insurance and there is a total destruction by fire of the insured premises, the aggregate amount of the insurance written, or the sum of the face amounts in the policies for this peril, is conclusive as to the value of the property insured and the true amount of the loss and measure of damages when so destroyed. Each insurer is liable for the full amount of its policy, provided, of course, there is no fraud or other conduct of the insured that would constitute a valid defense to an action to recover for the loss.

Boswell, 167 So. 2d at 784 (footnote omitted). The court recognized that the VPL's fundamental purposes might be thwarted if the rule were otherwise:

> 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. 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.
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> * * * *
>
> One of the very mischiefs the [VPL] sought to suppress arises in this case, and that is the haggling over the measure of liability. The mischief is more irksome when multiple insurers become involved and one or more seeks some escape from full response.

Id. at 784-85.

But here, the Florida Farm policy that was sold to the Coxes *excludes* coverage for flood or other water damage. (R:25; A:1). The parties to an insurance contract are bound by the contract's plain language. *See Prudential*

Prop. & Cas. Ins. Co. v. Swindal, 622 So. 2d 467, 470 (Fla. 1993) ("[i]nsurance contracts are construed in accordance with the plain language of the policies as bargained for by the parties"); *accord, e.g., Koikos v. Travelers Ins. Co.*, 849 So. 2d 263, 266 (Fla. 2003); *Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000). An insurer is accordingly entitled to enforcement of express coverage exclusions. *E.g., Swire Pac. Holdings, Inc. v. Zurich Ins. Co.*, 845 So. 2d 161, 166-67 (Fla. 2003); *State Farm Fire & Cas. Co. v. Metro. Dade County*, 639 So. 2d 63, 65-66 (Fla. 3d DCA), *review denied*, 649 So. 2d 234 (Fla. 1994). And, even when arguable ambiguity is present (which it undisputedly is not here), the courts may not "rewrite contracts, add meaning that is not present, or otherwise reach results contrary to the intentions of the parties." *Swire*, 845 So. 2d at 165 (citation omitted).

"In the absence of statutory provisions to the contrary, insurers have the right to limit their liability and to impose such conditions as they wish upon their obligations, not inconsistent with public policy, and the courts are without the right to add to or take away anything from their contracts." *France v. Liberty Mut. Ins. Co.*, 380 So. 2d 1155, 1156 (Fla. 3d DCA 1980). If a policy provision is indeed in "conflict" with a statutory provision in the insurance code, the courts cannot enforce the statutorily invalid provision. *E.g., Boman v. State Farm Mut. Auto. Ins. Co.*, 505 So. 2d 445, 449-50 (Fla. 1st DCA), *review denied*, 509 So. 2d 1119 (Fla. 1987). The question here is whether Florida Farm – and, by extension, all residential insurers doing business in Florida before 2005 – should be entitled to

enforce flood exclusions in windstorm policies, or whether the VPL overrides such clear policy exclusions.

B. Interpreting the VPL to Require an Insurer to Pay Policy Limits for a Total Loss Caused Only in Part by a Covered Peril Is an Untenable Construction of the Statute.

Mierzwa v. Florida Windstorm Underwriting Association, 877 So. 2d 774 (Fla. 4th DCA 2004), was the first Florida decision to interpret the VPL as something other than a liquidated-damages guarantee for single covered-peril losses. The homeowner insured brought a claim against the Florida Windstorm Underwriting Association (FWUA) under the FWUA's windstorm coverage. *Id.* at 776. The FWUA policy "expressly excluded flood damage," and the insured had purchased flood coverage from another insurer. *Id.* The Fourth District held that the FWUA was nonetheless liable for the policy's windstorm-coverage face amount:

> The VPL statutory text does not require that a covered peril be *the* covered peril causing the entire loss; it need merely be *a* covered peril. Plainly when these requisites exist, pro rata liability under the VPL would be in conflict with its terms, because the VPL provides that *any* liability of a casualty insurer where a covered peril is involved in a total loss must be for the face amount rather than pro rata with other coverages.

Id. at 776 (original emphasis).

The Fourth District thus construed the VPL to mean that, when two (or more) perils combine to cause a total loss, an insurer who contracted to provide coverage for only one of those perils and expressly not for the other is nonetheless liable for its policy limits. That construction converts the VPL from a liquidated-

damages provision for single-peril losses into an anti-apportionment provision governing *multiple*-peril total losses.[3]

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[3] No other state's valued policy law has ever been construed to require coverage in this scenario. In the only decision that appears to have addressed a similar claim, *Brady v. State Ins. Co. of Neb.*, 100 Neb. 497, 160 N.W. 882 (1916), the insured residence was destroyed, partially by a tornado and partially by fire. *Id.* at 883. The homeowner had separate polices for tornado and fire coverage (with the same carrier). *Id.* Under Nebraska's valued policy law, where two insurers provided coverage for the *same* peril, each is liable for the full policy amount in the event of a total loss from the peril. *Id.* at 885 ("[w]here several concurrent policies of insurance upon real property have been written …, and the property insured is wholly destroyed by fire, each company is liable for the full amount of its policy") (citation omitted). But the court held that, where multiple perils destroy the property, "[t]he case is entirely different from where two or more insurance companies … write a specific amount of insurance upon a building covering the same liability" and the insurer would not be required to pay out the policy limits for the non-covered peril. *Id.* at 884. The court reasoned:

> We think it is a matter of common knowledge, not only among insurers but with the insuring public, that insurance for a certain sum against loss or damage by fire or lightning, and for the same sum for loss or damage by tornado, is understood and intended to mean that the insurance by the second policy is not for a sum in addition to the first, but is the assumption by the insurer of risk from elements not covered by the first policy. When a fire policy is taken on a building, it is not unusual for the insurer to grant additional protection against loss or damage by tornadoes by what is called a "rider" attached to the fire policy, in which the insurer, for a certain additional amount of premium, assumes the risk for damage by tornado; the amount of this additional premium being based upon the extent to which the insured desires the insurer to assume this additional risk. In such a case, it surely would not be claimed that under the valued policy law the insurer could be held liable for both amounts; this, for the reason that the assured can only recover under the provisions of the valued policy law when his building

(continued . . .)

Here, the First District followed the Fourth District's lead, and the decision serves only to further illuminate the flaws in the *Mierzwa* analysis. The First District majority concluded that, "[i]f an insurer has *any* obligation under the policy to pay on account of a covered peril, and the structure is a total loss, then the insurer is responsible for paying the total amount of the policy," even if uncovered perils contributed to the loss, because "[t]he insurer's responsibility to pay the full amount of the policy is triggered when a total loss occurs and the insurer has 'any' liability for a covered peril." *Fla. Farm Bureau Cas. Ins. Co. v. Cox,* 943 So. 2d 823, 828 (Fla. 1st DCA 2006) (emphasis added). According to the majority, that conclusion is required by this Court's construction of the original VPL (which, as noted above, was limited solely to coverage for fire and lightning damage) in *Robinson,* 163 So. 2d at 19-21. *Cox,* 943 So. 2d at 833-34.

The majority opinion argues that, in *Robinson*, this Court "refused to allow an insurer to pay less than the full amount of the policy even on the assumption that an excluded peril … had helped cause the total loss." 943 So. 2d at 833. Thus, "[o]n the authority of *Robinson*," the First District majority held that Florida

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(. . . continued)

> is "wholly destroyed," and, as it could not be wholly destroyed by fire and also wholly destroyed by tornado, there will be no theory upon which the assured could recover under both. The case is entirely different from where two or more insurance companies, each with the consent of the others, write a specific amount of insurance upon a building covering the same liability.

Id. This rationale is fully applicable to Florida's VPL.

Farm "owes the full amount of the policy," regardless of whether wind damage caused the total loss. *Id.* at 834.

But the First District overlooked that, in *Robinson*, this Court *actually* held that "the value of a fire insurance policy, *upon total loss by fire or lightning,* must be paid to the insured." 163 So. at 19 (emphasis added).[4] As Judge Polston's dissent notes, the attempt to defeat coverage in *Robinson* because uncovered perils – in that case, dry rot or termites – had damaged the building is a far cry from forcing Florida Farm to pay policy limits when the only covered peril *did not destroy* the Coxes' home:

> The express language of [*Robinson*] indicates that the insurance company could not change the valuation of the policy because of various causes which may have affected the market value. It was required to pay the policy amount as required by the statute. The issue was valuation of the property. The Court did not address exclusions from the policy at all, contrary to the discussion of the case in the majority opinion.
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> The majority states that the insurance company argued in *Robinson* that it should not be required to pay the face amount of the policy because dry rot or termites were a cause of the destroyed building,

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[4] The majority opinion makes a passing reference to the fact that the fire in *Robinson* had "left an insured structure a total loss" 943 So. 2d at 833, but fails to give that fact its dispositive weight. The court's reliance on *Netherlands Insurance Co. v. Fowler,* 181 So. 2d 692 (Fla. 2d DCA 1966), as supporting the interpretation that the majority drew from *Robinson,* 943 So. 2d at 834-35, is equally ill-advised because, as in *Robinson*, the building at issue in *Fowler* was rendered "a total loss" *by fire*, according to the municipal authorities who refused to allow reconstruction. 181 So. 2d at 693. As in *Robinson,* the court did not discuss *excluded* perils that contributed to the loss.

> these events were excluded from coverage, and they caused a decrease in the building's value. To the contrary, there is no mention in *Robinson* that dry rot or termites were excluded from coverage. Significantly, there is no dispute in *Robinson* that fire was the sole cause of the building's destruction…. Here, [Florida Farm] does not dispute the valuation of the policy, but alleges that the total loss was caused by flood damage, an excluded peril, which was not at issue in *Robinson*.

943 So. 2d at 840-41 (Polston, J., dissenting).

And *Robinson* is entirely in harmony with the Legislature's own characterization of the VPL in 1982, when the Legislature amended the VPL to include *all* covered perils. Although the First District majority notes that the VPL was amended in 1982, 943 So. 2d at 829 & n.3, the court failed to consider the legislative history of that amendment – which, as the dissent accurately notes, states that the amendment extended the VPL "to all covered perils," such that "policy limits would be required to be paid *if there is a total loss to a building as a result of any covered peril*." *Id.* at 841, 845 (Polston, J., dissenting) (citation omitted; original emphasis). The Legislature thus evinced its intent to limit the VPL's application to *covered* perils. The First District majority simply ignored that plain statement of legislative intent.

Instead, the majority focused on the "if any" clause in the VPL to support its reading, *i.e.*, "'[i]f any' in the VPL means 'if there is any obligation to indemnify for loss attributable to the covered peril'" such that "[t]he insurer's responsibility to pay the full amount of the policy is triggered when a total loss occurs and the

insurer has 'any' liability for a covered peril." 943 So. 2d at 828.[5] That construction, however, ignores the VPL's precise language, under which an insurer's liability for the policy limits is actually triggered by the existence of liability "under the policy *for such total loss*." § 627.702(1), Fla. Stat. (2004) (emphasis added). As noted in Judge Polston's dissent, "[t]he more reasonable meaning" of the "if any" language "is that the insurer may have coverage defenses, as a result of which the insurer has no liability at all under the policy." 943 So. 2d at 845 (Polston, J., dissenting).

Indeed, the First District majority appeared to recognize as much when it suggested that, "where a covered peril causes only minor damage, the deductible … comes into play, and damage less than the deductible would not create 'any' liability for the windstorm insurer." 943 So. 2d at 834 n.7. But the majority fails

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[5] The VPL, on its face, does not contemplate multiple-peril losses. § 627.702(1), Fla. Stat. (2004) ("in the event of the total loss of any building … insured by any insurer as to a covered peril … the insurer's liability, if any, under the policy for such total loss shall be in the amount of money for which such property was so insured … and for which a premium has been charged and paid"). That is, if the insured peril causes the total loss, the insurer is liable for the policy's face value. But if – as here – the insurer is not liable under the policy for the total loss, the VPL does not compel payment of the policy's face value. The VPL "requires the parties to ascertain and agree in advance what the value is and in the case of *total loss by the insured peril* this amount shall be paid as liquidated damages." *Boswell*, 167 So. 2d at 784 (emphasis added; footnote omitted). Neither of the VPL's twin purposes – fixing the insurer's liability for a covered peril at the outset and preventing an insurer from collecting premiums and then disavowing total-loss coverage – are served by imposing liability on an insurer for a total loss where, as here, it is undisputed that multiple perils combined to destroy the structure.

to come to grips with the fact that the "if any" language was added to the statute in 1959, at a time when the VPL was still limited to fire or lightning-caused losses. *Id.* at 845 (Polston, J., dissenting). In that incarnation, the VPL, as the dissent correctly observes, was not thereby changed "to mean that the insurer is required to pay for the total loss of the building when it was caused by an excluded peril," but rather was intended to preserve coverage defenses "except with respect to the measure of damages." *Id.* And, because the legislative intent behind the 1982 amendment to the VPL plainly shows, as noted in the text, that the Legislature never intended to expand the VPL "to perils that are expressly excluded by an insurance policy," the "if any" language continues to play the same limited role that it did before the 1982 amendment, *i.e.*, preserving coverage defenses.

The Fourth District thus went astray in *Mierzwa*, and the First District should not have deferred to the Fourth District's erroneous interpretation of the VPL:

> Nothing in the VPL statute suggests that in the event of a total loss an insurer will be required to pay for losses resulting from perils that are not covered by the policy sold to the insured. The statute only requires payment of the face value of the policy where a total loss from a covered peril has occurred and the insurer has received the premium for providing coverage for that loss. To reiterate the pertinent language of the statute: "*In the event of the total loss of any building* ... located in this state *and insured by any insurer as to a covered peril*, the insurer's liability, if any, under the policy for such total loss shall be in the amount of money for which such property was so insured as specified in the policy and *for which a premium has been charged and paid*." § 627.702(1), Fla. Stat. (2004). There are no allegations in the pleadings indicating that [Florida Farm] charged a premium for flood coverage. To the contrary, flood coverage is expressly excluded by the policy.

* * * *

> Florida's VPL is merely a statutory liquidated-damages provision that, since its 1899 inception, has been intended only to prevent an insured from over-insuring property and ensuring that a property insurer does not value property, collect premiums based on that valuation, and then withhold payment of the policy limits when the property is a total loss. The *Mierzwa* interpretation stretches the statute far beyond its narrow scope.

943 So. 2d at 844, 846 (Polston, J., dissenting) (original emphasis).

III. LEGISLATIVE HISTORY SHOWS THAT THE FIRST DISTRICT'S INTERPRETATION OF THE VPL IS UNTENABLE.

Post-*Mierzwa* legislative history sheds considerable light on the Legislature's intentions in enacting the VPL. Whatever currency the *Mierzwa* interpretation may have had – and, as set forth in Point I, *supra*, it had little, if any – the Legislature has made it impossible for that interpretation to survive.

A. The 2005 Version of the VPL.

As the First District majority noted, the VPL was all but completely rewritten by the Legislature following *Mierzwa*. 943 So. 2d at 826 n.1. Effective June 1, 2005, Ch. 2005-111, §§ 16, 30, Laws of Fla., Section 627.702 no longer provides that, upon a total loss resulting from a covered peril "the insurer's liability, if any, under the policy for such total loss" shall be the policy limits. Rather, the pertinent language states that "the insurer's liability under the policy for such total loss, if caused by a covered peril," shall be the policy limits. § 627.702(1)(a), Fla. Stat. (2005). The statute also includes the following new provision:

> The intent of this subsection is not to deprive an insurer of any proper defense under the policy, to create new or additional coverage under the policy or to require an insurer to pay for a loss caused by a peril other than the covered peril. In furtherance of such legislative intent, when a loss was caused in part by a covered peril and in part by a noncovered peril, paragraph (a) does not apply. In such circumstances, the insurer's liability under this section shall be limited to the amount of the loss caused by the covered peril. However, if the covered perils alone would have caused the total loss, paragraph (a) shall apply. The insurer is never liable for more than the amount necessary to repair, rebuild, or replace the structure following the total loss, after considering all other benefits actually paid for the total loss.

§ 627.702(1)(b), Fla. Stat. (2005).

The First District rightly noted that the 2005 amendment is not retroactive. 943 So. 2d at 826-30. § 627.702(1)(c) ("[i]t is the intent of the Legislature that the amendment to this section shall not be applied retroactively and shall apply only to claims filed after the effective date of such amendment"). But the legislative history plainly shows that the *Mierzwa* decision had misinterpreted the VPL: although the First District majority suggests that "[t]he legislative history of the recent amendment to the VPL leaves many questions unanswered," 943 So. 2d at 830 n.4, that history is actually quite pellucid.

B. The Legislature's Intent.

The 2005 VPL amendment provides, for the first time in the VPL's existence, for apportionment between insurers for multiple-peril losses. The statute is no longer merely a liquidated-damages provision for single-peril loss, as it had been since its 1899 adoption. While the non-retroactivity provision bars

application of the apportionment subsection to the Coxes' claim, the legislative history plainly shows that the Fourth District misinterpreted the VPL.

The VPL amendments began their life in Senate Bill 1488. Fla. CS for SB 1488, § 16, at 52-53 (2005). Senate Bill 1486, which also addressed property insurance issues, proceeded through the legislative process at approximately the same time, beginning its life as a short provision that amended only Section 627.701, Florida Statutes (2004). Fla. CS for SB 1486 (2005). As the bills proceeded, Senate Bill 1486 was amended to incorporate much of Senate Bill 1488, Fla. CS for SB 1486, § 16, at 56-57 (2005).[6]

Senate Bill 1486's only legislative history *pre-dates* the bill's incorporation of Senate Bill 1488, such that the legislative history addresses *only* the narrow amendment that originally comprised the bill. Fla. S. Comm. on Banking & Ins., CS for SB 1486 (2005) Staff Analysis and Economic Impact Statement (Mar. 9, 2005). But the legislative history of Senate Bill 1488, which ultimately was largely incorporated into the bill that the Legislature finally adopted, speaks directly to *Mierzwa*, and that history is appropriately considered in ascertaining the Legislature's view of *Mierzwa*'s correctness.[7] The staff analysis of Senate Bill

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[6] There are slight differences between the VPL amendments as set forth in Senate Bill 1488 and Senate Bill 1486, but *both* versions specifically include non-retroactivity provisions. Fla. CS for SB 1486, § 16 at 57; Fla. CS for SB 1488, § 16 at 53.

[7] The First District majority's attempt to discount this legislative history is thus unavailing. The staff analysis of Senate Bill 1488 cannot be disregarded when determining the legislative intent underlying Senate Bill 1486, when the latter simply incorporated the former in all pertinent parts.

(continued . . .)

1488, Fla. S. Comm. on Banking & Ins., CS for SB 1488 (2005), Staff Analysis and Economic Impact Statement (Apr. 7, 2005), is indeed instructive. The analysis first states:

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

Id. at 3 (original emphasis). It continues:

> Valued Policy Law (*Mierzwa*) – The Legislature should consider amending the valued policy law … to clarify that a property insurer is responsible to pay only for that portion of damage to a structure which is caused by a peril insured under the property insurance policy *and is not required to pay for damage caused by excluded perils*; thereby clarifying that the Fourth DCA opinion in *Mierzwa v. Florida Windstorm Underwriting Association* was incorrect.

Id. at 7 (emphasis added).

The analysis of the amendment that ultimately was adopted by the Legislature states:

> [The bill] [a]mends s. 627.702, F.S., to provide legislative intent regarding the valued policy law. The bill provides that the legislative intent of this law is not to require an insurer to pay for a loss caused by a peril other than the covered peril, and that when a loss was caused in part by a covered peril and in part by a noncovered [peril],

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(. . . continued)

> *See Speights v. State*, 414 So. 2d 574, 576 (Fla. 1st DCA 1982) (legislative intent may be ascertained by "tracing the legislative history of an act"). As the dissenting opinion correctly notes, 943 So. 2d at 845 n.19 (Polston, J., dissenting), staff analyses are "one touchstone of the collective legislative will." *White v. State*, 714 So. 2d 440, 443 n.5 (Fla. 1998) (citation omitted).

> the insurer's liability is limited to the percentage of loss caused by the covered peril….
>
> In effect, this would reverse the holding of the decision in *Mierzwa v. Florida Windstorm Underwriting Association*…. This generally means that if a total loss was caused by the combination of a covered peril, such as windstorm, and a noncovered peril, such as flood, that the insurer's liability would be limited to the percentage of loss caused by the covered peril. By using the term "percentage" the Legislature indicates its intent that an insurer's liability is limited to its percentage or pro rata share of a "constructive total loss" that occurs due to application of a local building ordinance that requires a partially damaged home to be rebuilt to code.

Id. at 23.

C. Construed in Light of Legislative Intent, the VPL Cannot Require Payment of Policy Limits for Uncovered Losses.

The First District majority mistakenly focused *only* on the 2005 amendment *itself*. 943 So. 2d at 831 ("[a]n amendment nearly a quarter of century after a statute is enacted cannot … be considered 'clarification' of the original enactment") (citation omitted). Legislative *intent* stands on an entirely different footing: the courts "will show great deference" to the Legislature's declarations of its intent, particularly "when the enactment of an amendment to a statute is passed merely to clarify existing law." *State v. Lanier*, 464 So. 2d 1192, 1193 (Fla. 1985) (citation omitted).

"The legislature has the authority to explain its original intent," and the courts "may consider subsequent legislation to determine the intended result of a previously enacted statute." *Palma del Mar Condo. Ass'n #5 of St. Petersburg, Inc. v. Commercial Laundries of W. Fla., Inc.*, 586 So. 2d 315, 317 (Fla. 1991).

Thus, even in the absence of an affirmative statement of legislative intent, "[w]hen … an amendment to a statute is enacted soon after controversies as to the interpretation of the original act arise, a court may consider that amendment as a legislative interpretation of the original law and not as a substantive change thereof." *Lowry v. Parole & Prob. Comm'n,* 473 So. 2d 1248, 1250 (Fla. 1985) (citations omitted); *accord, e.g., State v. Bodden,* 877 So. 2d 680, 688 n.13 (Fla.), *cert. denied*, 543 U.S. 1003 (2004); *Metro. Dade County v. Chase Fed. Hous. Corp.*, 737 So. 2d 494, 503 (Fla. 1999); *Finley v. Scott,* 707 So. 2d 1112, 1116-17 (Fla. 1998); *G.E.L. Corp. v. Dep't of Envtl. Prot.*, 875 So. 2d 1257, 1262-63 (Fla. 5th DCA 2004); *State, Dep't of Bus. & Prof'l Reg., Div. of Pari-Mutuel Wagering v. WJA Realty Ltd. P'ship,* 679 So. 2d 302, 306 (Fla. 3d DCA 1996); *Lincoln v. Fla. Parole Comm'n,* 643 So. 2d 668, 672 (Fla. 1st DCA 1994). In such circumstances, a "clarifying amendment is persuasive evidence of legislative intent." *Lincoln*, 643 So. 2d at 672.

Here, as set forth above, there is *direct* legislative-intent evidence that, regardless of the 2005 amendment's non-retroactivity, *Mierzwa* simply got it wrong. "The legislature has the authority to explain its original intent" in a subsequent enactment. *Palma del Mar,* 586 So. 2d at 317.

This Court's decision in *Lanier* is instructive. In that case, the Third District reversed a criminal conviction for lewd assault based upon the court's construction of the statute as inapplicable to consensual intercourse. 464 So. 2d at 1193. Shortly after the Third District's decision, the Legislature amended the statute "specifically to cover the acts" with which the defendant had been charged. *Id.*

And the Legislature *also* "indicated its desire to correct the Third District Court of Appeal's misguided interpretation of [its] legislative intent" in the *original* statute, declaring that "the intent of the Legislature *was* and remains" to prohibit the acts with which the defendant had been charged. *Id.* (original emphasis).

As here, however, this Court was bound to apply the statute "as it existed … prior to the enactment of the amendment," *id.*, because the criminal statute in effect at the time of the defendant's acts controls, despite subsequent amendments, *e.g.*, *State v. Smith*, 547 So. 2d 613, 616 (Fla. 1989), and therefore the Court could not rely on the amended statute to uphold the conviction. 464 So. 2d at 1193. Because the Legislature had declared that the *pre-amendment statute* did not mean what the Third District had said that it meant, the Court accorded "great deference" to the Legislature's statement of its intent, and accordingly held that the defendant's conduct was punishable under the *pre*-amendment statute. *Id.*

Lanier controls, even if the Coxes would have had a valid argument *before* 2005. As in *Lanier*, this Court cannot apply the amended version of Section 627.702 to apportion coverage in this instance, because the Legislature has declared the amendment's non-retroactivity. But the non-retroactivity of the new statutory provision, as in *Lanier*, does not mean that Section 627.702 can still be construed as the First and Fourth Districts have construed it. Rather, the Court must honor and enforce the Legislature's express declaration that *Mierzwa* misconstrued the pre-amendment version of Section 627.702.

When viewed in the context of the 2005 amendment and the Legislature's declaration of its intent, both before and after the amendment, it becomes clear that

the pre-amendment statute simply does not address multiple-peril total losses. If that were not the case – that is, if *Mierzwa* is correct – there would have been little, if any, need for the Legislature to have enacted subsection (1)(b) in 2005 to provide for apportionment. And, of course, it will not be presumed that the Legislature "enact[ed] useless provisions." *Borden v. East-European Ins. Co.*, 921 So. 2d 587, 595 (Fla. 2006) (citation omitted).

The Legislature's 2005 enactments and declarations establish that the pre-2005 statute did not authorize compelling multiple insurers, providing coverage for different perils, all to pay their policy limits when combined perils cause a total loss *and* that the statute did not provide for apportionment among multiple covered perils. In the absence of a clear statutory command, Florida Farm is accordingly entitled to invoke the flood exclusion in the Coxes' policy:

> When viewed in the context of the 2005 amendment, it is more evident that the pre-2005 statute simply does not address losses caused by covered and excluded perils. There is no similar "causation" language in the pre-2005 version of the statute – it is completely absent.
>
> Accordingly, because the pre-2005 version of the statute, which is applicable in this case, does not address losses caused by covered and excluded perils, there is no conflict between the policy provision excluding from liability damage caused by water or flooding, and section 627.702(1). The pre-2005 statute does not mandate that the insurer of a covered peril pay the policy limits when an excluded peril causes the total loss. In the absence of a statutory command, [Florida Farm] is accordingly entitled to invoke the flood exclusion in the [Florida Farm] policies and the parties are bound by their contract.

943 So. 2d at 846 (Polston, J., dissenting).

CONCLUSION

Based on the foregoing, Florida Farm requests the Court to quash the First District's decision, to remand with directions to reverse the trial court's judgment, and to grant such other and further relief as the Court shall deem appropriate.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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