

NUMBER 07-247

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

MARK LANDRY AND BARBARA LANDRY

VERSUS

LOUISIANA CITIZENS PROPERTY INSURANCE CORPORATION

GENOVESE, J., dissenting.

The majority opinion in this case reverses the trial court judgment in part, amends the trial court judgment in part, renders its own judgment in part, and remands the case for further proceedings. I respectfully disagree with the majority opinion and dissent.

The question of law which we are called upon to decide is whether Louisiana's Valued Policy Law (VPL) requires a homeowner's insurer to pay the full face value of the policy in the event of a total loss of a structure, if the total loss is caused partially by a covered peril and partially by a non-covered peril.

The VPL, set forth in La.R.S. 22:695 (emphasis added), provides, in pertinent part, as follows:

A. Under any fire insurance policy insuring inanimate, immovable property in this state, if the insurer places a valuation upon the covered property and uses such valuation for purposes of determining the premium charge to be made under the policy, in the case of total loss the insurer shall compute and indemnify or compensate *any* covered loss of, or damage to, such property which occurs during the term of the policy at such valuation without deduction or offset, unless a different method is to be used in the computation of loss, in which latter case, the policy, and any application therefor, shall set forth in type of equal size, the actual method of such loss computation by the insurer. Coverage may be voided under said contract in the event of criminal

fault on the part of the insured or the assigns of the insured.

B. Any clause, condition, or provision of a policy of fire insurance contrary to the provisions of this Section shall be null and void, and have no legal effect. Nothing contained herein shall be construed to prevent any insurer from cancelling or reducing, as provided by law, the insurance on any property prior to damage or destruction.

This court recognized long ago that the purpose of the VPL is “to protect the insured by relieving him of the burden of proving the full value of his property after its total destruction, and to prevent insurance companies from receiving premiums on overvaluations but thereafter repudiating their contracts when it becomes to their interest to do so.” *Harvey v. Gen. Guar. Ins. Co.*, 201 So.2d 689, 692 (La.App. 3 Cir. 1967). In applying the VPL, we are mindful that “the public policy behind the Valued Policy [L]aw is very strong and the statute is intended to be interpreted liberally in favor of the insured.” *Farmers-Merchant Bank & Trust Co. v. St. Katherine Ins. Co.*, 96-1138, p. 9 (La.App. 3 Cir. 4/30/97), 693 So.2d 876, 882, *writ denied*, 97-1876 (La. 10/31/97), 703 So.2d 25. Additionally, “[a]ny policy provision attempting to limit the insurer’s liability is invalid when in conflict with the provision of the valued policy law.” *Harvey*, 201 So.2d at 692 (citing *Hart v. North British & Mercantile Ins. Co.*, 182 La. 551, 162 So. 177 (La.1935)).

Plaintiffs assert that the provisions of the VPL address the value, as opposed to the cause, of a total loss. They note that the VPL does not state that a covered peril must be the exclusive cause of the total loss for its provisions to apply. It is their contention that if an insured proves that a covered peril caused “any” of the total loss, the element of causation is satisfied so as to trigger the application of the VPL. Plaintiffs conclude, therefore, that “[i]n the event of a *total loss*, the insurer must compensate *any* covered loss at the *valuation* placed by the insurer on the covered

property *unless* a different method to compute the loss is included in both the policy **and** the application.”

Citizens asserts that La.R.S. 22:695 is ambiguous. Although it acknowledges in its brief that the “language admittedly can be read to support plaintiffs’ assertions,” Citizens contends that the statute may also be read such that in the case of a total loss, the insurer must compensate any “covered” loss at the full value of the policy, only if the total loss results from a “covered” loss. In the instant matter, such an interpretation would mean that because the damage which resulted in the total loss included a non-covered peril, e.g., flood, the VPL does not apply, and Citizens is not thereby obligated to compensate Plaintiffs for the full face value of the policy. If so, Citizens could reduce its liability by reducing its coverage from the total amount of the face value of the policy to a fraction thereof, represented solely by that portion of the damage to the Landry home which resulted from wind, the covered peril.

I agree with the trial court that La.R.S. 22:695 is not ambiguous. As explained by the trial court, “[t]he statute is clear that in those cases where the insurer determines valuation for the property and bases the premium on that valuation, and the insurer bears liability for any covered loss of a structure, and the property is deemed a total loss, the insurer must compensate any covered loss at valuation, and the insurer is thereby liable for the full amount of the policy.”¹ The exception to the foregoing general provision is that a different computation method may be utilized if the computation is set forth in the policy application and the policy itself. See also *Farmers-Merchant Bank & Trust Co.*, 693 So.2d at 881, wherein this court stated that

¹It is not disputed in this case that Citizens placed a valuation upon the covered property and used such valuation for purposes of determining the premium charge, nor is it disputed that the insured property was a total loss.

“La.R.S. 22:695 is clear, and we will not engage in a search of legislative intent contrary to the mandate of La.Civ. Code art. 9.”

The VPL does not require that a covered peril be the sole cause of the total loss. Rather, when there exists a total loss which is caused by a covered peril, or caused by a covered peril and a non-covered peril, the insurer is statutorily obligated to compensate the insured for the full face value of the policy. Therefore, as in the present case, when the total loss results from a covered peril, e.g., wind, and a non-covered peril, e.g., flood, the insurer may not reduce the face value amount on the policy to be paid to the insured by the portion of the total loss which may be attributed to the non-covered peril. This result is in keeping with the strong public policy behind the VPL, its express provision invalidating any policy terms which are not in keeping with its provisions, and the mandate of liberal construction in favor of the insured. The protections afforded by the VPL are intended to provide certainty to insureds who are faced with destruction of their property as to the amount which they are to receive in the event of a total loss. To hold that the VPL does not apply in situations of a total loss suffered by an insured because that loss was the result of a combination of a covered peril and a non-covered peril disregards the very purpose of the VPL. The consequence of such an interpretation would have the contrary consequence of continuing uncertainty and litigation over what percentage of a total loss can be attributed solely to a covered peril. See *Hart*, 162 So. at 181, wherein the supreme court opined that the VPL “is a measure in the public interest in order to secure greater certainly [sic] in the contract of insurance.” The supreme court went on to characterize the provisions of the VPL as statutory liquidated damages, explaining that the “statute must be regarded as part of the policy of insurance, and

the amount written in the policy as liquidated damages agreed upon by the parties, and this is so, notwithstanding the policy is inconsistent therewith.” *Id.* For the foregoing reasons, I would find that Citizens is liable for the full face value amount of the policy, unless in lieu of the statutory valuation method set forth in the VPL, a different method of computation of loss in the event of a total loss resulting from a covered and a non-covered peril is set forth in the policy and in the policy application.

Citizens asserts that it has effectively “opted out” of the VPL by complying with its qualifying language permitting the use of different loss computation methods if the actual computations are set forth in type of equal size in both the policy and its accompanying application. Citizens argues that said different method for computation of loss is contained in the application for the subject policy and that said different method of loss computation is consistent with the language of the policy and the VPL. I disagree. There is no provision in the Citizens policy and application setting forth a different loss computation applicable to a total loss resulting from a *combination* of a covered peril and a non-covered peril.

The legal determination in this case rests with the interpretation of a statute. Plaintiffs interpret Louisiana’s VPL one way; Citizens interprets it the other way. Under our constitution, it is not the function of this court to create legislation, but rather to interpret legislation when necessary to do so. The function of a statutory interpretation and the construction given to legislative acts rests with the judicial branch of government. *Unwired Telecom Corp. v. Parish of Calcasieu*, 03-732 (La. 1/19/05), 903 So.2d 392. Louisiana’s VPL is not ambiguous. As previously stated, this court has already held that Louisiana’s VPL is clear, and it will not engage in a

search of legislative intent contrary to the mandate of La.Civ.Code art. 9. *Farmers-Merchant Bank & Trust Co.*, 693 So.2d 876.

The statute unequivocally states that, in the event of a total loss, the insurer shall compensate *any* covered loss at the designated valuation unless a different method of computation of loss to be used is set forth in the policy and any application therefor. The statute says what it says. The statute says “any” covered loss. The key word is “any.” “Any” is defined in *The American Heritage Dictionary of the English Language*, fourth edition, as “one, some, every, or all without specification. . . .” Hence, the word “any” can only be interpreted as “one, some, every, or all” covered losses “without specification.” Therefore, under the policy in question, if the insured suffers a total loss resulting from “any” covered loss, the insurer must pay the designated valuation of the property, unless a different method to be used in the computation of the loss is specifically set forth.

The majority in this case speaks of “efficient or proximate cause.” And just what, pray tell, is “efficient or proximate cause”? Though one may be legally versed in the understanding of proximate cause in a tort sense, what is its meaning in a contractual sense, such as the case at bar? Better yet, what is “efficient cause”? The majority remands this case for a trial on the merits with no guidance whatsoever as to the legal standard or definition of “efficient or proximate cause” as it relates to this case. How will the trier of fact be able to determine whether or not Plaintiffs have proven, presumably by a preponderance of the evidence, that a covered peril was the “efficient or proximate cause” of the damage to their home which resulted in a total loss of their home? Additionally, just what percentage of the total loss resulting from a covered peril is necessary to meet the burden of proving that said covered peril was

the “efficient or proximate cause” of the total loss of Plaintiffs’ home? Is it 25%, 40%, 50% plus 1, 66 2/3%, 75%, or what? The majority, in remanding this case, provides no answers to these necessary and difficult questions.

It should also be noted that the only piece of evidence in the record of this summary judgment proceeding pertaining to the damage to Plaintiffs’ home as a result of Hurricane Rita is the wind damage estimate of the Citizens-hired adjuster. There is no estimate or evidence of flood damage at all. The wind damage estimate does not even estimate the extent of water damage from rain (not flood) secondary to said wind damage. Therefore, the damage caused by the covered peril is more than simply the amount of the wind damage estimate; it is more than negligible and is consequential. It is undisputed that Plaintiffs’ home was a total loss. The only evidence presented in this summary judgment proceeding is the wind damage estimate, which is a covered peril. Plaintiffs have proven their case and are entitled to the liquidated damages set forth in the statute.

In the case at bar, wind admittedly is a covered peril under the policy and is, therefore, a “covered loss.” Though wind is not the sole cause of the loss, it does qualify as “any” covered loss. However, the insurer may “opt out” of any unwanted exposure under the policy simply by inserting in its policy and application a different method to be used in the computation of the loss. This it did not do. There is nothing in the policy or its application addressing a method of computation of loss when the total loss arises out of a covered *and* non-covered peril. Notwithstanding an adverse interpretation of the word “any,” Citizens could have easily limited its exposure under the statute by setting forth in its policy and application a method of computation of loss in the event of a total loss *as a result of a covered and a non-covered peril*. It

failed to do so.

The state of Florida was called upon to address its similar VPL under similar circumstances as a result of Hurricane Irene in 1999. *Mierzwa v. Florida Windstorm Underwriting Ass'n*, 877 So.2d 774 (Fla.App. 4 Dist. 2004). In *Mierzwa*, the appellate court in Florida, in a unanimous decision speaking through its chief judge, held that its VPL requiring an insurer to pay the face amount of its policy for a total loss does not require that a covered peril be the covered peril causing the entire loss; it merely needed to be a covered peril. We do note, however, that the Florida legislature, subsequent to this *Mierzwa* decision, did amend its statute to specifically address this matter. Nevertheless, Florida's interpretation of its similar VPL, prior to remedial legislation, is the same interpretation that we should give our own VPL herein. It is solely within the province of our state legislature, not this court, to address any perceived inadequacies or inequities in the language of our present VPL.

Mark and Barbara Landry suffered a total loss of their home as a result of a combination of wind and flood damage caused by Hurricane Rita. Their home was insured by Louisiana Citizens Property Insurance Corporation for wind damage, but not flood damage. As presently written, and pertinent hereto, Louisiana's Valued Policy Law mandates that the insurer compensate the property owner in the amount of the designated valuation of the property when there is a total loss arising out of "any" covered loss, unless a different method of valuation is to be used in the computation of the loss. In this case, the Landry policy with Citizens undisputedly covered wind damage. Undisputedly, wind damage from Hurricane Rita was a contributing cause or factor in the undisputed total loss of the Landry home. There was no "opt out" or different method of valuation in the computation of loss in the

policy and its application in the event of a total loss caused by a covered and a non-covered peril. Therefore, in my view, the Landrys are entitled to the full face value amount of its homeowner's policy with Citizens as a result of the total loss of their home due in part to the wind damage from Hurricane Rita. I would affirm the trial court judgment.