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IN THE SUPREME COURT OF FLORIDA

STATE FARM FLORIDA INSURANCE COMPANY

vs.

JON PARRISH

CERTIFIED COPIES OF APPEAL PAPERS

CASE NO. SC21-172

DOCKET NO. 19-0130

CASE NO. SC21-172
DOCKET NO. 19-0130

STATE FARM FLORIDA INSURANCE COMPANY v. JON PARRISH

INDEX TO SUPREME COURT RECORD

Notice of Appeal Filed
Filed Jan 10, 2019.....5

LOWER TRIBUNAL TRANSMITTAL COVER SHEET
Filed Jan 10, 2019.....12

Acknowledgment Letter 1
Filed Jan 10, 2019.....14

fee - civil; atty
Filed Jan 10, 2019.....15

Stipulation for Extension of Time
Filed Mar 18, 2019.....16

Notice of Appearance
Filed Mar 22, 2019.....18

Stipulation for Extension of Time
Filed Apr 17, 2019.....20

Initial Appellant Brief on Merits
Filed Apr 22, 2019.....22

Request for Oral Argument
Filed Apr 22, 2019.....65

Stipulation for Extension of Time
Filed May 16, 2019.....68

Notice of Supplemental Authority
Filed Jun 11, 2019.....71

Stipulation for Extension of Time
Filed Jun 17, 2019.....89

Notice of Supplemental Authority
Filed Jun 20, 2019.....92

Stipulation for Extension of Time
Filed Jul 8, 2019.....101

Notice of Supplemental Authority
Filed Jul 30, 2019.....104

Stipulation for Extension of Time
Filed Aug 12, 2019.....117

Appellee Answer Brief
Filed Sep 3, 2019.....120

Motion For Attorney's Fees
Filed Sep 11, 2019.....151

Appellant Reply Brief
Filed Oct 1, 2019.....154

Oral Argument Notice
Filed Dec 4, 2019.....175
.....176

Notice of Supplemental Authority
Filed Dec 12, 2019

Notice of Supplemental Authority
Filed Dec 12, 2019.....188

Notice
Filed Dec 31, 2019.....201

Notice of Supplemental Authority
Filed Jan 27, 2020.....203

ORD-SUA SPONTE
Filed Feb 5, 2020.....213

Notice of Supplemental Authority
Filed Feb 11, 2020.....214

Notice of Supplemental Authority
Filed Feb 11, 2020.....222

Supplemental Appellant Initial Brief
Filed Feb 25, 2020.....231

Supplemental Appellee Answer Brief
Filed Mar 16, 2020.....252

Notice of Supplemental Authority
Filed Apr 15, 2020.....269

Notice of Supplemental Authority
Filed Aug 21, 2020.....292

Notice
Filed Aug 25, 2020.....296

Notice
Filed Oct 8, 2020.....299

Reversed
Filed Jan 6, 2021.....304

Miscellaneous Order
Filed Jan 6, 2021.....315

Motion For Rehearing on an Order
Filed Jan 11, 2021.....316

Motion For Rehearing on an Order
Filed Jan 22, 2021.....324

ORD-GRANT. REHEAR. ON AN ORDER
Filed Jan 27, 2021.....333

Notice of Discretional Jurisdiction to Supreme Court
Filed Feb 5, 2021.....334

Review Sent to Supreme Court
Filed Feb 5, 2021.....349

Acknowledged Receipt from Supreme Court
Filed Feb 5, 2021.....377

Acknowledged Receipt from Supreme Court
Filed Feb 10, 2021.....379

Mandate
Filed Mar 10, 2021.....380
.....382

Acknowledged Receipt from Supreme Court
Filed Oct 20, 2021

Acknowledged Receipt from Supreme Court
Filed Dec 21, 2021.....384

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IN THE CIRCUIT COURT OF THE
20TH JUDICIAL CIRCUIT, IN AND
FOR COLLIER COUNTY, FLORIDA

CASE NO.: 2018-CA-001198

STATE FARM FLORIDA
INSURANCE COMPANY,

Petitioner/Appellant,

v.

JON D. PARRISH,

Respondent/Appellee.
_____/

NOTICE OF APPEAL

Notice is given that Petitioner/Appellant, State Farm Florida Insurance Company, pursuant to Florida Rules of Appellate Procedure 9.030(b)(1)(A) and 9.110, appeals to the Second District Court of Appeal the Order on Petitioner's State Farm Florida Insurance Company, Petition to Compel Appraisal with a Disinterested Appraiser. [Conformed Copy attached as Exhibit "A" in accordance with Rule 9.110(d)].

The nature of the order on appeal is a final order.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished **via email** this 7th day of January, 2019 to: Theodore A. Corless, Esq. and Mary Catherine Lamoureux, Esq., Corless Barfield Trial Group, 6812 W. Linebaugh Ave., Tampa, FL 33625, Email: service@corlessbarfield.com, and Lynn S. Alfano, Esq., Robert A. Kingsford, Esq., and Kristin McMullen, Esq., Alfano Kingsford, P.A., 1060 Maitland Center Commons Blvd.,

I, Crystal K. Kinzel, Clerk of Courts in and for Collier County
do hereby certify that the above instrument is a true and
correct copy of the original filed in Collier County, Florida.

By:
Jennifer Lofendo, Deputy Clerk

Date: Jan 09 2019

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By: /s/ Kara Berard Rockenbach
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Florida Bar No. 0044903

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR COLLIER COUNTY, FLORIDA
CIVIL ACTION

STATE FARM FLORIDA INSURANCE COMPANY,

Petitioner,

v.

JON D. PARRISH,

Respondent.
_____/

CASE NO.: 2018-CA-001198

ORDER ON PETITIONER'S, STATE FARM FLORIDA INSURANCE COMPANY, PETITION TO COMPEL APPRAISAL WITH A DISINTERESTED APPRAISER

THIS MATTER coming before this Court on November 5, 2018 on Petitioner's, STATE FARM FLORIDA INSURANCE COMPANY, (hereinafter "State Farm"), Petition to Compel Appraisal With a Disinterested Appraiser, and the Court having heard argument of counsel, and being otherwise fully advised in the premises, it is thereupon determined as follows:

FINDINGS OF FACT

1. State Farm issued a policy of insurance bearing policy number 59-BQ-L268-9 ("Policy") to Jon D. Parrish ("Parrish" or "Insured") to insure property and contents located at 5780 Spanish Oaks Lane, Naples, Florida 34119–1156 which was in force from September 17, 2016 to September 17, 2017.

2. On or about November 3, 2017, Parrish made a claim with State Farm for damages occurring on September 10, 2017, which State Farm assigned claim number 59-1941-W39.

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EXHIBIT A

3. Parrish entered into an arrangement with Keys Claim Consultants, Inc. ("KCC") to serve as his public adjuster on a claim involving damages to his property dated October 23, 2017. State Farm was duly provided a copy of Jon D. Parrish's agreement with KCC.

4. The Policy provides the following provision regarding the appraisal process:

SECTION 1 – CONDITIONS

***

4. Appraisal. If you and we fail to agree on the amount of loss, either party can demand that the amount of the loss be set by appraisal. A demand for appraisal must be in writing. You must comply with **Your Duties After Loss** before making a demand.

Each party will select a qualified, disinterested appraiser and notify the other of the appraiser's identity within 20 days of receipt of the written demand. Each party shall be responsible for the compensation of their selected appraiser. The two appraisers shall then select a qualified, disinterested umpire. If the two appraisers are unable to agree upon an umpire within 15 days, you or we can ask a judge of a court of record in the state where the **residence premises** is located to select an umpire. Reasonable expenses of the appraisal and the reasonable compensation of the umpire shall be paid equally by you and us.

The appraisers shall then set the amount of the loss. The amount of the loss is determined by the actual cash value, market value or replacement cost of the loss according to the applicable Loss Settlement provision. If a dispute exists regarding the extent of the damages or whether any part of the loss is covered by the policy, the appraisers will itemize the damages according to the scope of the loss specified by each party. If the appraisers submit a written report of an agreement to us, the amount agreed upon shall be the amount of the loss. If the appraisers fail to agree within 30 days, unless the time is extended by mutual agreement, they shall submit their differences to the umpire. Written agreement signed by any two of these three shall set the amount of the loss.

Appraisal is only available to determine the actual cash value, market value or replacement cost of the loss, and has no effect on matters of coverage. Appraisal is a non-judicial proceeding and neither party will be awarded attorney fees or be subject to an entry of judgment in a court. We do not waive any of our rights by submitting to an appraisal.

5. Parrish, on January 8, 2018, through a letter sent via email and U.S. mail to State Farm, invoked the appraisal provision in the Policy and nominated George Keys of KCC as Parrish's qualified and disinterested appraiser. Accompanying the appraisal demand was a Sworn Proof of Loss from the insured, provided at the request of State Farm and in accord with the terms of the Policy.

6. State Farm's representative, together with Bobby Sims of KCC, inspected the insured property on January 29, 2018; at that time, State Farm agreed to provide revised estimates for the loss and necessary repairs.

7. On February 10, 2018, State Farm sent a letter to KCC containing the revised estimates, which differed from those submitted by KCC on Parrish's behalf; thus, as of that date, State Farm and Parrish had an identifiable and unequivocal disagreement as to the stated amount of the loss and those benefits due to Mr. Parrish under the Policy.

8. State Farm, on April 2, 2018, acknowledged the appraisal provision in the policy and named Bob Davis of Davis Claims Management as State Farm's appraiser, and, in addition, requested the Insured's designation of his qualified and disinterested appraiser within twenty (20) days.

9. The Insured thereafter appointed George W. Keys of KCC as his qualified and disinterested appraiser for purposes of setting the Amount of the Stated Loss in accordance with the Policy's appraisal provision.

CONCLUSIONS OF LAW

1. This Court finds Brickell Harbor Condominium Association, Inc. vs. Hamilton Specialty Insurance Company, Case Number: 3D17–2761, 2018 WL 4904927 (Fla. 3d DCA 2018), is persuasive and is the closest legal and factual authority to follow.

2. In Brickell Harbor the Court, in considering the holdings pronounced in Rios v. Tri-State Insurance Company, 714 So.2d 547 (Fla. 3d DCA 1998), and Galvis v. Allstate Insurance Company, 721 So.2d 421 (Fla. 3d DCA 1998), determined that resolution of questions concerning the "partiality" or "interest" of a nominated appraiser in the context of a property insurance policy's appraisal provision was principally one of disclosure, finding that disclosure of an agreement militated against later disqualification.

3. Brickell Harbor, in line with the Rios and Galvis decisions, holds very clearly that disclosure of the financial arrangement between an insured and his or her designated appraiser satisfies the requirements of the insurance policy's "appraisal provision", and thus, upon such notice disqualification is not appropriate. Parrish, through KCC, disclosed to State Farm the very nature of the existing arrangement between Parrish and KCC. Consequently, this Court finds that because Parrish's prior engagement was fully disclosed, George Keys is disinterested and can serve as Parrish's qualified and disinterested appraiser with respect to the appraisal of the instant claim.

4. This Court finds that State Farm's arguments against Parrish's nominated appraiser, who is qualified and disinterested under Rios and Galvis to be unpersuasive and inconsistent with the holding in Brickell Harbor finding that such argument is vitiated by the appointment of an umpire pursuant to the terms of the Policy.

5. Further, this Court rejects State Farm's request that this Court extend the specific holding in Florida Insurance Guaranty Association v. Branco, 148 So.3d 488 (Florida 5th DCA 2014) to apply to the relationship of an insured and a licensed public adjuster serving as a qualified disinterested appraiser. The holding in Branco was predicated on the existence of a confidential, attorney-client relationship. The Court finds no such relationship present between Parrish and KCC in this instance which would permit the application of the holding in Branco. Further, State Farm has failed to demonstrate a valid legal reason to preclude KCC from serving as a qualified and disinterested appraiser for Parrish.

Based on the foregoing Findings of Fact and Conclusions of Law it is hereby **ORDERED AND ADJUDGED** as follows:

a. The Petition to Compel Appraisal with Disinterested Appraiser is hereby denied.

b. The Petition to Compel Appraisal with Disinterested Appraiser is hereby dismissed in its entirety

c. The appraisal process invoked by Respondent proceed with Mr. George Keys of Keys Claims Consultants serving as Petitioner's nominated appraiser shall proceed in accordance with the Policy's "appraisal provision".

d. Petitioner will be responsible for the fees and costs incurred by Respondent in in the course of representing his interests in this matter, with this Court specifically reserving jurisdiction for the purpose of awarding fees and costs to the Respondent in accordance with Florida law.

DONE AND ORDERED in Chambers, at Collier County, Naples, Florida, this 14 day of December, 2018.

FREDERICK HARDT
Circuit Court Judge

COPIES SERVED BY CLERK'S ELECTRONIC E-FILING PORTAL:

Copies furnished to:
Emailed 12/17/18
Theodore A. Corless, Esquire Mary Catherine Lamoureux, Esquire, Attorneys for Respondent, Corless Barfield Trial Group, 6812 W. Linebaugh Avenue, Tampa, Florida 33625 at service@corlessbarfield.com

Lynn S. Alfano, Esquire, Robert A. Kingsford, Esquire, Kristen McMullen, Esquire, Attorneys for Plaintiff, Alfano Kingsford, P.A., 1060 Maitland Center Commons Boulevard, Suite 180, Maitland, Florida 32751 at lalfano@alfanokingsford.com and pleadings@alfanokingsford.com

Justin M. Thomas, Esquire, Gregory L. Evans, Esquire, Mark A. Boyle, Esquire, Boyle & Leonard, P.A., Attorneys for Respondent, 2050 McGregor Blvd., Fort Myers, Florida 33901 at eservice@insurance-counsel.com, jthomas@insurance-counsel.com, gevans@insurance-counsel.com and mboyle@insurance-counsel.com

RECEIVED, 01/10/2019 08:48:26 AM, Clerk, Second District Court of Appeal

DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA

NOTICE OF APPEAL TRANSMITTAL FORM

State Farm Florida Insurance Company	Collier
APPELLANT(S)	County/State Agency
v.	
Jon Parrish	L.T. Case No: 11-2018-CA-001198-0001-XX
APPELLEE(S)	

☒ The accompanying notice of appeal was filed on 01/07/19. A certified electronic copy of the notice accompanies this form.

☒ The civil notice carried with it a copy of the order appealed, which is transmitted with the notice.

☐ The civil notice was not accompanied by a copy of the order appealed.

☐ The district court's filing fee has been received and will promptly be forwarded to the court by U.S. Mail.

☐ There is no filing fee in this type of proceeding (e.g., dependency/termination of parental rights; postconviction and habeas corpus appeals; delinquency appeals; administrative reemployment assistance appeals initiated by an employee).

☐ The appellant has been determined to be indigent. Included in the transmission of the notice of appeal is an order or certificate of insolvency.

☒ An appellate filing fee appears to be required but has not been paid.

☐ This is dependency/termination of parental rights case. A designation to the court reporter ☐ does or ☐ does not accompany the notice of appeal in the transmission to the district court.

CASE TYPE:

☐ Summary postconviction appeal. An electronic bookmarked record is being transmitted to the district court's FTP server contemporaneously with the notice of appeal.

☐ Summary postconviction appeal. The electronic record cannot be transmitted at this time but will follow within days.

☐ Nonsummary postconviction appeal. The lower tribunal clerk ☐ has or ☐ has not treated the notice of appeal as a designation to the court reporter.

☐ Judgment and sentence appeal.

☐ Juvenile delinquency appeal.

☐ State criminal appeal.

☐ Dependency/termination of parental rights appeal.

☒ Other civil appeal, including probate/guardianship, Ryce, Baker Act, etc.

☐ Administrative Appeal.

☐ Criminal appeal of unknown case classification. A copy of the order that seems to be appealed is included in this transmission, or it is impossible to determine what order the appellant is attempting to appeal.

Further comments that might be of value to the district court in determining case classification and jurisdiction are:

Crystal K. Kinzel,
Clerk of the Circuit Court

BY: Jennifer Lofendo, Deputy Clerk

COLLIER COUNTY
STATE OF FLORIDA
CLERK OF THE CIRCUIT COURT

DISTRICT COURT OF APPEAL

SECOND DISTRICT

Post Office Box 327

LAKELAND, FLORIDA 33802

(863)940-6060

ACKNOWLEDGMENT OF NEW CASE

DATE: January 10, 2019

STYLE: STATE FARM FLORIDA INSURANCE COMPANY v. JON PARRISH

2DCA#: 2D19-0130

The Second District Court of Appeal has received the Appeal reflecting a filing date of January 7, 2019.

The county of origin is Collier.

The lower tribunal case number provided is 2018-CA-1198.

The filing fee is: Fee Owed.

Case Type: Civil Other Final

The Second District Court of Appeal's case number must be utilized on all pleadings and correspondence filed in this cause. Moreover, ALL PLEADINGS SIGNED BY AN ATTORNEY MUST INCLUDE THE ATTORNEY'S FLORIDA BAR NUMBER.

Please review and comply with any handouts enclosed with this acknowledgment.

cc: Theodore A. Corless, Esq.
Lynn S. Alfano, Esq.
Kara Berard Rockenbach, Esq.
Robert A. Kingsford, Esq.
Mary C. Lamoureux, Esq.
Crystal K. Kinzel, Clerk

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT, POST OFFICE BOX 327, LAKELAND, FL 33802-0327

January 10, 2019

CASE NO.: 2D19-0130
L.T. No.: 2018-CA-1198

STATE FARM FLORIDA INSURANCE COMPANY	v.	JON PARRISH
Appellant / Petitioner(s),		Appellee / Respondent(s).

BY ORDER OF THE COURT:

This appeal has been filed without a filing fee required by section 35.22(2)(a), Florida Statutes, Florida Statutes.

If the attorney for appellant has not already done so, they shall forward the required $300.00 filing fee or, if applicable, an order of the circuit court finding appellant insolvent pursuant to section 57.081, Florida Statutes, within twenty days from the date of this order.

If this court does not receive either of the above within the prescribed time, this appeal may be subject to dismissal without further notice.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

Theodore A. Corless, Esq.	Kara Berard Rockenbach, Esq.	Mary C. Lamoureux, Esq.
Lynn S. Alfano, Esq.	Robert A. Kingsford, Esq.	Crystal K. Kinzel, Clerk

ls

Mary Elizabeth Kuenzel
Mary Elizabeth Kuenzel
Clerk

RECEIVED, 03/18/2019 10:29:33 AM, Clerk, Second District Court of Appeal

IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

2ND DCA CASE NO.: 2D19-130
LOWER CASE NO.: 11-2018-CA-01198-0001

STATE FARM FLORIDA
INSURANCE COMPANY,

Appellant,

vs.

JON PARRISH,

Appellee.
_____/

NOTICE OF AGREED EXTENSION OF TIME
TO SERVE APPELLANT'S INITIAL BRIEF

Appellant, State Farm Florida Insurance Company, pursuant to Florida Rule of Appellate Procedure 9.300 and the Second District Court of Appeal's Administrative Order No. 2013-1, hereby states:

Appellant's Initial Brief is due on March 18, 2019. The undersigned, as counsel for Appellant, State Farm Florida Insurance Company, has agreed with Justin M. Thomas, Esq., counsel for Appellee, Jon Parrish, that the time for serving Appellant's Initial Brief may be extended for thirty (30) days to April 17, 2019.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the attorneys listed on below on this 18th day of March, 2019,

through the Florida Courts e-filing portal pursuant to Florida Rule of Judicial Administration 2.516(b)(1): **Theodore A. Corless, Esq.** and **Mary Catherine Lamoureux, Esq.**, Corless Barfield Trial Group, 6812 W. Linebaugh Ave., Tampa, FL 33625, Email: service@corlessbarfield.com; *Counsel for Appellee*; **Justin M. Thomas, Esq.**, **Gregory L. Evans, Esq.**, and **Mark A. Boyle, Esq.**, Boyle & Leonard, P.A., 2050 McGregor Blvd., Fort Myers, FL 33901 (eservice@insurance-counsel.com; jthomas@insurance-counsel.com; gevans@insuranec-counsel.com; mboyle@insurance-counsel.com); and **Lynn S. Alfano, Esq.** and **Robert A. Kingsford, Esq.**, Alfano Kingsford, P.A., 1060 Maitland Center Commons Blvd., Suite 180, Maitland, FL 32751, Emails: lalfano@alfanokingsford.com and pleadings@alfanokingsford.com; *Trial Counsel for Appellant*.

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RECEIVED, 03/22/2019 02:30:33 PM, Clerk, Second District Court of Appeal

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT

CASE NO.: 2D19-130
L.T. NO.: 11-2018-CA-01198-0001

STATE FARM FLORIDA
INSURANCE COMPANY,

Appellant,

vs.

JON PARRISH,

Appellee.
_____/

NOTICE OF APPEARANCE OF COUNSEL FOR APPELLEE

COMES NOW, Gregory L. Evans and Alicia M. Lopez, of the firm of BOYLE, LEONARD & ANDERSON, P.A., and gives notice of appearance in this action as appellate counsel on behalf of the Appellee, JON PARRISH, and further designates the following email addresses for service of court documents:

1. Primary Email Address: eservice@insurance-counsel.com
2. Secondary Email Address: gevans@insurance-counsel.com
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Respectfully submitted,

By: /s/ Gregory L. Evans
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail to the below for service and all parties listed on the Second District Court of Appeals' eDCA Portal on March 22, 2019.

Theodore A. Corless, Esq.
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Counsel for Appellant

Respectfully submitted,
By: /s/ Gregory L. Evans
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Fla. Bar No.: 0767824

RECEIVED, 04/17/2019 06:49:33 PM, Clerk, Second District Court of Appeal

IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

2ND DCA CASE NO.: 2D19-130
LOWER CASE NO.: 11-2018-CA-01198-0001

STATE FARM FLORIDA
INSURANCE COMPANY,

Appellant,

vs.

JON PARRISH,

Appellee.
_____/

NOTICE OF AGREED EXTENSION OF TIME
TO SERVE APPELLANT'S INITIAL BRIEF

Appellant, State Farm Florida Insurance Company, pursuant to Florida Rule of Appellate Procedure 9.300 and the Second District Court of Appeal's Administrative Order No. 2013-1, hereby states:

Appellant's Initial Brief is due on April 17, 2019. The undersigned, as counsel for Appellant, State Farm Florida Insurance Company, has agreed with Justin M. Thomas, Esq., counsel for Appellee, Jon Parrish, that the time for serving Appellant's Initial Brief may be extended for five (5) days to April 22, 2019.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the attorneys listed on below on this 17th day of April, 2019,

through the Florida Courts e-filing portal pursuant to Florida Rule of Judicial Administration 2.516(b)(1): **Theodore A. Corless, Esq.** and **Mary Catherine Lamoureux, Esq.**, Corless Barfield Trial Group, 6812 W. Linebaugh Ave., Tampa, FL 33625, Email: service@corlessbarfield.com; *Counsel for Appellee*; **Justin M. Thomas, Esq.**, **Gregory L. Evans, Esq.**, and **Mark A. Boyle, Esq.**, Boyle & Leonard, P.A., 2050 McGregor Blvd., Fort Myers, FL 33901 (eservice@insurance-counsel.com; jthomas@insurance-counsel.com; gevans@insurance-counsel.com; mboyle@insurance-counsel.com); and **Lynn S. Alfano, Esq.** and **Robert A. Kingsford, Esq.**, Alfano Kingsford, P.A., 1060 Maitland Center Commons Blvd., Suite 180, Maitland, FL 32751, Emails: lalfano@alfanokingsford.com and pleadings@alfanokingsford.com; *Trial Counsel for Appellant*.

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RECEIVED, 04/22/2019 06:02:34 PM, Clerk, Second District Court of Appeal

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT

CASE NO.: 2D19-130
LT CASE NO.: 11-2018-CA-001198-0001-XX

STATE FARM FLORIDA INSURANCE COMPANY,

Appellant,

vs.

JON PARRISH,

Appellee.
_____/

On Appeal from the Circuit Court of the 20th Judicial Circuit in and for Collier County, Florida

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES……...iii

PREFACE……..…….....1

INTRODUCTION…….1

STATEMENT OF THE CASE AND OF THE FACTS……...2

A. Statement of the Case…….....2

B. Factual Background: The Insured Hires KCC to Inspect and Adjust his Loss, Negotiate with State Farm, and Advocate on his Behalf……..4

1. The Insurance Contract's Appraisal Provision…….....4

2. Parrish Incurs a Covered Loss…….5

3. Parrish Hires a Public Adjuster, Invokes Appraisal, and Names his Public Adjuster as his "Disinterested" Appraiser…….5

C. Procedural Background: The Trial Court Permits the Public Adjuster to Serve as Parrish's "Disinterested" Appraiser…….9

SUMMARY OF THE ARGUMENT……..……13

ARGUMENT…….....16

The Trial Court Erred in Denying State Farm's Petition Because KCC Cannot Serve as Parrish's "Disinterested" Appraiser as Required by the Insurance Contract…….16

A. Standard of Review……..16

B. Insurance Contract Principles from the Florida Supreme Court…...…..17

C. Parties are Free to Contract for Disinterested Appraisers……17

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D. Meaning of Disinterested……17

E. Most Instructive Authority is Branco from the Fifth District……..18

F. Fiduciary Relationship of Public Adjuster to the Insured……....21

G. Persuasive Federal Authority in Vernues……22

H. Verneus Mirrors this Appeal……24

I. Other Analogous Legal Contexts Rejects Partiality and Financial Interest……..25

J. The Third District's *Rios* and *Galvis* are Inapplicable and Outdated…..26

K. Even *Brickell Harbor* Compels Reversal……30

L. Florida Insurance Contract Law Requires "Disinterested" to Have Meaning……32

CONCLUSION……...35

CERTIFICATE OF SERVICE……36

CERTIFICATE OF COMPLIANCE……...37

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TABLE OF AUTHORITIES

Cases

Brickell Harbour Condominium Association, Inc. v. Hamilton Specialty Insurance Company, 256 So. 3d 245 (Fla. 3d DCA 2018)……passim

Cent. Life Ins. Co. v. Aetna Cas. & Sur. Co.,
466 N.W.2d 257 (Iowa 1991)……..18, 25

Citizens Prop. Ins. Corp. v. Mango Hill #6 Condo. Ass'n, Inc.,
117 So. 3d 1226 (Fla. 3d DCA 2013)……...……..28, 29

Florida Insurance Guaranty Association v. Branco,
148 So. 3d 488 (Fla. 5th DCA 2014)…….……passim

Galvis v. Allstate Insurance Co.,
721 So. 2d 421 (Fla. 3d DCA 1998)…….….passim

Intervest Const. of Jax, Inc. v. Gen. Fid. Ins. Co.,
133 So. 3d 494 (Fla. 2014)……...……1, 17, 32, 33

Johnson v. Estate of Fraedrich,
472 So. 2d 1266 (Fla. 1st DCA 1985)…….……..21

Maxwell First United Bank,
782 So. 2d 931 (Fla. 4th DCA 2001)……..……..21

Morris v. Muniz,
252 So. 3d 1143 (Fla. 2018)…….….16

N. Assur. Co., Ltd. of London v. Melinsky,
213 N.W. 70 (Mich. 1927)……...……18

Panama City Beach Condos, Ltd. P'ship v. Adjusters Int'l Colo., Inc.,
No. 4:080cv369-RH-WCS,
2009 WL 10674033 (N.D. Fla. July 28, 2009)……...……..20

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Phoenix Assur. Co., Ltd. of London v. Davis,
67 F.2d 824 (5th Cir. 1933)……..……18

Prescott v. Kreher,
123 So. 2d 721 (Fla. 2d DCA 1960)…….……21

Rios v. Tri-State Insurance Co.,
714 So. 2d 547 (Fla. 3d DCA 1998)…….….passim

Smith v. DeParry,
86 So. 3d 1228 (Fla. 2d DCA 2012)……...……..18

State v. Chillingworth,
116 So. 633 (Fla. 1928)…….……25

Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.,
913 So.2d 528 (Fla.2005)…….……17

Tiger Fibers, LLC v. Aspen Specialty Ins. Co.,
571 F. Supp. 2d 712 (E.D. Va. 2008)……18

Verneus v. Axis Surplus Insurance Co.,
No. 16-21863-CIV-Martinez/Goodman,
2018 WL 3417905 (S.D. Fla. July 13, 2018)……..……..23, 24, 25

Weinger v. State Farm Fire & Cas. Co.,
620 So. 2d 1298 (Fla. 4th DCA 1993)……..25

Yearwood v. State Farm Fla. Ins. Co.,
No. 2018-CA-8119-O (Fla. 9th Jud. Cir. Mar. 29, 2019)…….……34

Other Authorities:

Fla. Admin. Code R. 69B-220.201…….……19

§ 626.854(1), Fla. Stat……...……20, 22

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The Code of Ethics for Arbitrators in Commercial Disputes (Oct. 21, 2011), https://www.adr.org/aaa/faces/arbitratorsmediators/aboutarbitratorsmediators/codeofethics).....30

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PREFACE

State Farm Florida Insurance Company ("State Farm") appeals the trial court's final order dismissing and denying, on the merits, its Petition to Compel Appraisal with a Disinterested Appraiser (the "Petition"). (R. 119-25). The trial court's dismissal of the Petition permits appraisal of Appellee, Jon Parrish's property loss to proceed with Parrish's public adjuster serving as his appraiser—contrary to the bargained-for requirement in the parties' insurance policy that, when appraisal is invoked, both parties' appraisers be "disinterested." (R. 40).

In State Farm's Initial Brief, citations to the Record on Appeal are denoted as "R. [page number]."

INTRODUCTION

Words have meaning. In the context of an insurance policy, courts may not "rewrite contracts, add meaning that is not present, or otherwise reach results contrary to the intentions of the parties." *Intervest Const. of Jax, Inc. v. Gen. Fid. Ins. Co.,* 133 So. 3d 494, 497 (Fla. 2014). This longstanding principle governs this appeal and compels reversal.

Here, the parties' insurance contract contains an appraisal provision requiring both parties to select qualified and disinterested appraisers. If the contract's term "disinterested" is not given meaning and applied to each party's

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choice of appraiser, then the word is redacted, the appraisal provision is rendered meaningless, and insurers may no longer seek the alternative dispute resolution path of appraisal. Because the trial court's ruling gave no meaning or application to the word "disinterested," the final order must be reversed and remanded with instructions for entry of an order requiring that the insured select a qualified and disinterested appraiser pursuant to the insurance contract.

STATEMENT OF THE CASE AND FACTS

A. Statement of the Case

State Farm issued a Homeowners Policy to Parrish which provided coverage for his Hurricane Irma property damage. (R. 19). This insurance contract provides for an alternative dispute resolution process to set a disputed amount of loss—appraisal—and sets forth the procedure. The contractually-specified procedure is for both parties to select a qualified, *disinterested* appraiser. (R. 40).

State Farm acknowledged coverage for the loss and issued an actual cash value payment to Parrish. (R. 10, 49-51). At different times during the claim, both parties invoked the policy's appraisal clause based on disagreement with the other's estimate. (R. 29, 51). The question for this Court is a purely legal one—who is a "disinterested" appraiser under the insurance contract and Florida law.

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Parrish selected George Keys of Keys Claims Consultants ("KCC") as his appraiser. (R. 29). State Farm objected to Mr. Keys serving as Parrish's appraiser because he is not "disinterested" as required by the insurance policy. (R. 31). Rather, KCC—of which Mr. Keys is President—is Parrish's public adjuster who is obligated by law to act in Parrish's best interest, has previously inspected the loss, formed opinions on the scope and extent of the damages, and prepared a written estimate—all before appraisal was invoked. (R. 8, 29-31). KCC is also entitled to a contingency fee of 10% of any insurance proceeds recovered. (R. 25).

As Parrish's public adjusting firm, obligated by law and contract to promote Parrish's interests, KCC has acted as Parrish's advocate and negotiated with State Farm. KCC's estimate of the damages, which differs from State Farm's, is what gives rise to an "amount of loss" dispute, triggering appraisal. For Mr. Keys to now serve as Parrish's appraiser defeats the very purpose and plain words of the contract's appraisal provision—for three new, qualified, disinterested persons to evaluate the loss with no preconceived biases.

The trial court, on the undisputed facts, disagreed with State Farm and determined that there was no legal or contractual impediment to George Keys serving as Parrish's "disinterested" appraiser. (R. 112-16). Because Mr. Keys' company, KCC, has (1) contracted to adjust this loss on behalf of Parrish as his

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agent, owes him fiduciary responsibilities of advocacy and loyalty, (2) inspected and evaluated the loss, (3) prepared a written estimate, and (4) is entitled to a percentage of the insurance proceeds, KCC and its principals are biased in favor of their prior work product and incentivized to work for Parrish to receive as much indemnity from State Farm as possible. These unassailable facts disqualify KCC from serving as Parrish's "disinterested" appraiser as a matter of law. State Farm respectfully requests this Court reverse the denial and dismissal of its Petition and remand with directions that Parrish be required to select a "disinterested" appraiser so that appraisal of Parrish's insurance claim to proceed—fairly to all parties as contemplated by the insurance contract.

B. Factual Background: The Insured Hires KCC to Inspect and Adjust his Loss, Negotiate with State Farm, and Advocate on his Behalf.

1. *The Insurance Contract's Appraisal Provision*

State Farm and Parrish entered into a contract to insure Parrish's property at 5780 Spanish Oaks Lane, Naples, FL 34119 with effective dates of coverage from September 17, 2016 through September 17, 2017. (R. 19). The insurance policy contains a provision for appraisal as a means of alternative dispute resolution in situations where the parties disagree as to the amount of a loss:

> 4. **Appraisal**. If you and we fail to agree on the amount of loss, either party can demand that the amount of the loss be set by

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> appraisal. A demand for appraisal must be in writing. You must comply with **Your Duties After Loss** before making a demand.
>
> *Each party will select a qualified, disinterested appraiser and notify the other of the appraiser's identity within 20 days of receipt of the written demand*. Each party shall be responsible for the compensation of their selected appraiser. The two appraisers shall then select a qualified, disinterested umpire. If the two appraisers are unable to agree upon an umpire within 15 days, you or we can ask a judge a court of record in the state where the **residence premises** is located to select an umpire. Reasonable expenses of the appraisal and the reasonable compensation of the umpire shall be paid equally by you and us.
>
> The appraisers shall then set the amount of the loss. . . . If a dispute exists regarding the extent of the damages or whether any part of the loss is covered by the policy, the appraisers will itemize the damages according to the scope of the loss specified by each party. If the appraisers submit a written report of an agreement to us, the amount agreed upon shall be the amount of the loss. If the appraisers fail to agree within 30 days, unless the time is extended by mutual agreement, they shall submit their differences to the umpire. Written agreement signed by any two of these three shall set the amount of the loss.

(R. 40) (italicized emphasis supplied).

2. *Parrish Incurs a Covered Loss*

Hurricane Irma impacted Florida on September 10, 2017, and damaged Parrish's property. (R. 7). Parrish made a claim for wind damage to his property with State Farm. (R. 7). State Farm has accepted coverage for the hurricane claim.

3. *Parrish Hires a Public Adjuster, Invokes Appraisal, and Names his Public Adjuster as his "Disinterested" Appraiser.*

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On October 23, 2017, Parrish, in connection with his insurance claim, entered into a contract for public adjusting services ("All Risk Agreement") with KCC. (R. 25). The All Risk Agreement describes KCC's public adjusting duties as:

> Keys Claims Consultants, Inc. (KCC) will prepare a detailed accounting of the damages and present them to the insurance company. KCC will negotiate the damages with the insurance company representative(s). Should the claim not be settled promptly, the Owner authorizes KCC to demand and invoke the Appraisal provision of the policy and is naming KCC as Owner's Appraiser.

(R. 25).

The All Risk Agreement further entitles KCC to a contingency fee of 10% of any insurance proceeds recovered on behalf of Parrish:

> Owner agrees to pay KCC in consideration thereof, and hereby assign[s] to KCC, a contingency fee of 10% of all insurance funds, contractual and extra contractual, received after the date of this agreement. The fee will be based on the gross amount of the insurance proceeds after the application of the deductible(s) and in conformance with Florida Statutes.

(R. 25). To effectuate its fee entitlement, Parrish directed State Farm to add KCC as a joint payee on any claim payments and likewise assigned KCC the right to be paid as a joint payee. (R. 25, 28).

On October 31, 2017, Bobby Sims with KCC sent State Farm a letter of representation, advising that KCC "has been asked to represent [Parrish] for

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damages sustained" in the loss. (R. 23). In its letter, KCC requested documentation from State Farm to assist it in its "valuation and presentation" of Parrish's claim, and further advised State Farm of Parrish's "intent to make claim for all coverage provided by the Replacement Cost Provision of the policy." (R. 23).

In December 2017, Mr. Sims inspected the loss and prepared a written estimate of the damages in the amount of $495,079.25. (R. 8, 29-30). Several days later, State Farm's field adjuster inspected the loss (with Mr. Sims present) and received a copy of Mr. Sims' estimate. (R. 8).

On January 8, 2018, State Farm contacted Mr. Sims to schedule a second inspection of the property, to reconcile the differences between State Farm's adjustment and KCC's estimate. (R. 8). That day, Mr. Sims sent Parrish's Sworn Proof of Loss, mirroring Mr. Sims' estimate, to State Farm. (R. 29-30). Mr. Sims also advised State Farm that Parrish was invoking the policy's appraisal provision and has "employed George Keys to serve as [his] appraiser." (R. 29). The January 8, 2018 correspondence indicated that George Keys is affiliated with KCC, shares the same address as KCC, and his email address is GeorgeKeys@KeysClaims.com. (R. 29). In fact—as State Farm demonstrated with public records—George Keys is *president* of KCC. (R. 61-62).

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On January 15, 2018, State Farm responded to Mr. Sims. (R. 31). While State Farm advised Mr. Sims that appraisal was premature because it continued to investigate, it objected to George Keys serving as Parrish's appraiser. (R. 31). State Farm informed Mr. Sims that George Keys, as "the assigned public adjuster who is representing Mr. Parrish in this claim" is not "disinterested." (R. 31). On January 26, Parrish, through counsel, insisted that George Keys could serve as Parrish's appraiser. (R. 46-47).

On January 29, State Farm re-inspected the loss (again with Mr. Sims present) and agreed to prepare a revised estimate for necessary repairs. (R. 10). In February, State Farm issued a supplemental actual cash value payment to Parrish based on its revised damage estimate. (R. 10, 49-51). Mr. Sims advised State Farm that he would review State Farm's revised estimate and contact it with "any issues." (R. 10, 50).

In correspondence dated April 2, 2018, State Farm memorialized a March 23, 2018 telephone conversation it had with Mr. Sims regarding disputes concerning the type of roof underlayment at the property and the cost of roofing materials. (R. 51). This time, State Farm invoked the policy's appraisal provision due to the remaining amount of loss disputes. (R. 51). State Farm selected Bob Davis with Davis Claim Management (who had never, before appraisal was

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invoked, been involved in this claim) as its appraiser, and requested Parrish to select a qualified, disinterested appraiser within twenty days.[1] (R. 52).

Neither Parrish, Mr. Sims, nor anyone else with KCC contacted State Farm to name an alternate, qualified and disinterested appraiser. (R. 11).

C. Procedural Background: The Trial Court Permits the Public Adjuster to Serve as Parrish's "Disinterested" Appraiser.

State Farm sought judicial intervention to resolve the impasse and attempt to expeditiously pursue appraisal. On May 5, 2018, State Farm filed its Petition. (R. 7-61). State Farm supported its Petition with comprehensive legal argument in support of its position that "neither George Keys nor any person affiliated with [KCC] is disinterested under the terms of the subject insurance policy." (R. 11). State Farm requested the entry of an order compelling Parrish to participate in appraisal with a disinterested appraiser. (R. 17). Parrish responded. (R. 72-89).

On November 5, 2018, the trial court held a hearing to decide the narrow question of whether George Keys and/or KCC could "operate as [Parrish's] appraiser" pursuant to the parties' insurance contract. (R. 126-79, 134). There, State Farm urged the trial court to apply the rationale of *Florida Insurance Guaranty Association v. Branco*, 148 So. 3d 488 (Fla. 5th DCA 2014), and to

[1] State Farm prepared a one-page timeline that offers a condensed history of the claim from September 10, 2017 through April 2, 2018 and presented it to the trial court at the hearing on its Petition. The timeline is in the record. (R. 108-110).

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conclude that earlier decisions from the Third District Court of Appeal, *Rios v. Tri-State Insurance Co.*, 714 So. 2d 547 (Fla. 3d DCA 1998) and *Galvis v. Allstate Insurance Co.*, 721 So. 2d 421 (Fla. 3d DCA 1998), did not control. (R. 135-42). State Farm explained why KCC and its representatives are not "disinterested" in the insurance claim:

> When you look at the facts of the relationship between KCC and Mr. Parrish, it's clear that a fiduciary relationship exists because he put his trust in KCC to adjust the loss on his behalf, and KCC accepted that trust for a fee. That relationship, which was established at the initiation of the claim prior to the invocation of appraisal and it's precisely what the Fifth held in Branco, prevents an entity like KCC from later acting as that party's appraiser because they are not disinterested.
>
> Mr. Keys and his company are obligated to advance the interest of Mr. Parrish, and that's what they have done. I've got eight facts, judge, identified that shows that fiduciary relationship. . . .
>
> . . . .
>
> So, every action, judge, taken by KCC with regard the claim was done on behalf of and as a representative of Mr. Parrish with a goal to protect and advance his interest with regard to the claim.
>
> It's clear, we contend, that Mr. Parrish reposed his confidence in KCC to properly adjust the claim on his behalf; and KCC accepted that obligation in return for a fee. We contend that meets the definition of a fiduciary relationship between Mr. Parrish and KCC.

(R. 143-46).

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At the hearing's end, the trial court orally denied State Farm's Petition in exclusive reliance on *Brickell Harbour Condominium Association, Inc. v. Hamilton Specialty Insurance Company*, 256 So. 3d 245 (Fla. 3d DCA 2018). (R. 168). After summarizing the facts and some of the *Brickell Harbour* Court's statements, the trial court ruled that "[t]hey also go on to discuss the problem, there is a contingency arrangement. And they said in *Brickell* that that requires disclosure rather than disqualification, which is what we have here." (R. 169). Based expressly on *Brickell Harbour*, the trial court denied the Petition. (R. 169).

The court later issued a written Order on State Farm's Petition echoing its reliance on *Brickell Harbour*:

> 1. This Court finds Brickell Harbour Condominium Association, Inc. v. Hamilton Specialty Insurance Company . . . is persuasive and is the closest legal and factual authority to follow.
>
> 2. In Brickell Harbour the Court, in considering the holdings pronounced in Rios v. Tri-State Insurance Company, 714 So. 2d 547 (Fla. 3d DCA 1998), and Galvis v. Allstate Insurance Company, 721 So. 2d 421 (Fla. 3d DCA 1998), determined that resolution of questions concerning the "partiality" or "interest" of a nominated appraiser in the context of a property insurance policy's appraisal provision was principally one of disclosure, finding that disclosure of an agreement militated against later disqualification.
>
> 3. Brickell Harbour, in line with the Rios and Galvis decisions, holds very clearly that disclosure of the financial arrangement between an insured and his or her designated

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> appraiser satisfies the requirements of the insurance policy's "appraisal provision", and thus, upon such notice disqualification is not appropriate. Parrish, through KCC, disclosed to State Farm the very nature of the existing arrangement between Parrish and KCC. Consequently, the Court finds that because Parrish's prior engagement was fully disclosed, George Keys is disinterested and can serve as Parrish's qualified and disinterested appraiser with respect to the appraisal of the instant claim.
>
> 4. This Court finds that State Farm's arguments against Parrish's nominated appraiser, who is qualified and disinterested under Rios and Galvis to be unpersuasive and inconsistent with the holding in Brickell Harbour finding that such argument is vitiated by the appointment of an umpire pursuant to the terms of the Policy.
>
> 5. Further, this Court rejects State Farm's request that this Court extend the specific holding in Florida Insurance Guaranty Association v. Branco, 148 So. 3d 488 (Fla. 5th DCA 2014) to apply to the relationship of an insured and a licensed public adjuster serving as a qualified disinterested appraiser. The holding in Branco was predicated on the existence of a confidential, attorney-client relationship. The Court finds no such relationship present between Parrish and KCC in this instance which would permit the application of the holding in Branco. Further, State Farm has failed to demonstrate a valid legal reason to preclude KCC from serving as a qualified and disinterested appraiser for Parrish.

(R. 114-15).

The order both denied State Farm's Petition to Compel Appraisal with Disinterested Appraiser and dismissed it "in its entirety" (rendering it a final

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order). (R. 115-16). The order further directs that the appraisal process proceed "with Mr. George Keys of [KCC]" serving as Parrish's appraiser. (R. 116).

State Farm's timely appeal follows. (R. 119-25).

SUMMARY OF THE ARGUMENT

The words in an insurance contract must be upheld if clear and courts have no authority to rewrite the contracts, add meaning not present, or otherwise reach results contrary to the intentions of the parties. Here, the trial court erred in denying State Farm's Petition because the undisputed facts compel the conclusion that George Keys cannot serve as Parrish's "disinterested" appraiser as required by the insurance contract. George Keys is the president of KCC which Parrish hired to act as his public adjuster to further his interests in connection with his property damage claim. KCC was contractually and legally obligated to inspect the loss, prepare a written estimate and present it to State Farm, and negotiate the amount of loss with State Farm on Parrish's behalf. (R. 8, 25, 29-30).

Pursuant to its public adjusting responsibilities imposed by contract as well as chapter 626, Florida Statutes and rules in the Florida Administrative Code, KCC formed a fiduciary and agency relationship with Parrish. Because Mr. Keys' company, KCC, is Parrish's fiduciary, has contracted to adjust this loss on behalf of Parrish, inspected and evaluated the loss, prepared a written estimate, and is

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entitled to a percentage of the insurance proceeds, KCC and its principals are biased partisans, and their role in the adjustment process is fundamentally inconsistent with their ability to serve as Parrish's "disinterested" appraiser. These facts bring this matter squarely within the rationale applied by the Fifth District Court of Appeal in *Branco*, 148 So. 3d 488, where the Court held that the existence of a fiduciary duty "between a litigant and its appraiser creates too great a likelihood that the appraiser will be incapable of rendering a fair judgment." *Id.* at 495. In fact, KCC's competing estimate is what gives rise to the amount-of-loss dispute that makes appraisal appropriate in the first place—such that to allow KCC to simply reaffirm existing work product is to defeat the very purpose of the provision's "disinterested" requirement.

Importantly, State Farm's objection to KCC serving as Parrish's appraiser is *not solely* because of its 10% interest in the insurance proceeds that Parrish will recover, although this pecuniary interest in the insurance claim certainly supports its "interest." No Florida case—including the Third District's decisions in *Rios* and *Galvis*—has considered the quantum of evidence bearing on a chosen appraiser's "interest" present here. *Rios* and *Galvis* did not involve public adjusters at all and as recognized in *Branco*, relied heavily on the Code of Ethics for Arbitrators in a manner that is now outdated, if it was even applicable to appraisal to begin with.

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The trial court's exclusive reliance on the Third District's decision in *Brickell Harbour* was error. Like *Rios* and *Galvis*, *Brickell Harbour* did not concern the unique public adjusting context. The "disclosure" approach endorsed in *Brickell Harbour*, fully embraced by the trial court here, is inapposite and must be rejected by this Court. Simply, the "disclosure" approach was antiquated, undercut by changes in the law post-*Rios* and *Galvis*, and not a categorical bar to challenging an opposing party's selected appraiser who fails to satisfy a bargained-for, contractual requirement. Finally, the trial court's acceptance of *Brickell Harbour*'s "umpire" logic was also flawed. Falling back on the umpire to resolve *interested* appraisers' disagreements places the cart before the horse and is not cause to disregard the *initial* requirement that the *appraisers* be "disinterested." In fact, the insurance contract imparts the *same* requirements for *both* the appraisers *and* the umpire: That they be "qualified" and "disinterested." (R. 40).

Because the undisputed facts mandate the conclusion that George Keys or any other representative of KCC do not qualify as a "disinterested" appraiser, State Farm respectfully requests that this Court reverse the denial of its Petition and remand with directions for Parrish to select a "disinterested" appraiser.

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ARGUMENT

THE TRIAL COURT ERRED IN DENYING STATE FARM'S PETITION BECAUSE KCC CANNOT SERVE AS PARRISH'S "DISINTERESTED" APPRAISER AS REQUIRED BY THE INSURANCE CONTRACT

The trial court erred in denying State Farm's Petition because the undisputed facts demonstrate that neither George Keys nor his public adjusting firm, KCC, qualify as a "disinterested" appraiser as required by the insurance contract between State Farm and Parrish. State Farm requests that this Court reverse the Order with directions that State Farm's Petition be granted, and direct Parrish to select a disinterested appraiser so that the appraisal of his insurance claim may proceed.

A. Standard of Review

The trial court issued its decision directly on the merits of State Farm's Petition and Parrish's response, adjudicating the matter as a question of law based upon undisputed facts. Therefore, the standard of review is *de novo*. *See generally Morris v. Muniz*, 252 So. 3d 1143, 1155 (Fla. 2018) (approving statement that "questions of law 'arising from undisputed facts' are reviewed de novo"); *see also Fla. Ins. Guar. Ass'n v. Branco*, 148 So. 3d 488, 495 (Fla. 5th DCA 2014) (reviewing de novo whether, on undisputed facts, an appraiser was "disinterested" as required by insurance policy).

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B. Insurance Contract Principles from the Florida Supreme Court

The Florida Supreme Court has held "[i]nsurance contracts are construed according to their plain meaning. Ambiguities are construed against the insurer and in favor of coverage." *Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.*, 913 So.2d 528, 532 (Fla.2005). Here, there has been no claim of ambiguity by either party. Furthermore, courts have no authority to "rewrite contracts, add meaning that is not present, or otherwise reach results contrary to the intentions of the parties." *Intervest Const. of Jax, Inc. v. Gen. Fid. Ins. Co.*, 133 So. 3d 494, 497 (Fla. 2014).

C. Parties are Free to Contract for Disinterested Appraisers

Florida law is clear that State Farm and Parrish, the parties to the insurance policy, were free to contract for the qualifications of the decision makers in their preferred form of alternative dispute resolution. *Fla. Ins. Guar. Ass'n v. Branco*, 148 So. 3d 488, 495 (Fla. 5th DCA 2014). "Appraisals are creatures of contract and the subject or scope of appraisal depends on the contract provisions." *Id.* at 491. Here, upon either party's invocation of appraisal, the parties contracted for the other's appraiser to be "disinterested." (R. 40). This provision "expresses the parties' clear intention to restrict appraisers to people who are, in fact, disinterested." *Id.* at 496.

D. Meaning of Disinterested

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Thus, it is appropriate to consider the meaning or definition of "disinterested." The Fifth District Court of Appeal deemed "disinterested" to mean an unbiased and objective individual without an interest or stake in the matter, especially a pecuniary or financial interest. *Branco*, 148 So. 3d at 496 n.9 (defining "disinterested" as "[f]ree from bias, prejudice, or partiality; not having a pecuniary interest . . . not having the mind or feelings engaged: not interested . . . free from selfish motive or interest: unbiased . . . the quality of being objective or impartial."); *accord Smith v. DeParry*, 86 So. 3d 1228, 1235 (Fla. 2d DCA 2012) (applying the same definition of "disinterested").[2]

E. Most Instructive Authority is Branco from the Fifth District

Branco—not *Brickell Harbour*—is the most instructive authority on the narrow issue before this Court. In *Branco*, the insureds nominated one of their own

[2] Other states define "disinterested" similarly. *See, e.g.*, *Tiger Fibers, LLC v. Aspen Specialty Ins. Co.*, 571 F. Supp. 2d 712, 716 (E.D. Va. 2008) (defining "disinterested" as "lacking or revealing lack of interest," "not influenced by regard to personal advantage," "free from selfish motive," or "not biased or prejudiced"); *Cent. Life Ins. Co. v. Aetna Cas. & Sur. Co.*, 466 N.W.2d 257, 261 (Iowa 1991) ("[W]e have defined a disinterested person to be one without a pecuniary interest."); *Phoenix Assur. Co., Ltd. of London v. Davis*, 67 F.2d 824, 825 (5th Cir. 1933) ("But the agreement in the policy was to submit the matter to 'competent and disinterested appraisers' which . . . excludes not merely pecuniary interest but also bias and prejudice, and is designed to secure a tribunal acting in a quasi-judicial capacity free from partisanship and seeking to do equal justice . . . ."); *N. Assur. Co., Ltd. of London v. Melinsky*, 213 N.W. 70, 71 (Mich. 1927) ("The [appraisers] selected to act should be indifferent between the parties.").

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attorneys as an appraiser in a sinkhole loss claim. *Id.* at 494. The Fifth District observed that attorneys share "confidential relationship[s]" with their clients and owe them "fiduciary dut[ies] of loyalty." *Id.* at 495. The Court held that if an appraiser owes his nominating party a "fiduciary duty of loyalty" or a "confidential relationship," as do attorneys, then "[t]he existence of such a relationship between a litigant and an [appraiser] creates too great a likelihood that the [appraiser] will be incapable of rendering a fair judgment." *Id.* (citation omitted). *Branco* held that attorneys may not serve as their clients' "disinterested" appraisers because such a role was fundamentally inconsistent with "the duty of loyalty owed by an attorney to a client" and observed that "[t]his conclusion makes common sense." *Id.*

As it relates to a contracting party's obligation to select an appraiser that is "disinterested," there is no reason to treat the public adjuster-insured relationship differently from an attorney-client relationship.[3] Public adjusters fill a unique role in Florida law. By definition, a public adjuster is a person who, for money, commission, or other thing of value, directly or indirectly prepares, completes, or files an insurance claim for an insured or who, for such pecuniary compensation,

[3] In its Order here, the trial court found "no such [confidential, attorney-client] relationship present between Parrish and KCC . . . which would permit the application of the holding in *Branco*." (R. 115). This somewhat myopic finding ignored the thrust of the analogy, as well as State Farm's citation to Fla. Admin. Code R. 69B-220.201 in its Petition. (R. 14).

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aids an insured in negotiating for or effecting the settlement of a claim for a covered loss. § 626.854(1), Fla. Stat.

Like attorneys, public adjusters are regulated by Florida law and owe a fiduciary duty to act in the client's best interest. *See* § 626.854, Fla. Stat.; Fla. Admin. Code R. 69B-220.201(3) (2015) ("The work of adjusting insurance claims engages the public trust. An adjuster shall put the honest treatment of the claimant above the adjuster's own interests in every instance.") *Id.* 69B220.201(3)(c) ("An adjuster shall not approach investigations, adjustments, and settlements in a manner prejudicial to the insured."). A public adjuster represents a client in a matter requiring the exercise of ethical duties in favor of the client, and the public adjuster's expertise.[4] *See Panama City Beach Condos, Ltd. P'ship v. Adjusters Int'l Colo., Inc.*, No. 4:080cv369-RH-WCS, 2009 WL 10674033 (N.D. Fla. July 28, 2009). As one significant example, a public adjuster "shall not accept a settlement of a claim unless the terms and conditions of the settlement are approved by the insured or claimant." Fla. Admin. Code. R. 69B-220.051(7).[5]

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[4] Parrish directed State Farm to include KCC as a joint payee on all proceeds, which in turn, gives KCC some responsibility for ensuring that funds belonging to Parrish are property distributed to him. (R. 25, 28). This supports the existence of a fiduciary relationship.

[5] This duty, alone, precludes a public adjuster from estimating or setting the amount of loss in a "disinterested" manner. It is neither possible nor consistent with the

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F. Fiduciary Relationship of Public Adjuster to the Insured

All this neatly fits with the characterization of a fiduciary relation as trust and confidence being reposed in one party that is accepted by the other. *See generally Prescott v. Kreher*, 123 So. 2d 721, 727 (Fla. 2d DCA 1960). Thus, the rules that public adjusters are bound to follow create a duty of loyalty flowing from public adjuster to represented insured.

Additionally, as State Farm argued in its Petition (R. 15), there is an undeniable agency relationship between public adjuster and insured—meaning that all actions of KCC are cloaked with Parrish's direction. *See, e.g.*, *Maxwell First United Bank*, 782 So. 2d 931, 933 (Fla. 4th DCA 2001) (noting that a fiduciary, principal/agent relationship may be created by contract); *Johnson v. Estate of Fraedrich*, 472 So. 2d 1266, 1268 (Fla. 1st DCA 1985) ("An act done by an agent on behalf of the principal within the scope of the agency is not the act of the agent but of the person by whose direction it is done."). As such, disqualification of an insured's public adjuster from serving as his appraiser when the insured is contractually bound to select a "disinterested" appraiser falls squarely within *Branco*'s rationale.

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policy's "disinterested" requirement for the appraisers to "set the amount of loss" when one of the appraisers is ethically obligated to consult with the insured, and subject to his or her veto power, before they may do so.

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Florida law also requires that "[e]ach public adjuster . . . provide to the claimant or insured a written estimate of the loss to assist in the submission of a proof of loss or any other claim for payment of insurance proceeds." § 626.854(11), Fla. Stat. Here, besides their purely legal duties to Parrish which preclude a finding of "disinterestedness," Mr. Keys and KCC are not disinterested because of their extensive *pre-appraisal* involvement in the claim and familiarity with the loss. KCC has previously inspected the loss, formed preconceived opinions regarding the amount of Parrish's damages, and quantified the damages in the form of a written estimate for $495,079.25 that it furnished to State Farm and, as part of its advocacy and negotiation efforts on Parrish's behalf, used to assist him "in the submission of [his] proof of loss" (a policy requirement binding Parrish). *Id.* (R. 29-30).

Indeed, KCC's estimate gave rise to the "amount of loss" dispute making the invocation of appraisal by both parties appropriate in the first place. Having already inspected the loss and prepared a written estimate, there is no reason to believe that Keys Claim Consultants or its representatives will stray from their existing work product and approach the alternative dispute resolution with a fresh perspective, as the "disinterested" appraiser requirement contemplates.

G. Persuasive Federal Authority in Verneus

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This discrete problem was expertly evaluated by a federal magistrate judge in *Verneus v. Axis Surplus Insurance Co.*, No. 16-21863-CIV-Martinez/Goodman, 2018 WL 3417905 (S.D. Fla. July 13, 2018). There, a court order required both parties to select "impartial" appraisers—but the insured selected her public adjuster who had originally scoped the loss and submitted his estimate to the insurer. Agreeing with the insurer's contention that the public adjuster was not impartial, the Court observed:

> Simply put, Boaziz was involved in the initial appraisal of the damages caused by the subject fire, so he has an interest in giving a second appraisal that does not differ much from his first. . . .
>
> . . . .
>
> . . . Boaziz is the appraiser who already examined the property and prepared the demand for payment for Verneus. He is the one who submitted Verneus's scope of loss to the defendant insurer, Axis. So he has an interest to protect. As a professional who presumably values his reputation, Boaziz is unlikely to reach a conclusion as an appraiser that is significantly different from the work product he already produced.

Id. at *1, *6 [emphasis added].

After the magistrate judge disqualified the insured's public adjuster as not "disinterested," the insured boldly selected her expert witness, Al Brizuela, as her "disinterested" appraiser. *Verneus v. Axis Surplus Ins. Co.*, No. 16-21863-Civ-Martinez/Goodman, 2018 WL 4150933 (S.D. Fla. Aug. 29, 2018). The magistrate

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rejected this attempt, too, because like the public adjuster, the expert had previously inspected the loss and formed an opinion on the damages' scope:

> In this case, as a paid expert for Verneus, Brizuela has already taken a position about the cause of the damages and the scope of the damages. If chosen as the appraiser, then Brizuela would be tasked with doing so again—but, this time, he would also [be] wearing the hat of an impartial appraiser, rather than one of a party-retained expert. Yet he is unlikely to adopt a different opinion merely because he is now appointed as an appraiser. To the contrary, it seems likely that he would want to maintain his earlier opinion, especially because experts rely in significant part on their reputations, reliability, and consistency.

Id. at *3.

H. Verneus Mirrors this Appeal

Like both the public adjuster and the expert witness in *Verneus*, KCC has inspected the loss and prepared a written estimate of the damages that it has used in support of Parrish's insurance claim. As the magistrate in *Verneus* correctly observed, a person or entity who has so acted is unlikely to reach new or different conclusions. *See id.* Avoiding this type of bias is among the policy's most compelling reasons for requiring that appraisers be "disinterested."

Additionally, KCC or its representatives cannot serve as a "disinterested" appraiser because KCC is entitlement to a 10% contingency fee of any insurance proceeds recovered by Parrish after October 23, 2017. (R. 25). (Notably, the

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"contingency" has already vested, as the record reflects that State Farm will pay Parrish some amount of insurance proceeds on his claim). Even in *Brickell Harbour*, the Third District did not discount that "[t]he existence of a contingent fee payable to the party-appointed appraiser has been identified as a 'factor' in assessing partiality." *Brickell Harbour*, 256 So. 3d at 248 n.4 (quoting *Verneus*, 2018 WL 3417905).

I. Other Analogous Legal Contexts Reject Partiality and Financial Interest

In many analogous legal situations requiring an arbiter to be impartial, a financial interest in the dispute's outcome is disqualifying. *See Weinger v. State Farm Fire & Cas. Co.*, 620 So. 2d 1298, 1298 (Fla. 4th DCA 1993) (agreeing that "[a] 'neutral' umpire could hardly be neutral when he had a continuing financial relationship with the appellee"); *State v. Chillingworth*, 116 So. 633, 634-35 (Fla. 1928) ("The interest which disqualifies a judge is a direct pecuniary or a direct property interest . . . in the subject-matter of the litigation . . . . [T]he degree of the interest is immaterial . . . the court will not inquire into the effect it will have upon his ruling."); *see also Cent Life Ins. Co.*, 466 N.W.2d at 261 ("Due to the contingent fee arrangement, Central's appraiser was interested because he had a direct financial interest in the dispute.").

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Concluding that KCC's financial interest in the appraisal's outcome negates its claimed "disinterest" is perfectly sensible. Self-evidently, it is in KCC's financial interest for State Farm to pay Parrish as much money as possible. Such an interest objectively incentivizes an appraiser in KCC's position to inflate the price and scope of claimed necessary repairs, and a disincentive for the appraiser to agree regarding the amount of loss before submission to the neutral umpire.

To be sure (as explained *supra*), State Farm does not rely exclusively on KCC's entitlement to a percentage of the proceeds as to why it is not "disinterested": It is but one factor. Holistically, KCC is not "disinterested" due to its pre-appraisal involvement in inspecting the loss and preparing an estimate, its advocacy role, and fiduciary duties owed to Parrish as his public adjuster, *and* its financial interest. The fact that State Farm *does not* rely exclusively on KCC's entitlement to a fee undercuts Parrish's anticipated reliance on the Third District's decisions in *Rios v. Tri-State Insurance Co.*, 714 So. 2d 547 (Fla. 3d DCA 1998) and *Galvis v. Allstate Insurance Co.*, 721 So. 2d 421 (Fla. 3d DCA 1998).

J. The Third District's Rios and Galvis are Inapplicable and Outdated

In *Rios*, an insurance policy required appraisers to be "competent" and "independent" and the insureds selected "East Coast Appraisers, Inc." as their appraiser, whose compensation was based on a contingency percentage of the

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insureds' recovery. *Rios*, 714 So. 2d at 548-49. (*Rios*, importantly, did not involve a public adjuster-insured relationship at all). The trial court compelled the insureds to produce discovery of their compensation arrangement with the appraisal company, and the insureds sought review by certiorari. *Id.* at 549.

On review, the Third District first held that the policy's use of the word "independent" did not limit the type of compensation that the insured could pay the appraisal company. Next, the Third District relied substantially on the model Code of Ethics for Arbitrators in Commercial Disputes ("Code of Ethics") to conclude that the discovery order should be quashed for "the parties [to] make the disclosures required by the Code of Ethics." *Id.* at 550. The Court observed that under that Code of Ethics, "persons who are requested to serve as arbitrators should, before accepting, disclose (1) any direct or indirect financial or personal interest in the outcome of the arbitration . . . ." *Id.* In turn, the Court held the "more workable approach" to this issue was "voluntary disclosure" to minimize a need for court rulings and ensure that opposing arbitrators are aware of financial or personal interest "before they proceed with their work." *Id.* The Third District applied the same reasoning in *Galvis*, which arose in the same procedural posture, with the only difference that the insurance policy required appraisers to be "disinterested." *Galvis*, 721 So. 2d 421.

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Rios and *Galvis* (with which this Court is free to disagree) do not control the present case for numerous reasons. First, neither *Rios* nor *Galvis* involved the public adjuster-insured relationship and related concepts of fiduciary duty at issue here. There is no indication in either case that the insured's appraiser was a public adjuster bound to advocate on the insured's behalf and subject to the ethical constraints of section 626.854 and Florida Administrative Code rules cited *supra*. And there is no indication that the selected appraisers in *Rios* or *Galvis* had any pre-appraisal involvement in assessing the loss. Second, and related, *Rios* and *Galvis* were *limited* to consideration of whether and the extent to which the appraiser's contingent-fee interest was disqualifying. In fact, the only orders before the Court for review merely compelled discovery of this financial relationship.

Even on the discrete contingency-fee issue, however, respectfully, *Rios* and *Galvis* are based on misplaced premises. *Rios* and *Galvis* not only failed to give effect to the policy's "independent" and "disinterested" requirements, but incorrectly placed substantial reliance on the Code of Ethics. There are important differences between *arbitration* and *appraisal* that the courts' analogy overlooked. *See Branco*, 148 So. 3d at 494 ("*Unlike arbitration*, '[a]ppraisal exists for a limited purpose—the determination of 'the amount of the loss.'") (emphasis added). Elsewhere, the Third District has explored these differences in detail. *Citizens*

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Prop. Ins. Corp. v. Mango Hill #6 Condo. Ass'n, Inc., 117 So. 3d 1226, 1229 (Fla. 3d DCA 2013) (stating "[t]he differences between arbitration and appraisal are well defined in this state," outlining the same, and holding that the Florida Arbitration Code did not apply to appraisals).

Moreover, even if the analogy to arbitrators' Code of Ethics was appropriate, as explained in *Branco*, *Rios*' and *Galvis*' reliance on the Code of Ethics is severely undercut in the face of 2004 changes to that model code:

> *Rios* was in large part premised on, and extensively quoted from, the then-existing version of the Code of Ethics for Arbitrators in Commercial Disputes, promulgated jointly by the American Arbitration Association ("AAA") and the American Bar Association ("ABA"). That version of the Code of Ethics did not explicitly address the neutrality of arbitrators, but simply required disclosure of any direct or indirect financial interest in the outcome of the proceeding. However, the revised Code of Ethics adopted by AAA and ABA, effective since March 1, 2004, changes the landscape considerably; thus, undercutting the continued viability of the holding in *Rios*. The current Code of Ethics provides, in relevant part:
>
> > [I]t is preferable for all arbitrators including party-appointed arbitrators to be neutral, that is, independent and impartial, and to comply with the same ethical standards. . . .
> >
> > > This Code establishes a presumption of neutrality for all arbitrators, including party-appointed arbitrators, which applies unless the parties' agreement, the arbitration rules

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> agreed to by the parties or applicable laws provide otherwise.

Branco, 148 So. 3d at 495 (quoting American Arbitration Association, *The Code of Ethics for Arbitrators in Commercial Disputes* (Oct. 21, 2011), https://www.adr.org/aaa/faces/arbitratorsmediators/aboutarbitratorsmediators/codeofethics)) (initial citation omitted).

Based on this change in the law, the Fifth District in *Branco* explained that "[u]nlike the Code of Ethics relied upon in *Rios*, the current Code of Ethics establishes a presumption of neutrality for all arbitrators, including party-appointed arbitrators. This fundamental change undermines the *Rios* holding, particularly when, as here, the contract requires the appointment of "disinterested" appraisers." 148 So. 3d at 495. The *Branco* Court is correct. Even on the contingency fee issue (which, again, is only part of State Farm's objection to KCC here), there is no reason that this district should adhere to the outdated and now-undermined reasoning of *Rios* and *Galvis*.

K. Even Brickell Harbor Compels Reversal

The Third District has continued its endorsement of the "disclosure approach" of *Rios* and *Galvis*, in a different context. *See Brickell Harbour*, 256 So. 3d at 249 (concluding that *Rios*' direction to the appraisers to make financial disclosures to each other "remains a 'workable approach to this issue'"). In

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Brickell Harbour, the insurance policy required the parties' appraisers to be "impartial." *Id.* at 246. Earlier, the insurer had appointed one Randy Ison as its appraiser. Mr. Ison was "an employee of J.S. Held, a building consultant hired by the Insurer." *Id.* at 248. The record did not indicate whether Mr. Ison was directly paid by the insurer, or whether any part of Mr. Ison's or J.S. Held's compensation involved a contingency fee. *Id.*

On appeal of an order granting the insurance company's motion to compel appraisal, the insured contended that Mr. Ison should be disqualified as not "impartial" because he was the "boss" of a J.S. Held employee who was considering the insured's claim, and the "boss" was the subject of a fraud inquiry with the Department of Financial Services. *Id.* The Third District rejected this argument because the insured's public adjuster had launched this fraud inquiry, making its contention "transparently circular" as its own actions should not be deemed to defeat Mr. Ison's impartiality. *Id.*

Next, the Third District suggested that challenges to appraisers as not "impartial" should be held in low regard due to the presence of the umpire:

> The tie-breaking third appraiser—often referred to as the "umpire" (as in the Policy before us) or "neutral"—provides the real impartiality. If an appraiser acts unprofessionally, skews what should be objective calculations regarding materials and labor costs, and puts the proverbial thumb on the scale, the umpire is the safeguard empowered to reject such efforts by

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> siding with the other party-appointed appraiser. Alternatively, a professionally-qualified umpire may negotiate one or both of the party-appointed appraisers into a reasonable compromise.

Id. at 248-49.

Finally, the Third District, based on *Rios*, concluded that "impartiality" does not mean what the dictionary says it means on the topic of appraisers, held that disclosure "remains a 'workable approach to this issue,'" encouraged the parties to make disclosures that concerned financial interest, and on the record before it, determined that the insurer's appointment of Mr. Ison did not warrant his disqualification. *Id.* at 249.

L. Florida Insurance Contract Law Requires "Disinterested" to Have Meaning

In the present case, the trial court denied State Farm's Petition because, based on *Brickell Harbour*, George Keys "is disinterested" as Parrish and KCC "disclosed to State Farm the very nature of the existing arrangement between Parrish and KCC." The trial court further found State Farm's arguments "vitiated by the appointment of an umpire pursuant to the terms of the policy." (R. 114-15). This was error for three reasons.

First, contrary to the trial court's finding, "disclosure" does not equal "disinterested" and in ruling as such, the trial court plainly rewrote the insurance contract in violation of Florida law. *Intervest Const. of Jax, Inc. v. Gen. Fid. Ins.*

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Co., 133 So. 3d 494, 497 (Fla. 2014) (a trial court may not "rewrite contracts, add meaning that is not present, or otherwise reach results contrary to the intentions of the parties."). In this context, the Third District's reliance on the pre-2004 Code of Ethics should never have occurred, only compounding a mistake that need not be furthered by this Court. From the outset, the notion that "disclosure" of an arbiter's interest in the subject matter satisfies contracting parties' agreement that their arbiters be neutral, disinterested, or impartial is unsound. The insurance contract simply does not say "disinterested, but if interested then disclose."

Rather, a disqualifying "interest"—whether disclosed or not—vitiates, not satisfies, the parties' agreement for "disinterested" appraisers. And even if citing to the Code of Ethics in the first instance was appropriate, that Code has now materially changed to render neutrality (not bias plus disclosure) as a default setting. *Branco*, 148 So. 3d at 495.

Further, if this Court were to concur with the Third District that "disclosure" has some role to play in this process, the trial court overextended the "disclosure" concept to create a categorical bar to a party's challenge to an opponent's appraiser that simply does not exist. (R. 114-15) ("[B]ecause Parrish's prior engagement was fully disclosed, George Keys is disinterested . . . ."). Not even *Brickell Harbour* equated "disclosure" with "disinterest" to the extent the trial court did here. 256

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So. 3d at 248 (refusing to disqualify Mr. Ison "on the record before" it). The first step is disclosure, then determination of whether the interest would disqualify the individual from serving.

Second, *Brickell Harbour* did not vet whether Mr. Ison was (or was not) impartial arising from the fact that his employee had considered the facts of the insured's claim. Instead, the Third District addressed and rejected this point because the insured's argument centered around a fraud inquiry launched against the employee. Here, fraud is not the issue, nor does State Farm's argument suffer from the "circularity" problem in *Brickell Harbour*. Rather, the facts surrounding KCC's involvement (George Keys' company and employees) are clear from the record and undisputed. These facts concern the uniquely disqualifying public adjuster-insured relationship, which were not present in *Brickell Harbour*.

Lastly, the Third District's reliance on the "safeguard[ing]" powers of the umpire to mediate disagreements between the appraisers—as a reason to reject insistence on compliance with contractual *appraiser* requirements—is flawed. The fact that the umpire exists to mediate disagreements between the appraisers is not license to disregard the nature of the *appraisers* that the parties bargained for. *See Yearwood v. State Farm Fla. Ins. Co.*, No. 2018-CA-8119-O (Fla. 9th Jud. Cir. Mar. 29, 2019) (rejecting this logic because "[t]he presence of one element of

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contractual language does not read out of the Policy another element of contractual language"). Here, in fact, the insurance policy uses the same phrase—"qualified, disinterested"—in relation to *both* appraisers *and* the umpire. Of course, the courts' role is to apply and enforce the language of the parties' contract, and reliance on the umpire as a reason to disregard contractual language governing appraisers places the cart before the horse and renders the parties' choice of the word "disinterested" *as it relates to appraisers* meaningless.

Thus, in summary, the trial court erred in its extensive, exclusive reliance on *Brickell Harbour* and its denial of State Farm's Petition must be reversed.

CONCLUSION

The insurance contract plainly requires Parrish to select a "disinterested" appraiser. KCC is Parrish's public adjuster and agent and owes him an ethical and fiduciary duty of loyalty as his advocate and negotiator. KCC has been involved in the insurance claim from near claim inception, having prepared an estimate to support Parrish's Sworn Proof of Loss. KCC is also entitled to a percentage-based fee of Parrish's recovery. State Farm requests that this Court reverse the trial court's Order on State Farm's Petition, direct that the Petition be granted, and direct that Parrish select an appraiser that is not affiliated with KCC who satisfies the insurance policy's "disinterested" appraiser requirement.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished via email this 22nd day of April, 2019 to: **Theodore A. Corless, Esq.** and **Mary Catherine Lamoureux, Esq.**, Corless Barfield Trial Group, 6812 W. Linebaugh Ave., Tampa, FL 33625 (service@corlessbarfield.com); **Gregory L. Evans, Esq.**, and **Alicia M. Lopez, Esq.**, Boyle, Leonard & Anderson, P.A. 2050 McGregor Blvd., Fort Myers, FL 33901 (eservice@insurance-counsel.com; gevans@insurance-counsel.com; and alopez@insurance-counsel.com).

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared in Microsoft Word, Times New Roman 14-point font and complies with the requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ Kara Berard Rockenbach
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IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

2ND DCA CASE NO.: 2D19-130
LOWER CASE NO.: 11-2018-CA-01198-0001

STATE FARM FLORIDA
INSURANCE COMPANY,

Appellant,

vs.

JON PARRISH,

Appellee.
_____/

APPELLANT'S REQUEST FOR ORAL ARGUMENT

Appellant, STATE FARM FLORIDA INSURANCE COMPANY, pursuant to Florida Rule of Appellate Procedure 9.320, respectfully requests oral argument in this appeal. In this case, the trial court, on the undisputed facts, denied State Farm's petition to declare that that Appellee's selected appraiser is not "disinterested" in the matter as required by the parties' insurance contract. State Farm believes that oral argument will assist this Court in approaching the several Florida authorities that bear upon this issue and applying them to the undisputed facts of this matter.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the attorneys listed on below on this 22nd day of April, 2019, through the Florida Courts e-filing portal pursuant to Florida Rule of Judicial Administration 2.516(b)(1): **Theodore A. Corless, Esq.** and **Mary Catherine Lamoureux, Esq.**, Corless Barfield Trial Group, 6812 W. Linebaugh Ave., Tampa, FL 33625, Email: service@corlessbarfield.com; *Counsel for Appellee*; **Gregory L. Evans, Esq.**, and **Alicia M. Lopez, Esq.,** Boyle, Leonard & Anderson, P.A., 2050 McGregor Blvd., Fort Myers, FL 33901 (eservice@insurance-counsel.com; gevans@insuranec-counsel.com; and alopez@insurance-counsel.com); and **Lynn S. Alfano, Esq.** and **Robert A. Kingsford, Esq.**, Alfano Kingsford, P.A., 1060 Maitland Center Commons Blvd., Suite 180, Maitland, FL 32751, Emails: lalfano@alfanokingsford.com and pleadings@alfanokingsford.com; *Trial Counsel for Appellant*.

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IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

2ND DCA CASE NO.: 2D19-130
LOWER CASE NO.: 11-2018-CA-01198-0001

STATE FARM FLORIDA
INSURANCE COMPANY,

Appellant,

vs.

JON PARRISH,

Appellee.
_____/

NOTICE OF AGREED EXTENSION OF TIME TO SERVE APPELLEE'S ANSWER BRIEF

Appellee, Jon Parrish, pursuant to Florida Rule of Appellate Procedure 9.300 and the Second District Court of Appeal's Administrative Order No. 2013-1, hereby states:

Appellee's Answer Brief is due on **May 22, 2019.** The undersigned has had an active schedule, including numerous trial court deadlines. Therefore, the undersigned counsel is requesting a thirty (30) day extension to serve the Initial Brief.

The undersigned, as counsel for Appellee, Jon Parrish, has agreed with, Kara Berard Rockenbach, Esq. and Daniel M. Schwarz, Esq., counsel for Appellant, State

Farm Florida Insurance Company, that the time for serving Appellee's Initial Brief may be extended for thirty (30) days to June 21, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail to the below for service and all parties listed on the Second District Court of Appeals' eDCA Portal on May 16, 2019.

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IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

Appellate Case No.: 2D19-130
LT Case No.: 11-2018-CA-01198-0001
LT Judge: Hon. Elizabeth V. Krier

STATE FARM FLORIDA
INSURANCE COMPANY,

Appellant,

vs.

JON PARRISH,

Appellee.
_____/

NOTICE OF FILING SUPPLEMENTAL AUTHORITY

Appellant, STATE FARM FLORIDA INSURANCE COMPANY ("State Farm"), files the following supplemental authority pursuant to Florida Rule of Appellate Procedure 9.225 in support of its appeal and states:

1. State Farm presents *Mina Ruiz v State Farm Florida Ins. Co.,* No. 2018-025910-CA-01, 2019 WL 2401348 (Fla. 11th Jud. Cir. May 31, 2019), rendered by the Honorable Michael A. Hanzman on May 30, 2019, as supplemental authority because of its significance to the issues argued in this appeal and discovery after service of State Farm's last brief in this appeal. (Exhibit "A").

2. The circuit court order is persuasive authority relating to the issue regarding the term "disinterested" appraiser required in State Farm's insurance

contract that governs this appeal. Specifically, the order supports State Farm's positions that (1) the holdings of *Rios v. Tri-State Ins. Co.*, 714 So.2d 547 (Fla. 3d DCA 1998) and *Galvis v. Allstate Ins. Co.*, 721 So.2d 421 (Fla. 3d DCA 1998) (or at the very least *Galvis)* have been called into question by subsequent material changes to the Code of Ethics for Arbitrators in Commercial Disputes and (2) based on this, an insured's contingency-fee retained public adjuster, who has a direct financial interest in the outcome of the appraisal is ineligible to serve as a "disinterested" appraiser.

CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing has been furnished to the attorneys listed on below on this 11th day of June, 2019, through the Florida Courts e-filing portal pursuant to Florida Rule of Judicial Administration 2.516(b)(1): **Theodore A. Corless, Esq.** and **Mary Catherine Lamoureux, Esq.**, Corless Barfield Trial Group, 6812 W. Linebaugh Ave., Tampa, FL 33625, Email: service@corlessbarfield.com; *Counsel for Appellee*; **Justin M. Thomas, Esq.**, **Gregory L. Evans, Esq.**, and **Mark A. Boyle, Esq.**, Boyle & Leonard, P.A., 2050 McGregor Blvd., Fort Myers, FL 33901 (eservice@insurance-counsel.com; jthomas@insurance-counsel.com; gevans@insuranec-counsel.com;

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IN THE CIRCUIT COURT OF THE 11th JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

Mina Ruiz

Plaintiff,

vs.

State Farm Florida Ins. Co.,

Defendant.
_____/

CIRCUIT CIVIL DIVISION
CASE NO.: 2018-025910-CA-01

ORDER

Before the Court are: (a) Defendant's "Motion to Compel Compliance with the Court's Order of December 10, 2018 Ordering the Parties to Appraisal in Accordance with the Policy, Motion to Compel the Plaintiff to Name a Qualified, Disinterested Appraiser and for Sanctions"; and (b) Plaintiff's "Motion to Compel Defendant to Comply with this Court's Order dated December 10, 2018 and for Sanctions." These cross-motions raise one issue: Is the appraiser selected by Plaintiff "disinterested" and therefore qualified to serve. For the reasons discussed herein, the Court finds that he is not and, as a result, grants Defendant's Motion (except to the extent it seeks sanctions).

I. PROCEDURAL HISTORY AND RELEVANT FACTS

On December 10, 2018, this Court entered its Order granting Defendant State Farm Florida Insurance Company's ("Defendant" or "State Farm") "Motion to Compel Appraisal and Stay Litigation," ordering both parties to proceed to

appraisal pursuant to the terms of their insurance contract.[1] On December 14, 2018 State Farm named Eduardo Goyanes, a General Adjuster employed by Sedgwick Claims Management Services, Inc., as its appraiser. Mr. Goyanes is not employed by State Farm, owes no duty of loyalty to State Farm, and has no financial stake in the outcome of the appraisal.

On January 3, 2019 Plaintiff named her proposed appraiser, Eric O. Jimenez. Mr. Jimenez is an employee of the public adjusting firm, Rapid Public Adjusters ("RPA"), retained by Plaintiff to assist her in submitting and processing the claim. The "Authority to Represent and Contingency Fee Agreement" between Plaintiff and RPA provides that RPA will "advise and assist in the adjustment and or appraisal and negotiation of his/her claim for the loss of damages caused by Hurricane Irma...." As consideration for these services Plaintiff agreed to pay RPA "10-20%" of the "proceeds of any funds received in the settlement of his/her insurance claim." The RPA contract also obligates Plaintiff to pay RPA out of any insurance proceeds

[1] The general purpose behind appraisal, an alternative dispute resolution process, is to expeditiously resolve disputed claims where coverage exists, but the parties disagree on the value of the claim. *See generally Citizens Prop. Ins. Corp. v. Mango Hill 6 Condo. Ass'n,* 117 So.3d 1226, 1230 (Fla. 3d DCA 2013) ("[a]ppraisal exists for a limited purpose - the determination of 'the amount of the loss.'"). Florida Courts prefer appraisal and other similar dispute resolution mechanisms over prolonged and unnecessary litigation. *See First Protective Ins. Co. v. Hess*, 81 So. 3d 482, 485 (Fla. 1st DCA 2011) ("[a]ppraisal clauses are preferred, as they provide a mechanism for prompt resolution of claims and discourage the filing of needless lawsuits") (citing *Fla. Ins. Guar. Ass'n, Inc. v. Olympus Ass'n, Inc.*, 34 So. 3d 791, 794 (Fla. 4th DCA 2010); *First Floridian Auto & Home Ins. Co. v. Myrick*, 969 2d 1121, 1125 (Fla. 2d DCA 2007); *New Amsterdam Casualty Co. v JH Blackshear, Inc.*, 116 Fla. 289, 291 (Fla. 1934) (appraisal clauses "are valid and are binding upon the parties if they are appropriately invoked"); *Preferred Mut. Ins. Co. v. Martinez*, 643 So. 2d 1101, 1102 (Fla. 3d DCA 1994) ("courts have construed appraisal provisions in insurance policies and have treated these provisions as arbitration provisions"); *State Farm Fire & Cas. Co. v. Middleton*, 648 So. 2d 1200, 1201-02 (Fla. 3d DCA 1995); *Soler v. Secondary Holdings, Inc.*, 771 So. 2d 62 (Fla. 3d DCA 2000); *State Farm Fire & Cas. Co. v. Middleton*, 648 So. 2d 1200, 1201 (Fla. 3d DCA 1995); *EMSA Ltd Partnership v. Mason*, 677 So. 2d 105, 107 (Fla. 4th DCA 1996).

"any cost associated with services (*i.e.* appraiser, general contractor...) rendered to settle his/her claim."

Based on the disclosure of financial interest by Mr. Jimenez (his employer RPA will receive a percentage of the appraisal award) State Farm objected to his selection and asked Plaintiff to name a "qualified, disinterested appraiser" as mandated by the insurance contract. Plaintiff politely declined that invitation and insisted that Mr. Jimenez was competent to serve, prompting the filing of the pending cross-motions. So the question presented is again singular and simple. Does Mr. Jimenez fit the definition of a "qualified disinterested appraiser"?

II. ANALYSIS

An insurance policy is a contract, and sitting both as an associate appellate and circuit judge this Court has written, time and time again, that "contracts are voluntary undertakings, and contracting parties are free to bargain for – and specify – the terms and conditions of their agreement." *Okeechobee Resorts, LLC v. E Z Cash Pawn, Inc.*, 145 So.3d 989, 993 (Fla. 4th DCA 2014); *City of Pompano Beach v. Beatty*, 222 So. 3d 598, 600 (Fla. 4th DCA 2017); *Sky Bell Asset Mgmt., LLC And Sky Bell Select, L.P., vs. National Union Fire Ins. Co. of Pittsburgh, P.A.*, 23 Fla. L. Weekly Supp. 535a (11th Jud. Cir., Dec. 17, 2015); *DePrince v. Starboard,* 23 Fla. L. Weekly Supp. 1022 (11th Jud. Cir., April 7, 2016; *JDJ of Miami, Inc., v. Valdez, et. al.*, 23 Fla. L. Weekly Supp. 1026 (11th Jud. Cir., March 23, 2016); *Regalia Beach*

Developers, LLC, vs. MVW Mgmt. LLC, 24 Fla. L. Weekly Supp. 286 (11th Jud. Cir., June 30, 2016). Put another way, "[c]ontracting parties are at liberty to address any issue they see fit ...," *Perera v. Diolife LLC*, 44 Fla. L. Weekly D1067 (Fla. 4th DCA Apr. 24, 2019), and when they do so the Court's task is "to enforce the contract as plainly written." *Okeechobee Resorts, L.L.C, supra* at 993; *Gulliver Sch., Inc. v. Snay*, 137 So. 3d 1045, 1047 (Fla. 3d DCA 2014).

Like any contract an insurance policy must be interpreted in accordance with its plain and ordinary meaning. *See, e.g., Fayad v. Clarendon Nat. Ins. Co.*, 899 So. 2d 1082 (Fla. 2005) ("insurance contracts are construed in accordance with "the plain language of the polic[y] as bargained for by the parties"). *Anthony v. Anthony*, 949 So. 2d 226 (Fla. 3d DCA 2007) (courts must enforce clear and unambiguous contract terms); *Kel Homes, LLC v. Burris*, 933 So. 2d 699, 702 (Fla. 2d DCA 2006) ("words in a contract are presumed to have been used with their ordinary and customary meaning"). And when terms or words in a contract are not defined, a court will look "to the dictionary" in order to ascertain that "plain and ordinary meaning." *Beans v. Chohonis*, 740 So. 2d 65, 67 (Fla. 3d DCA 1999); *citing City of Miami Beach v. Royal Castle System, Inc.,* 126 So.2d 595 (Fla. 3d DCA 1961). Though the insurance contract at issue here does not define the phrase "qualified, disinterested appraiser," or the word "disinterested," that word is generally defined as "[f]ree from self-interest; having no personal interest or private advantage in a

question or affair; not influenced or dictated by private advantage; unselfish; uninterested." *Webster's Encyclopedia Dictionary* (1980 Ed). *See also Black's Law Dictionary* (5th Edition 1979) defining "disinterested" as: "not concerned, in respect to a possible gain or loss in the result of the pending proceedings or transaction." *Id.*

This definition – as well as common sense – leads to the inexorable conclusion that an appraiser whose employer stands to gain financially in direct proportion to the size of an award is clearly not "disinterested," as they have a "personal interest" in the appraisal "affair," *Webster, supra,* and are obviously "concerned in respect to a possible gain or loss in the result of the [proceeding]." *Blacks, supra.* Indeed, this Court is at a loss to see how one could argue or conclude otherwise, as the plain, obvious and rational meaning of the word "disinterested" undoubtedly excludes an appraiser who stands to gain financially from the award; a conclusion any reasonable lady or "man-on-the-street" would reach without hesitation. *See, e.g., State Farm Fire & Cas. Co. v. Castillo,* 829 So. 2d 242 (Fla. 3d DCA 2002) ("[i]n accordance with well-established rules of interpretation, terms utilized in an insurance policy should be given their plain and unambiguous meaning as understood by the 'man-on-the-street'"). Put another way, it does not take the proverbial "Philadelphia Lawyer" to figure out that one who has a financial stake in the outcome of a proceeding is not "disinterested" in it. *Warter v. Bancroft Hotel*

Associates, 285 So. 2d 676, 678 (Fla. 3d DCA 1973) ("astuteness of the proverbial 'Philadelphia Lawyer' was not required to determine" intent of the parties).

Notwithstanding how open and shut this Court believes the question to be, Plaintiff claims that our appellate court has concluded otherwise no less than three times. *See Rios v. Tri-State Ins. Co.*, 714 So. 2d 547 (Fla. 3d DCA 1998); *Galvis v. Allstate Ins. Co.*, 721 So. 2d 421 (Fla. 3d DCA 1998); *Brickell Harbour Condo. Ass'n, Inc. v. Hamilton Specialty Ins. Co.*, 256 So. 3d 245 (Fla. 3d DCA 2018). State Farm insists that these decisions are either distinguishable or no longer controlling, as subsequent revisions to the Code of Ethics for Arbitrators in Commercial Disputes promulgated jointly by the American Arbitration Association (AAA) and American Bar Association (ABA) (Code of Ethics) have drastically altered the relevant landscape. State Farm also says that the Third District's decisions in *Rios* and *Galvis* do not address the "fiduciary duty of loyalty argument" made by State Farm here and embraced by the Fifth District in *Florida Ins. Guar. Ass'n v. Branco*, 148 So. 3d 488 (Fla. 5th DCA 2014) – a case State Farm suggests is persuasive and meaningfully indistinguishable from the situation at hand.

In *Rios*, the first relevant reported decision, our appellate court addressed the requirement that each party select "a competent, independent appraiser." 714 So. 2d at 548. The insured had designated East Coast Appraisers, Inc., an entity that would "be compensated based on a contingency percentage of the award." *Id.* at 549. In

addressing the question of whether that appraiser was qualified the court first noted that the parties were free "to specify the credentials of party-appointed appraisers," and that they had done so, albeit in a policy which – like the present policy – contained "no definition" of the operative term. *Id.* The court therefore looked to the dictionary definition of "independent" and concluded that the contract language used called for the "appointment of an outside appraiser, unaffiliated with the parties." *Id.* Rejecting the carrier's claim that a "direct financial interest in the award" rendered the proposed appraiser "not independent," the *Rios* court pointed out that: (a) the contract did not limit the type of compensation which may be paid; and (b) the "[t]he insurance policy must be read favorably to the insured." *Id.*

Aside from a pure contract/definitional analysis, the *Rios* court also emphasized that the then existing Code of Ethics required that persons requested to serve as arbitrators disclose "any direct or indirect financial or personal interest in the outcome of the arbitration...." *Id.* at 550. According to the *Rios* court "[t]he balance struck by the Code is that such an interest will not be a basis for disqualification, but it must be disclosed so that the other arbitrators are aware of it before they proceed with their work." *Id.*

This Court takes no issue with *Rio*s and finds that it actually supports State Farm's position here, as the contract *sub-judice* does not merely require independence – it requires disinterest, terms that are not necessarily synonymous.

And in this case there is no doubt that Mr. Jimenez is "interested" in the outcome. Thus, applying the contract/definitional principles embraced by the *Rios* court (and all other courts interpreting an insurance policy or other contract) these parties were "free" to bargain for "the credentials of [their] party-appointed appraisers," and they placed a reasonable and rational qualification on eligibility to serve. That bargain should be honored. *See also Lee v. Marcus*, 396 So. 2d 208 (Fla. 3d DCA 1981) (parties may by contract place words of limitation on the identity, status, or qualifications of arbitrators).

Though *Rios* itself presents no problem, four months later the Third District issued its single paragraph opinion in *Galvis v. Allstate Ins. Co.*, 721 So. 2d 421 (Fla. 3d DCA 1998), a case involving an appraisal clause that – like the clause here – required each party to select a "competent and disinterested," not merely an "independent," appraiser. *Id.* In holding that the insureds "contingent-fee appraiser" was qualified, the court found that this distinction made no "legal difference," quashed the order under review, and directed that the parties make the disclosure required by the Code of Ethics. *Id.* So *Galvis*, following the lead of *Rios*, relied heavily upon that then existing Code.

As brief as it may be – and as much as this Court may disagree with it – *Galvis* is controlling unless subsequent events or legal developments call its holding into serious question. *See, e.g., State v. Washington*, 114 So. 3d 182 (Fla. 3d DCA 2012)

("[w]hile a lower court is free to disagree and to express its disagreement with an appellate court ruling, it is duty-bound to follow it"). Claiming that such is the case, and that *Galvis* is no longer good law, State Farm relies heavily upon *Florida Ins. Guar. Ass'n v. Branco*, 148 So. 3d 488 (Fla. 5th DCA 2014), and suggests that: (a) an argument made there – but not in *Rios* or *Galvis* – should carry the day; and (b) subsequent changes to the Code of Ethics enacted post *Rios* and *Galvis* undermine the holdings in these cases.

In *Branco* the insured selected "a partner in the law firm representing them as their appraiser," notwithstanding a contractual requirement that appointees be "disinterested." *Id.* at 490. Concluding that an attorney representing the insured was clearly "interested" and hence disqualified, the *Branco* court – like the *Rios* court – first observed that parties "are free to contract for the qualifications of the decision makers in their preferred form of alternative dispute resolution." *Id.* at 495. The court then eschewed the insured's reliance on *Rios* and *Galvis,* emphasizing that these decisions were "in large part premised on, and extensively quoted from, the then existing version of the Code of Ethics," which at the time "did not explicitly address the neutrality of arbitrators, but simply required disclosure of any direct or indirect financial interest in the outcome of the proceeding." *Id.* The court then pointed out that the Code has since been revised and now establishes a "presumption of neutrality for all arbitrators, including party-appointed arbitrators, which applies

unless the parties' agreement, the arbitration rules agreed to by the parties or applicable laws provide otherwise." *Id.*, citing AAA, the *Code of Ethics for Arbitrators in Commercial Disputes* (Oct. 21, 2011). In the *Branco* court's view this revision changed the "landscape considerably, thus, undercutting the continued viability of the holding in *Rios*" (and by extension *Galvis*), particularly in circumstances where the parties' "contract requires the appointment of 'disinterested' appraisers." *Id.* at 495.

Applying the plain meaning of the contract before it, the *Branco* court concluded that the appraisal provision, which required "disinterested" fact finders, expressed the parties "clear intention to restrict appraisers to people who are, in fact, 'disinterested.'" *Id.* at 496. And if an appraiser – such as the attorney selected by the Brancos – owes his nominating party a "fiduciary duty of loyalty," or has a "confidential relationship" with that party, he is not – in the *Branco* court's view – disinterested. This Court agrees because, as one court put it, "[t]he existence of such a relationship between a litigant and an arbitrator creates too great a likelihood that the arbitrator will be incapable of rendering a fair judgment." *Donegal Ins. Co. v. Longo*, 610 A.2d 466, 469 (1992). The same can be said for an appraiser who has a direct financial interest in the outcome of the proceeding.

Since *Branco* our appellate court has had one other occasion to address this issue. In *Brickell Harbour, supra,* the policy in question required the appointment

of a "competent and impartial appraiser." 256 So. 3d at 246. The insured appointed an employee of J. S. Held, a building consultant it had hired. But unlike the situation in *Rios* and *Galvis*, there was no "indication in the record" that any part of appraiser's [or his employer's] compensation for work on the appraisal or the [Plaintiff's] claim would include a contingent fee. *Id.* at 248. Under those circumstances the court concluded that the disclosure protocol adopted in *Rios* remains a "workable approach to this issue," *Id.* at 249, and that on "the record before it" the "appointment of Mr. Ison did not warrant disqualification." *Id.* The Court did, however, cite with approval *Verneus v. Axis Surplus Ins. Co.*, 16-21863-CIV, 2018 WL 3417905 (S.D. Fla. July 13, 2018), which found that the existence of a contingency fee payable to a party appointed appraiser is a "factor" in assessing partiality. And the *Brickell Harbour* court again emphasized that the appraiser had no financial stake in the outcome (*i.e.,* contingency fee).

Upon a careful review of these decisions, the Court believes that in a case such as this where: (a) the contract requires the appointment of "disinterested" appraisers; and (b) a party appoints someone with a direct financial interest in the outcome, our appellate court would no longer continue to follow *Galvis* due to the material changes that have been made to the Code of Ethics and the increasing role appraisal clauses now play. Unlike in 1998, this alternate dispute resolution mechanism is now found in virtually all property insurance policies, and the decision

of appraisers on scope and pricing is – for all practical purposes – final and binding on the parties. Given this reality, and the outcome-determinative nature of the appraisal process, parties should be free to contract for "disinterested" appraisers, and one who has a direct financial interest in the outcome of a case is – by definition – not disinterested. To the contrary, one who has a financial interest in the outcome of an adversary proceeding, including one adjudicated via a form of alternative dispute resolution, is the antithesis of disinterested.

In this Court's view this case presents nothing more than a "run-of-the-mill" question of contract interpretation and it is not a close call. And while *Galvis* would obviously be binding precedent, the Court again agrees with the *Branco* court that its holding has been undermined by material changes in the Code of Ethics upon which the *Rios* court, and *Galvis* as its progeny, relied heavily in reaching their decisions. Given those significant (and in the Court's view warranted) changes, the Court believes that our appellate court would now sanction the disqualification of an appraiser who has a direct financial interest in the outcome of a case where, as here, the parties bargained for "disinterested" fact finders.

III. CONCLUSION

This Court fully understands and appreciates that our judicial system is built on a vertical hierarchy, and it would never fail to apply precedent out of mere disagreement – however strong that disagreement might be. But like the *Branco*

court, this Court is convinced that the holdings of *Rios* and *Galvis* (or at the very least *Galvis*) have been called into question by subsequent material changes to the Code of Ethics, and that our appellate court – like the *Branco* court – would apply that existing Code (just as it applied it in *Rios*) and conclude that one who has a direct financial stake in the proceeding may not serve when the parties' contract mandates appointment of "disinterested" arbiters.

Even putting aside the fact that the parties bound themselves to this qualification, the Court sees no reason why appraisal/arbitration proceedings should be tainted by self-interest – a taint that infects any outcome and – equally importantly – undermines the public's respect for, and confidence in, this adversarial process. Where parties have expressly agreed to have a dispute decided by neutral fact finders, courts should enthusiastically enforce that agreement – not look for ways to thwart it through over analysis and judicial wheel-spinning. Indeed, the Court finds it ironic that for over fifty years we (meaning the judiciary) have chastised insurance carriers for failing to draft policies "so that the average person can clearly understand" them, and have repeatedly warned that if policies continue to be "drawn in such a manner that it requires the proverbial Philadelphia Lawyer to comprehend the terms" the judiciary will continue to construe them liberally in favor of insureds. *Hartnett v. S. Ins. Co.*, 181 So. 2d 524, 528(Fla. 1965). Then when a carrier heeds that warning, and drafts a plain term understandable to any common

man, we dance on the head of a pin in a struggle to "interpret" that which needs no interpretation.

The bottom line is that these parties bargained for "disinterested" appraisers and this Court will enforce that bargain as clearly written – no more or less. And while the Court understands that it may be going out on a limb by concluding that the rationale underlying *Galvis* no longer holds, and that this decision is therefore not controlling, it has never embraced the philosophy that "if you don't throw it, they can't hit it."[2] So if my judicial colleagues on a higher court conclude that Plaintiff's appraiser is disinterested despite his employer's direct financial interest in the outcome of the proceeding, and this Order gets "hit," so be it. But the Court is convinced – beyond *any* doubt – that permitting Plaintiff's proposed appraiser to serve would run afoul (and amount to a judicial re-write) of the parties' contract.

For the foregoing reasons it is hereby **ORDERED**:

1. Defendant's Motion is **GRANTED** in part. Plaintiff shall select a "disinterested" appraiser within twenty (20) days of this Order.
2. Plaintiff's Motion is **DENIED**.
3. Both parties' motions for sanctions are **DENIED**.

[2] A quote attributable to the great Yankee pitcher, Lefty Gomez.

DONE and **ORDERED** in Chambers at Miami-Dade County, Florida on this 30TH day of May, 2019.

MICHAEL A. HANZMAN
Circuit Court Judge

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IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

2ND DCA CASE NO.: 2D19-130
LOWER CASE NO.: 11-2018-CA-01198-0001

RECEIVED, 06/17/2019 02:02:30 PM, Clerk, Second District Court of Appeal

STATE FARM FLORIDA
INSURANCE COMPANY,

Appellant,

vs.

JON PARRISH,

Appellee.
_____/

NOTICE OF AGREED EXTENSION OF TIME TO SERVE APPELLEE'S ANSWER BRIEF

Appellee, Jon Parrish, pursuant to Florida Rule of Appellate Procedure 9.300 and the Second District Court of Appeal's Administrative Order No. 2013-1, hereby states:

Appellee's Answer Brief is due on **June 21, 2019.** The undersigned is requesting an additional twenty (20) days to file Appellee's Answer Brief.

The undersigned, as counsel for Appellee, Jon Parrish, has agreed with, Kara Berard Rockenbach, Esq. and Daniel M. Schwarz, Esq., counsel for Appellant, State Farm Florida Insurance Company, that the time for serving Appellee's Answer Brief may be extended for twenty (20) days to July 11, 2019.

Respectfully submitted,

By: ***/s/ Alicia M. Lopez***
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail to the below for service and all parties listed on the Second District Court of Appeals' eDCA Portal on June 17, 2019.

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RECEIVED, 06/20/2019 11:14:33 AM, Clerk, Second District Court of Appeal

IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

Appellate Case No.: 2D19-130
LT Case No.: 11-2018-CA-01198-0001

STATE FARM FLORIDA
INSURANCE COMPANY,

Appellant,

vs.

JON PARRISH,

Appellee.
_____/

NOTICE OF SUPPLEMENTAL AUTHORITIES

Appellant, STATE FARM FLORIDA INSURANCE COMPANY ("State Farm"), files the following supplemental authorities in support of its appeal, pursuant to Florida Rule of Appellate Procedure 9.225, that were either recently discovered or issued after service of State Farm's Initial Brief:

- *Landmark American Insurance Company v. H. Anton Richardt, DDS, PA*, No. 2018-CV-600-FtM-29UAM, 2019 WL 2462865 (M.D. Fla. June 13, 2019) (appended as **Exhibit A)**

- *The Shores at Coco Plum Condominium Association, Inc,. v. Westchester Surplus Lines Insurance Company*, No. 18-23910—Civ-Cooke/Goodman, 2019 WL 2223172 (S.D. Fla. Apr. 29, 2019) (appended as **Exhibit B)**

The supplemental authorities are persuasive in support of State Farm's argument on appeal that Appellee's public adjuster may not serve as his "disinterested" appraiser under Florida law.

CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing has been furnished to the attorneys listed on below on this 20th day of June, 2019, through the Florida Courts e-filing portal pursuant to Florida Rule of Judicial Administration 2.516(b)(1): **Theodore A. Corless, Esq.** and **Mary Catherine Lamoureux, Esq.**, Corless Barfield Trial Group, 6812 W. Linebaugh Ave., Tampa, FL 33625, Email: service@corlessbarfield.com; *Counsel for Appellee*; **Justin M. Thomas, Esq.**, **Gregory L. Evans, Esq.**, and **Mark A. Boyle, Esq.**, Boyle & Leonard, P.A., 2050 McGregor Blvd., Fort Myers, FL 33901 (eservice@insurance-counsel.com; jthomas@insurance-counsel.com; gevans@insuranec-counsel.com; mboyle@insurance-counsel.com); and **Lynn S. Alfano, Esq.** and **Robert A. Kingsford, Esq.**, Alfano Kingsford, P.A., 1060 Maitland Center Commons Blvd., Suite 180, Maitland, FL 32751, Emails: lalfano@alfanokingsford.com and pleadings@alfanokingsford.com; *Trial Counsel for Appellant*.

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Florida Bar Number: 92537

2019 WL 2462865
Only the Westlaw citation is currently available.
United States District Court, M.D. Florida,
Fort Myers Division.

LANDMARK AMERICAN INSURANCE COMPANY, Plaintiff,

v.

H. ANTON RICHARDT, DDS, PA, Defendant.

Case No: 2:18-cv-600-FtM-29UAM

Signed 06/13/2019

Attorneys and Law Firms

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Warren Donald Diener, The Diener Firm, P.A., Plantation, FL, for, for Defendant.

OPINION AND ORDER

JOHN E. STEELE, SENIOR UNITED STATES DISTRICT JUDGE

*1 This matter comes before the Court on defendant's Motion for Judgment on the Pleadings (Doc. #37) filed on April 30, 2019. Plaintiff filed a Response in Opposition and Cross-Motion for Judgment on the Pleadings (Doc. #38) on May 14, 2019, and defendant filed a Response (Doc. #39) and Notices of Filing (Docs. #41, #44, #46) with supplemental authority attached. Plaintiff also filed supplemental authority. (Doc. #45.)

I.

"After the pleadings are closed--but early enough not to delay trial--a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). "Judgment on the pleadings is appropriate when there are no material facts in dispute, and judgment may be rendered by considering the substance of the pleadings and any judicially noticed facts." Hawthorne v. Mac Adjustment, Inc., 140 F.3d 1367, 1370 (11th Cir. 1998) (citations omitted). The Court accepts "the facts alleged in the complaint as true and view them in the light most favorable to the nonmoving party." Cannon v. City of W. Palm Beach, 250 F.3d 1299, 1301 (11th Cir. 2001) (citation omitted). "The complaint may not be dismissed 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " Slagle v. ITT Hartford, 102 F.3d 494, 497 (11th Cir. 1996) (quoting Conley v. Gibson, 355 U.S. 41, 45–46 (1957)).

II.

Landmark American Insurance Company (Landmark) is an insurance company. H. Anton Richardt, D.D.S., doing business as International Institute for Cosmetic Dentistry (International), is the insured under a policy issued by Landmark for coverage of property located in Naples, Florida. On or about September 10, 2017, International's property sustained damages as a result of Hurricane Irma.

International claimed $596,875.04 in damages to its property and a loss of business income and extra expense in the amount of $96,080.50. The estimate of damages came from Stellar Public Adjusting Services (Stellar). Landmark however determined that International's building suffered only $12,984.15 in covered damages, and no payment was issued because the policy carried a $65,000 deductible.[1] Landmark further determined that there was no coverage for the business interruption and extra expense claim based on an applicable policy exclusion.[2] The determination was communicated in writing on or about December 6, 2017. On June 11, 2018, International forwarded correspondence to Landmark enclosing a March 28, 2018, estimate created by Stellar and demanding appraisal. Mr. Rami Boaziz of Stellar conducted the appraisal for International. Landmark investigated International's claim and assigned Engle Martin and Associates to investigate the claim and to estimate the cost of repair.

*2 The policy's appraisal provision requires that each party select a 'competent and impartial appraiser':

> E. Loss Conditions
>
> The following conditions apply in addition to the Common Policy Conditions and the Commercial Property Conditions:

EXHIBIT A

...

2. Appraisal

If we and you disagree on the value of the property or the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser.

(Doc. #30, ¶ 38.) Stellar's compensation agreement with International provides it with a direct financial interest in the outcome of the appraisal, a percentage, which percentage amount is in dispute.[3] The compensation agreement provides that International agrees to pay and assigns to Stellar 10% "of all payments made by the insurance company related to the loss, whether contractual or extra-contractual. In the event appraisal or mediation is demanded or a lawsuit is filed on the above claim, there will be an additional charge of five-percent. The total contractual percentage shall not exceed the maximum allowed by law. The fee will be based on the total amount of the settlement after the application of the deductible. Fees will only be charged on monies paid by the Insurer after the date this Agreement is signed." (Doc. #30-8, Ex. F.) Landmark's appraiser, Phillip Ambrose wrote an email to International's public adjuster. Both Landmark and International's appraisers signed the Declaration of Appraisers.

International has refused to appoint another appraiser, and the parties agree that there is a bona fide, actual, present and practicable need for a declaration as to whether Mr. Boaziz may serve as the appraiser.

III.

Defendant seeks to disqualify International's public adjuster from acting as its appraiser because Stellar is being compensated on a contingency fee basis. Defendant argues that Rios v. Tri- State Ins. Co., 714 So. 2d 547 (Fla. 3d DCA 1998) and its progeny do not apply. Plaintiff seeks judgment in its favor based on the Rios progeny, and the more recent decision in Brickell Harbour Condo. Ass'n, Inc. v. Hamilton Specialty Ins. Co., 256 So. 3d 245 (Fla. 3d DCA 2018).

In Rios, the Court found that disqualification of a party-appointed arbitrator with a direct or an indirect financial interest in the outcome of an arbitration was not required, only voluntary disclosure. Rios v. Tri-State Ins. Co., 714 So. 2d 547, 550 (Fla. 3d DCA 1998). See also Galvis v. Allstate Ins. Co., 721 So. 2d 421, 421 (Fla. 3d DCA 1998) (directing disclosure based on Rios for requirement of a "**disinterested**" **appraiser**); Brickell Harbour Condo. Ass'n, Inc. v. Hamilton Specialty Ins. Co., 256 So. 3d 245, 249 (Fla. 3d DCA 2018) (also requiring disclosure but not disqualification).

***3** The Southern District has addressed the exact same "competent and impartial appraiser" language as in this case, and Mr. Boaziz of Stellar was also the appraiser in that case. Verneus v. Axis Surplus Ins. Co., 16-21863-CIV, 2018 WL 3417905 (S.D. Fla. July 13, 2018). The Southern District considered the contingency fee agreement, but also considered additional factors not present in this case. The Southern District considered that Mr. Boaziz was the principal or owner of Stellar and now a trust bearing his name is the managing member of Stellar, that Mr. Boaziz's role as "president" and registered agent and "perhaps more" was not adequately explained, that Stellar has had six other cases with the law firm that represents the insured, and none of these facts were disclosed, and that Mr. Boaziz was unlikely to reach a conclusion that significantly differs from the original scope of loss submitted. The Southern District concluded that "the unique and special combination of circumstances" required disqualification. The court clarified that it was "not setting forth a rule that an appraiser cannot be impartial whenever his financial compensation is based on a percentage of the recovery. Rather, as is apparent, Stellar's contingency contract is only one of *several* factors underlying this decision." Verneus v. Axis Surplus Ins. Co., 16-21863-CIV, 2018 WL 3417905, at *6 n.2 & *7 (S.D. Fla. July 13, 2018). The facts available in this case are that Stellar anticipates a percentage of the appraisal award. Nothing more. The Court finds that disqualification is not necessarily required under the sole factor of a financial interest.

Landmark asks the Court to apply the Code of Ethics for Arbitrators in Commercial Disputes and the presumption of neutrality for arbitrators to International's appraiser who cannot be considered impartial based on the contingent-fee agreement. In Branco, a Florida appellate court noted that "the revised Code of Ethics adopted by AAA and ABA, effective since March 1, 2004, changes the landscape considerably, thus, undercutting the continued

viability of the holding in Rios. Florida Ins. Guar. Ass'n v. Branco, 148 So. 3d 488, 495 (Fla. 5th DCA 2014). The issue was whether the party's attorney could act as a "**disinterested**" **appraiser** when there is a "fiduciary duty of loyalty" or "confidential relationship" with the client, and the court concluded that an attorney to a client cannot serve as an **appraiser** or arbitrator.

Citing Verneus and Branco, the Southern District recently disqualified an **appraiser** in Shores and required the designation of a "**disinterested appraiser**, that has no pecuniary interest in this matter." Shores at Coco Plum Condo. Ass'n, Inc. v. Westchester Surplus Lines Ins. Co., No. 18-23910-CIV, 2019 WL 2223172, at *2 (S.D. Fla. Apr. 29, 2019). This was so even though the additional factors were not present, and no bright-line rule was established. "By virtue of the contingency compensation plan, Mr. Downs has a vested interest in appraising the Property at the highest possible recovery because his compensation will be a percentage of the appraisal." Id. See also Nalcrest Found., Inc. v. Landmark Am. Ins. Co., No. 8:18-CV-996-T-24AAS, 2018 WL 4293147, at *6 (M.D. Fla. July 27, 2018) (concluding that the appraiser was not impartial because he had a financial interest in the outcome of the appraisal).

Black's Law Dictionary defines "impartial" as "[n]ot favoring one side more than another; unbiased and disinterested; unswayed by personal interest." Black's Law Dictionary (11th ed. 2019). A pecuniary interest in the outcome is by definition a personal interest that favors one side over the other. The Court finds that the Verneus line of cases apply and that disqualification is appropriate.

Accordingly, it is hereby

ORDERED:

1. Defendant's Motion for Judgment on the Pleadings (Doc. #37) is **DENIED** and the declaratory relief sought in Count I of the Counterclaim (Doc. #36) is denied.

2. Plaintiff's Cross-Motion for Judgment on the Pleadings (Doc. #38) as to Count II of the Amended Complaint (Doc. #30) is **GRANTED** and Rami Boaziz of Stellar is disqualified to act as the appraiser during any part of the appraisal process.

3. The Clerk shall withhold the entry of judgment until the conclusion of the case.

DONE and ORDERED at Fort Myers, Florida, this 13th day of June, 2019.

All Citations

Slip Copy, 2019 WL 2462865

Footnotes

1 On November 8, 2017, Landmark's engineering consultant, EFI Global inspected the property and allegedly observed evidence of deterioration in the exposed underlayment in the valleys of the roof. (Doc. #30, ¶ 21.)

2 The exclusion states:

CAUSES OF LOSS – SPECIAL FORM (CP 10 30 10 12):

B. Exclusions

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

...

e. Utility Services.

The failure of power, communication, water or other utility service supplied to the described premises; however caused, if the failure:

(1) Originates away from the described premises; or

(2) Originates at the described premises, but only if such failure involves equipment used to supply the utility service to the described premises from a source away from described premises. Failure of any utility service includes lack of sufficient capacity and reduction in supply. Loss or damage caused by a surge of power is also excluded, if the surge would not have occurred but for an event causing a failure of power.

(Doc. #36, ¶ 20.)

3 The agreement provides for an additional 5%, however defendant argues that Florida State law caps the amount at 10%.

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2019 WL 2223172
Only the Westlaw citation is currently available.
United States District Court, S.D. Florida.

The SHORES AT COCO PLUM CONDOMINIUM ASSOCIATION, INC., Petitioner,
v.
WESTCHESTER SURPLUS LINES INSURANCE COMPANY, Respondent.

Case No. 18-23910-Civ-COOKE/GOODMAN

Signed 04/29/2019

Attorneys and Law Firms

Christine Marie Deis, Struble, P.A., Fort Lauderdale, FL, for Petitioner.

John David Dickenson, Cozen O'Connor, West Palm Beach, FL, for Respondent.

ORDER ON MOTION TO DISMISS

MARCIA G. COOKE, United States District Judge

*1 THIS CAUSE is before the Court upon Respondent, Westchester Surplus Lines Insurance Company's ("Westchester"), Motion to Dismiss and Compel Appraisal (ECF No. 3). The Court has reviewed the Motion, all supporting and opposing filings and submissions, the record in the case, and is otherwise fully advised on the premises. For the reasons that follow, Respondent's Motion is granted.

I. BACKGROUND

On September 21, 2018, Petitioner, The Shores at Coco Plum Condominium Association, Inc. ("Coco Plum"), filed a petition to compel appraisal and for declaratory relief. (ECF No. 1). Coco Plum asserts that an insurance policy issued by Westchester was in full force and effect when Coco Plum suffered certain losses to its property located at 111 Coco Plum Drive, Marathon, FL 33050 (the "Property"). Westchester initially admitted partial coverage for the loss and issued a payment for the claim. However, the payment was insufficient to repair all covered damages to the Property. On June 4, 2018, Coco Plum invoked appraisal pursuant to the appraisal provision in the policy and designated Kevin Downs ("Downs") of Five Star Claims adjusting, as its appraiser.

Westchester, for its part, agrees with Petitioner that this matter should be resolved by appraisal but maintains that Mr. Downs is an inappropriate appraiser as he has a pecuniary interest in the matter. Specifically, Respondent asserts that Mr. Downs' compensation for his work is based on the amount Coco Plum ultimately recovers by virtue of a contingency fee agreement. Thus, Mr. Downs' appointment as an appraiser would be contrary to Florida law requiring that each party appoint a competent and unbiased appraiser. Respondent requests that this Court compel Plaintiff to appoint an impartial appraiser.

The appraisal provision of the Insurance Policy issued by Westchester states in pertinent part:

> If we and you disagree on the value of the property or the amount of the loss, either may make written demand for appraisal of the loss. In this event, each part will select a competent and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge or a court having jurisdiction. The appraisers will state separately the value of the property and amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding....

I. LEGAL STANDARD

In order to survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

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EXHIBIT B

When evaluating a complaint subject to a motion to dismiss, all factual allegations must be accepted as true, however, mere conclusory statements "are not entitled to the assumption of truth." *See Iqbal*, 556 U.S. at 664. The factual allegations alone must state a facially plausible entitlement to relief. *Id.* The standard of facial plausibility is met "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678 (citing *Twombly*, 550 U.S. at 556).

II. DISCUSSION

***2** It is well-settled that an appraiser with a financial interest in the outcome of an appraisal is not impartial. *Verneus v. Axis Surplus Ins. Co.*, No. 16-CV-21863, 2018 WL 3417905, at *7 (S.D. Fla. July 13, 2018) (finding that the appraiser could not be unbiased and unswayed by personal interest even if he were to change his fee after suit was filed); *Nalcrest Found., Inc. v. Landmark Am. Ins. Co.*, No. 8:18-CV-996-T-24AAS, 2018 WL 4293147, at *7 (M.D. Fla. July 27, 2018); *Colorado Hosp. Services Inc. v. Owners Ins. Co.*, 14-CV-001859, 2015 WL 4245821, at *3 (D. Colo. July 14, 2015) (vacating an appraisal award because the plain language of the contract required both sides to select an "impartial" appraiser and finding, as a matter of law, that the insured, by appointing its contingency-fee public adjuster as its appraiser, had not done so)

Simply put, Mr. Downs is not an impartial appraiser. Here, Coco Plum admits that it intends that Mr. Downs be compensated on a contingency fee basis. Further, Coco Plum does not dispute that Mr. Downs has already prepared an estimate of the Property. By virtue of the contingency compensation plan, Mr. Downs has a vested interest in appraising the Property at the highest possible recovery because his compensation will be a percentage of the appraisal. *Verneus*, 2018 WL 3417905, at *6.

Coco Plum's reliance on *Rios v. Tri-State Ins. Co.*, 714 So.2d 547 (Fla. 3d DCA 1998), is misplaced. As explained in *Branco, Rios* was largely premised on the then-existing version of the Code of Ethics for Arbitrators in Commercial Disputes, promulgated jointly by the American Arbitration Association and the American Bar Association. *Fla. Ins. Guar. Ass'n v. Branco*, 148 So.3d 488, 495 (Fla. 5th DCA 2014). The court further explained that "[u]nlike the Code of Ethics relied upon in *Rios*, the current Code of Ethics establishes a presumption of neutrality for all arbitrators, including party-appointed arbitrator," and that "[t]his fundamental change undermines the *Rios* holding." *Id.*

II. CONCLUSION

For the reasons discussed above, it is **ORDERED and ADJUDED** that Respondent's Motion to Dismiss and Compel Appraisal (ECF No. 3) is **GRANTED**. Petitioner shall designate a disinterested appraiser, that has no pecuniary interest in this matter. This matter is hereby **STAYED** pending appraisal. Plaintiff shall promptly notify the Court when this case is ready to proceed, and in any event, shall file a status report every ninety (90) days from the date of this Order.

DONE and ORDERED in Chambers, Miami, Florida, this 29th day of April 2019.

All Citations

Slip Copy, 2019 WL 2223172

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IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

2ND DCA CASE NO.: 2D19-130
LOWER CASE NO.: 11-2018-CA-01198-0001

RECEIVED, 07/08/2019 04:04:37 PM, Clerk, Second District Court of Appeal

STATE FARM FLORIDA
INSURANCE COMPANY,

Appellant,

vs.

JON PARRISH,

Appellee.
_____/

NOTICE OF AGREED EXTENSION OF TIME
TO SERVE APPELLEE'S ANSWER BRIEF

Appellee, Jon Parrish, pursuant to Florida Rule of Appellate Procedure 9.300 and the Second District Court of Appeal's Administrative Order No. 2013-1, hereby states:

Appellee's Answer Brief is due on **July 11, 2019.** The undersigned is requesting an additional thirty (30) days to file Appellee's Answer Brief.

The undersigned, as counsel for Appellee, Jon Parrish, has agreed with, Kara Berard Rockenbach, Esq. and Daniel M. Schwarz, Esq., counsel for Appellant, State Farm Florida Insurance Company, that the time for serving Appellee's Answer Brief may be extended for thirty (30) days to August 12, 2019.

Respectfully submitted,

By: ***/s/ Alicia M. Lopez***
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail to the below for service and all parties listed on the Second District Court of Appeals' eDCA Portal on July 8, 2019.

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Respectfully submitted,

By: ***/s/ Alicia M. Lopez***
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IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

Appellate Case No.: 2D19-130
LT Case No.: 11-2018-CA-01198-0001

STATE FARM FLORIDA
INSURANCE COMPANY,

Appellant,

vs.

JON PARRISH,

Appellee.
_____/

NOTICE OF SUPPLEMENTAL AUTHORITY

Appellant, STATE FARM FLORIDA INSURANCE COMPANY ("State Farm"), files the following supplemental authority in support of its appeal, pursuant to Florida Rule of Appellate Procedure 9.225, that was issued after service of State Farm's Initial Brief:

- *State Farm Florida Insurance Company v. Sanders*, Case No. 3D19-927 (Fla. 3d DCA July 24, 2019) (Exhibit "A")

The supplemental authority is persuasive in support of State Farm's argument on appeal that Appellee's public adjuster may not serve as his "disinterested" appraiser under State Farm's insurance contract with Appellee and Florida law.

CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing has been furnished to the attorneys listed on below on this 29th day of July, 2019, through the Florida Courts e-filing portal pursuant to Florida Rule of Judicial Administration 2.516(b)(1): **Theodore A. Corless, Esq.** and **Mary Catherine Lamoureux, Esq.**, Corless Barfield Trial Group, 6812 W. Linebaugh Ave., Tampa, FL 33625, Email: service@corlessbarfield.com; *Counsel for Appellee*; **Justin M. Thomas, Esq.**, **Gregory L. Evans, Esq.**, and **Mark A. Boyle, Esq.**, Boyle & Leonard, P.A., 2050 McGregor Blvd., Fort Myers, FL 33901 (eservice@insurance-counsel.com; jthomas@insurance-counsel.com; gevans@insuranec-counsel.com; mboyle@insurance-counsel.com); and **Lynn S. Alfano, Esq.** and **Robert A. Kingsford, Esq.**, Alfano Kingsford, P.A., 1060 Maitland Center Commons Blvd., Suite 180, Maitland, FL 32751, Emails: lalfano@alfanokingsford.com and pleadings@alfanokingsford.com; *Trial Counsel for Appellant*.

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Third District Court of Appeal

State of Florida

Opinion filed July 24, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-927
Lower Tribunal No. 18-27366

State Farm Florida Insurance Company,
Petitioner,

vs.

Charles Sanders and Diana Sanders,
Respondents.

A Writ of Certiorari to the Circuit Court for Miami-Dade County, Martin Zilber, Judge.

Link & Rockenbach, P.A., Kara Berard Rockenbach and David A. Noel (West Palm Beach), for petitioner.

Marin, Eljaiek, Lopez & Martinez, P.L., Steven E. Gurian and Joe De Prado, for respondents.

Before EMAS, C.J., and FERNANDEZ, and LINDSEY, JJ.

FERNANDEZ, J.

EXHIBIT "A"

State Farm petitions this Court for a writ of certiorari to quash the trial court's April 9, 2019 order allowing the insureds' agent/public adjuster to act as their "disinterested" appraiser. We agree with State Farm and quash the order.

Respondents/insureds Charles Sanders and Diana Sanders had a homeowners' insurance policy with State Farm to provide coverage for property damages. The appraisal condition in State Farm's Homeowner Policy states that, "Each party will select a qualified, disinterested appraiser . . ." On August 13, 2018, the insureds filed suit against State Farm for breach of contract arising out of a Hurricane Irma property damage claim, alleging that State Farm failed to provide coverage for the loss. In response to the complaint, State Farm filed a Motion to Invoke Appraisal, claiming that there was a pre-suit dispute regarding the insureds' selected appraiser.

On December 12, 2018, the parties entered into an agreed order granting State Farm's Motion to Invoke Appraisal. The Order named Peter Patterson of VRS Vericlaim as State Farm's appraiser and required the insureds to designate their "qualified, disinterested appraiser," as stated in State Farm's policy. The insureds selected Gian Franco Debernardi of 911 Claims Corporation as their appraiser.

Mr. Debernardi is the insureds' agent pursuant to their contract with 911 Claims Corporation, which states that he will "be the agent and representative, under the insurance contract by State Farm Insurance . . . to adjust, appraise, advise and assist in the settlement of the loss." In addition, the contract assigns 10% of the

amount recovered to 911 Claims Corporation. Previously, Mr. Debernardi inspected the property, reported the insurance claim to State Farm, and prepared the $88,536.41 estimate that is the subject of the dispute between State Farm and the insureds.

On February 20, 2019, the insureds filed a Motion to Lift Stay and Compel Compliance with the Court Order, contending that appraisal should move forward with Mr. Debernardi as their appraiser. State Farm argued that Mr. Debernardi was not "disinterested" because of his agent/principal relationship with the insureds, his contingency fee, and his prior estimate of damages. On April 9, 2019, the trial court granted the Motion to Lift Stay and entered an order permitting Mr. Debernardi to act as the insureds' "disinterested" appraiser. State Farm then filed this petition for writ of certiorari.

The trial court's April 9, 2019 order allowing Mr. Debernardi to act as the insureds' disinterested appraiser departs from the essential requirements of the law. This will cause material injury to State Farm that cannot be remedied on appeal. Rousso v. Hannon, 146 So. 3d 66, 69 (Fla. 3d DCA 2014) ("To invoke an appellate court's certiorari jurisdiction, '[t]he petitioning party must demonstrate that the contested order constitutes "(1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the case[,] (3) that cannot be corrected on post-judgment appeal."'" (first quoting Bd. of Trs. of Internal

Improvement Tr. Fund v. Am. Educ. Enters., 99 So. 3d 450, 454 (Fla. 2012); then quoting Reeves v. Fleetwood Homes of Fla., Inc., 889 So. 2d 812, 822 (Fla. 2004))).

Allowing Mr. Debernardi to act as the insureds' "disinterested" appraiser is a harm that cannot be remedied on appeal, due to the nature of appraisal. The insureds contend in their Response to State Farm's petition, once an appraisal award is confirmed by the trial court, State Farm could then move to vacate it and then file an appeal.

However, Florida case law does not support this position. After an insurer pays an appraisal award, the trial court is not required to confirm this award, as a petition to confirm an appraisal award is not authorized under Florida law. State Farm Fla. Ins. Co. v. Gonzalez, 76 So. 3d 34, 37 (Fla. 3d DCA 2011); Federated Nat. Ins. Co. v. Esposito, 937 So. 2d 199, 200-01 (Fla. 4th DCA 2006).

Moreover, according to the terms of State Farm's homeowner's insurance policy, State Farm is required to pay an appraisal award within sixty days after State Farm receives the insureds proof of loss and there is a filing of an appraisal award with State Farm. If State Farm did not comply with this term in the contract, it would be in breach. Consequently, State Farm would not have the chance to vacate the appraisal award, as the insureds argue, because the trial court would not have confirmed such award.

Additionally, pursuant to the terms of the State Farm policy and Florida law, appraisal is binding on the parties. State Farm Fire & Cas. Co. v. Licea, 685 So. 2d 1285, 1287-88 (Fla. 1996) ("If a court decides that coverage exists, the dollar value agreed upon under the appraisal process will be binding upon both parties."). The binding nature of appraisal is outlined in the "Appraisal" provision of the State Farm policy: "The appraisers shall then set the amount of the loss. … Written agreement signed by any two of these three shall set the amount of the loss." For these reasons, certiorari review is proper in this case, as the harm to State Farm cannot be remedied on direct appeal.

We turn next to the "disinterested" appraiser issue presented by State Farm. In Florida, "[a]ppraisals are creatures of contract and the subject or scope of the appraisal depends on the contract provisions." Fla. Ins. Guar. Ass'n v. Branco, 148 So. 3d 488, 491 (Fla. 5th DCA 2014). Thus, it is clear that State Farm and the insureds were free to contract for the qualifications of the appraisers involved in their alternative dispute resolution. Here, the parties contracted for each other's appraiser to be "disinterested." State Farm's Homeowners Policy appraisal condition stated, "Each party will select a qualified, disinterested appraiser..." According to Branco, this "policy provision, which requires a 'disinterested appraiser,' expresses the parties' clear intention to restrict appraisers to people who are, in fact, disinterested." Id. at 496.

Addressing the definition of "disinterested," the court in Branco stated, "'Disinterested' is defined as '[f]ree from bias, prejudice, or partiality; not having a pecuniary interest.'" Id. at 496 n.9 (citing Black's Law Dictionary 536 (9th ed. 2009)). The court also stated "disinterested" meant "not having the mind or feelings engaged: not interested . . . free from selfish motives or interest: unbiased," and "the quality of being objective or impartial." [1] Id. (citing Miriam-Webster's Collegiate Dictionary 333 (10th ed. 2000)).

Additionally, we find the analysis in Branco to be particularly instructive. In Branco, the insureds named one of their attorneys as an appraiser in the insureds' sinkhole claim. Id. at 494. The appellate court held that if an appraiser owes his nominating party a "fiduciary duty of loyalty" or a "confidential relationship," then "[t]he existence of such a relationship between a litigant and an [appraiser] creates

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[1] An additional description of the term "disinterested" is provided as follows:

> [A] person may be described as "disinterested" when he or she is "[f]ree from bias, prejudice, or partiality; not having a pecuniary interest." *Black's Law Dictionary* 536 (9th ed. 2009). It follows that a "disinterested witness"—as the term is used in section 733.207—refers to a person "who has no private interest in the matter at issue." *Black's Law Dictionary* 1740 (9th ed. 2009). To put it differently, a "disinterested witness" has no stake in the outcome of the matter in which he or she offers evidence. *See The American Heritage Dictionary of the English Language* 519, usage note (4th ed. 2000) ("In traditional usage, *disinterested* can only mean 'having no stake in an outcome,'....").

Smith v. DeParry, 86 So. 3d 1228, 1235 (Fla. 2d DCA 2012).

too great a likelihood that the [appraiser] will be incapable of rendering a fair judgment." Id. Accordingly, the Branco court held that attorneys cannot be named as their clients' "disinterested appraisers."

In the case before us, the contract language between the insureds and Mr. Debernardi made Mr. Debernardi the insureds' agent. The insureds then selected Mr. Debernardi to be their "disinterested" appraiser. We find that the distinguishing fact that the disinterested appraiser in Branco was an attorney, as opposed to here, an agent, is irrelevant. Florida law is clear that an agent owes a fiduciary duty to his or her principal. See Fisher v. Grady, 178 So. 2d 852, 860 (Fla. 1937); Capital Bank v. MVB, Inc., 644 So. 2d 515, 518 (Fla. 3d DCA 1994). Moreover, Florida law regulates public adjusters. See § 626.854, Fla. Stat. (2018). Florida Administrative Code Rule 69B-220-201(3) (2015), Ethical Requirements for All Adjusters and Public Adjuster Apprentices, states, "The work of adjusting insurance claims engages the public trust. An adjuster shall put the honest treatment of the claimant above the adjuster's own interests in every instance." Consequently, Branco's holding is applicable to the case before us. Because Mr. Debernardi is the insureds' agent, he cannot be named their disinterested appraiser.

In addition, State Farm contends in its petition that Mr. Debernardi was involved with the insureds' claim from the beginning. He inspected the loss at the insureds' property, reported the claim to State Farm, and prepared the written

estimate for the $88,536.41 claim. Moreover, Mr. Debernardi has a financial interest in the insurance claim. Under his agency contract with the insureds, he stands to earn a 10% contingency fee of whatever amount the insureds recover from State Farm. See Brickell Harbour Condo. Ass'n, Inc. v. Hamilton Specialty Ins. Co., 256 So. 3d 245, 248 n.4 (Fla. 3d DCA 2018) ("The existence of a contingent fee payable to the party-appointed appraiser has been identified as a 'factor' in assessing partiality . . . ."). As such, Mr. Debernardi cannot be disinterested, as he has a financial interest in whether or not the insureds recover from State Farm and how much they recover.

Federal case law also supports State Farm's position. In Verneus v. Axis Surplus Ins. Co., No. 16-21863-CIV, 2018 WL 3417905, at *1 (S.D. Fla. July 13, 2018), a court order required both parties to select "competent and impartial" appraisers. Id. The insured selected her public adjuster who had originally inspected the loss and submitted his estimate to the insurer. The federal district court agreed with the insurance company's position that the public adjuster was not impartial. The court stated:

> Boaziz is the appraiser who already examined the property and prepared the demand for payment for Verneus. He is the one who submitted Verneus's scope of loss to the defendant insurer, Axis. So he has an interest to protect. As a professional who presumably values his reputation, Boaziz is unlikely to reach a conclusion as an appraiser that is significantly different from the work product he already produced.

Id. at *6.

Thereafter, when the magistrate judge in Verneus v. Axis Surplus Ins. Co., No. 16-21863-CIV, 2018 WL 4150933, at *1 (S.D. Fla. Aug. 29, 2018) disqualified the insured's public adjuster by finding he was not "disinterested," the insured went ahead and named her expert witness as her "disinterested" appraiser. Id. at *1. The magistrate also disqualified this appraiser, as well, as not "disinterested." The Court stated:

> In this case, as a paid expert for Verneus, Brizuela [the expert witness] has already taken a position about the cause of the damages and the scope of the damages. If chosen as the appraiser, then Brizuela would be tasked with doing so again—but, this time, he would also [be] wearing the hat of an impartial appraiser, rather than one of a party-retained expert. Yet he is unlikely to adopt a different opinion merely because he is now appointed as an appraiser. To the contrary, it seems likely that he would want to maintain his earlier opinion, especially because experts rely in significant part on their reputations, reliability, and consistency.

Id. at *3.

Similarly, in the case before us, Mr. Debernardi has previously inspected the loss, and he was the person who prepared the written estimate of damages the insureds used to file their claim. It is hard to imagine that Mr. Debernardi is going to reach a different amount from the initial $88,56.41 estimate he already reached. See also Landmark Am. Ins. Co. v. H. Anton Richardt, DDS, PA, No. 2018-CV-600-FtM-29UAM, 2019 WL 2462865 at *1 (M.D. Fla. June 13, 2019); The Shores at Coco Plum Condo. Ass'n, Inc. v. Westchester Surplus Lines Ins. Co., No. 18-23910-CIV, 2019 WL 2223172 at *1 (S.D. Fla. Apr. 29, 2019).

Accordingly, we hold that a fiduciary, such as a public adjuster who is in a contractual agent-principal relationship with the insureds, cannot be a disinterested appraiser as a matter of law. The trial court thus departed from the essential requirements of the law in allowing Mr. Debernardi to be named the insureds' disinterested appraiser. As the harm cannot be remedied on appeal because pursuant to the policy language the appraisal process is binding and cannot be undone, we grant the petition for writ of certiorari and quash the trial court's April 9, 2019 order that allowed the insureds' agent to act as their disinterred appraiser.

Petition granted, writ issued, and order quashed.

IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

2ND DCA CASE NO.: 2D19-130
LOWER CASE NO.: 11-2018-CA-01198-0001

RECEIVED, 08/12/2019 02:22:29 PM, Clerk, Second District Court of Appeal

STATE FARM FLORIDA
INSURANCE COMPANY,

Appellant,

vs.

JON PARRISH,

Appellee.
_____/

NOTICE OF AGREED EXTENSION OF TIME
TO SERVE APPELLEE'S ANSWER BRIEF

Appellee, Jon Parrish, pursuant to Florida Rule of Appellate Procedure 9.300 and the Second District Court of Appeal's Administrative Order No. 2013-1, hereby states:

Appellee's Answer Brief is due **August 12, 2019.** The undersigned is requesting an additional twenty (20) days to file Appellee's Answer Brief.

The undersigned, as counsel for Appellee, Jon Parrish, has agreed with, Kara Berard Rockenbach, Esq. and Daniel M. Schwarz, Esq., counsel for Appellant, State Farm Florida Insurance Company, that the time for serving Appellee's Answer Brief may be extended for twenty (20) days to September 3, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail to the below for service and all parties listed on the Second District Court of Appeals' eDCA Portal on August 12, 2019.

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IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

APPEAL CASE NO.: 2D19-0130

STATE FARM FLORIDA INSURANCE COMPANY,

Appellant,

vs.

JON PARRISH,

Appellee.

L.T. Court Case No.: 11-2018-CA-01198-0001

ANSWER BRIEF ON BEHALF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES..... iii

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

SUMMARY OF ARGUMENT.....4

STANDARD OF REVIEW.....6

ARGUMENT.....6

I. THE TRIAL COURT CORRECTLY RULED THAT GEORGE KEYS WAS QUALIFIED TO SERVE AS PARRISH'S APPRAISER.. 6

A. PAYING AN APPRAISER A CONTINGENCY FEE DOES NOT PRECLUDE AN APPRAISER FROM BEING DISINTERESTED AS A MATTER OF LAW.....8

B. MR. KEYS IS CAPABLE OF EXERCISING HIS OWN INDEPENDENT JUDGMENT IN EVALUATING THE LOSS..... 17

1. NEITHER THE ALL RISK AGREEMENT NOR FLORIDA LAW CREATES A FIDUCIARY DUTY OWED BY MR. KEYS TO MR. PARRISH.....17

2. MR. KEYS HAS HAD NO INVOLVEMENT IN THIS CLAIM; THUS, STATE FARM CAN PRESENT NO VIABLE EVIDENCE OF A PRE-APPRAISAL BIAS..... 22

3. PROHIBITING PUBLIC ADJUSTERS FROM SERVING AS APPRAISERS WILL DENY ACCESS TO APPRAISAL FOR INSUREDS AND ALLOW INSURERS TO TAKE ADVANTAGE OF INSUREDS.....24

CONCLUSION.....26

CERTIFICATE OF COMPLIANCE 26

CERTIFICATE OF SERVICE 26

TABLE OF AUTHORITIES

Cases

Berkshire Life Ins. Co. v. Adelberg,
698 So. 2d 828 (Fla. 1997) 7

Brickell Harbour Condo. Ass'n, Inc. v. Hamilton Specialty Ins. Co.,
256 So. 3d 245 (Fla. 3d DCA 2018)..... passim

Donegal Ins. Co. v. Longo,
610 A. 2d 466 (Pa. Super. Ct. 1992) 15

Florida Ins. Guar. Ass'n, Inc. v. Castilla,
18 So.3d 703 (Fla. 4th 2009) 6

Florida Ins. Guar. Ass'n, Inc. v. Lustre,
163 So.3d 624 (Fla. 3d DCA 2015).....6

Florida Insurance Guaranty Association v. Branco,
148 So.3d 488 (Fla. 5th DCA 2014) ..... passim

Galvis v. Allstate Ins. Co.,
721 So. 2d 421 (Fla. 3d DCA 1998)..... passim

Gorman v. State,
253 So.3d 740 (Fla. 2d DCA 2018).....13

Home Ins. Co. v. Crawford & Co.,
890 So. 2d 1186 (Fla. 4th DCA 2005) 17, 18, 19, 21, 22

Hozlock v. Donegal Companies/Donegal Mut. Ins. Co.,
745 A. 2d 1261 (Pa. Super. Ct. 2000) 15, 16

Ivey v. Allstate Ins. Co.,
774 So. 2d 679 (Fla. 2000) 24

King v. Nat'l Sec. Fire & Cas. Co.,
656 So.2d 1338 (Fla. 4th DCA 1995) 18

Landmark American Ins. Co. v. Richardt,
2019 WL 2462865 (M.D. Fla. 2019)..... 12, 13, 16

Linville v. Ginn Real Estate Co., LLC,
697 F. Supp. 2d 1302 (M.D. Fla. 2010) (applying Florida law) 22

Owners Ins. Co. v. Dakota Station II Condo., Ass'n, Inc.,
2019 WL 2571645 (Colo. 2019) 14, 15

Rios v. Tri-State Ins. Co.,
714 So. 2d 547 (Fla. 3d DCA 1998)..... passim

Security Ins. Co. of Hartford v. Investors Diversified Ltd., Inc.,
407 So. 2d 314 (Fla. 4th DCA 1981) 16

State Farm Florida Insurance Company v. Sanders, _____ So. 3d_____,
2019 WL 3309217 (Fla. 3d DCA 2019)..... passim

The Shores at Coco Plum Condo. Ass'n, Inc. v. Westchester Surplus Lines Ins. Co.,
2019 WL 2223172 (S.D. Fla. 2019)..... 12, 13, 16, 23

Verneus v. Axis Surplus Ins. Co.,
2018 WL 3417905 (S.D. Fla. 2018)..... passim

Wanless v. State,
271 So.3d 1219 (Fla. 1st DCA 2019).....13

Westgate Miami Beach, LTD. v. Newport Operating Corp.,
55 So. 3d 567 (Fla. 2010).....17

White v. State Farm Fire & Cas. Co.,
809 N.W. 2d 637 (Mich. Ct. App. 2011)..... 14, 15

Statutes

Section 627.428, Florida Statutes 6, 24

STATEMENT OF THE CASE AND FACTS

Jon Parrish, a former attorney, purchased an all-risk insurance policy from State Farm Florida Insurance Company ("State Farm") to protect his home located at 5780 Spanish Oaks Ln, Naples, Florida, with effective dates September 17, 2016 to September 17, 2017. (R. 19, 144) While the policy was effect, Hurricane Irma devastated Southwest Florida and damaged Mr. Parrish's home. (R. 7.) Mr. Parrish timely reported the loss to State Farm. (R. 7.)

On October 23, 2017, Parrish retained Keys Claims Consultants, Inc. ("KCC") to provide public adjusting services with regard to the subject claim on a contingent fee basis ("All Risk Agreement"). (R. 35-26.) John Waligora and Casey James Sims executed the All Risk Agreement on behalf of KCC. (R. 26). Bobby Sims, a licensed public adjuster, handled the claim on behalf KCC prior to any appraisal demands. (R. 23-24). On October 31, 2017, Mr. Sims mailed the All Risk Agreement to State Farm. (R. 23-28.)

On January 8, 2018, Mr. Sims forwarded Mr. Parrish's duly executed Sworn Statement in Proof of Loss to State Farm. In his cover letter, Mr. Sims demanded appraisal, named George Keys as Mr. Parrish's appraiser, provided Mr. Key's contact information, and requested that State Farm appoint its appraiser. (R. 29.). Mr. Parrish's proof of loss valued the damage at $495,079.25. (R. 30.) The policy's appraisal provision provides:

> Appraisal. If you and we fail to agree on the amount of loss, either party can demand that the amount of the loss be set by appraisal. A demand for appraisal must be in writing. You must comply with Your Duties After Loss before making a demand.
>
> Each party will select a qualified, *disinterested* appraiser and notify the other of the appraiser's identity within 20 days of receipt of the written demand. *Each party shall be responsible for the compensation of their selected appraiser*. The two appraisers shall then select a qualified, disinterested umpire. If the two appraisers are unable to agree upon an umpire within 15 days, you or we can ask a judge of a court of record in the state where the residence premises is located to select an umpire. Reasonable expenses of the appraisal and the reasonable compensation of the umpire shall be paid equally by you and us.
>
> The appraisers shall then set the amount of the loss. The amount of the loss is determined by the actual cash value, market value or replacement cost of the loss according to the applicable Loss Settlement provision. If a dispute exists regarding the extent of the damages or whether any part of the loss is covered by the policy, the appraisers will itemize the damages according to the scope of the loss specified by each party. If the appraisers submit a written report of an agreement to us, the amount agreed upon shall be the amount of the loss. If the appraisers fail to agree within 30 days, unless the time is extended by mutual agreement, they shall submit their differences to the umpire. Written agreement signed by any of the two of these three shall set the amount of the loss.
>
> Appraisal is only available to determine the actual cash value, market value or replacement cost of the loss, and has no effect on matters of coverage. Appraisal is a non-judicial proceeding and neither party will be awarded attorney fees or be subject to an entry of judgment in a court. We do not waive any of our rights by submitting to an appraisal.

(R. 40) (emphasis added).

State Farm acknowledged receipt of Mr. Parrish's Sworn Statement in Proof of Loss but disagreed with the amount claimed. (R. 31.) In the same letter, State Farm, despite acknowledging a dispute on the damage amount, refused to participate

in appraisal. (R. 31.) State Farm claimed appraisal was premature because it needed to "continue to evaluate the damages." (R. 31.) Finally, State Farm incorrectly contended that Mr. Keys was not disinterested because he was the "assigned public adjuster who is representing Mr. Parrish in this claim." (R. 31).

On January 26, 2018, Attorney Ted Corless, on behalf of Mr. Parrish, wrote State Farm to explain that State Farm's positon was inconsistent with Florida law. (R. 45-48.) On February 10, 2018, State Farm sent its estimate and payment to Mr. Sims. (R. 49.) The amount of State Farm's estimate was $295,298.70 and the amount of the payment was $107,156.84. (R. 110.) Although State Farm had concluded its evaluation of the claim and there was a clear dispute as to the amount of loss, State Farm still refused to name an appraiser. (R. 49.) Then, on April 2, 2018, State Farm demanded appraisal, despite Mr. Parrish's previous appraisal demand. (R. 52). State Farm appointed Bob Davis as its appraiser. (R. 52.) The letter says nothing about Mr. Keys. (R. 51-54.)

Instead of simply proceeding to appraisal, State Farm petitioned the trial court to compel Mr. Parrish to select a different appraiser. At the hearing, the trial court denied State Farm's Petition. (R. 169.) The trial court found that Mr. Keys was "disinterested." (R. 114-115). The trial court also found that Mr. Keys should not be disqualified in light of the disclosure of the relationship between Mr. Keys and Mr. Parrish and that the appointment of an umpire in the appraisal process cured any

potential bias associated with the contingency fee payment. (R. 114-115.) Further, the trial court specifically rejected the argument that the case of *Florida Insurance Guaranty Association v. Branco*, 148 So.3d 488 (Fla. 5th DCA 2014), should be applied to treat the relationship between an insured and a public adjuster the same as the relationship between an insured and his attorney, with regard to the appraisal provision. (R. 115.) This appeal followed.

SUMMARY OF ARGUMENT

Insurance companies control the insurance policy form. Property insurance carriers typically, as an element of exercising that control, place appraisal provisions in their policies to resolve to disputes over the amount of loss. More recently, insurers have required that party appointed appraisers be "independent," "impartial," or "disinterested." Such a provision exists in the instant case. As is typical, the appraisal provision in this case makes no reference to the type of authorized compensation a party-appointed can be paid nor does the appraisal provision disallow use of a public adjusters as an appraiser. The absence of such terms is striking given that Florida has over 25 years of uninterrupted case law allowing public adjusters to serve as the appraiser for the insured who hired him or her. Florida's historical treatment of this issue is consistent with authorities from across the country. Many, if not most of these authorities, allow an insured's public adjuster to serve as their party appointed appraiser. The existence of this wide swath of

authority is, definitionally, under Florida law, ambiguity that necessarily has to be construed against the insurer as drafter of the policy form.

In contrast to the absence of terms specifying the methods of compensation of the party appraisers, the policy in this case has very specific limitations and specifications on the compensation of the neutral umpire. If State Farm wanted similar limitations to apply to party appraisers, it should have so specified. The term "disinterested" and other similar analogues found in property policies should not be interpreted to disallow the appointment of any appraiser unless there can be no question but the appraiser can exercise no independent judgment.

State Farm believes each party should only hire appraisers who are paid by the hour. The policy does not so state and could have easily done so. However, even State Farm's paradigm—hourly only—involves some level of bias. Someone hired by the hour by another person, lawyer, or insurance company has the potential to have their judgment influenced by the possibility of future work. The truth of the matter is that if State Farm wanted a truly neutral process, it can have one: our judicial system—a forum where detailed rules of neutrality exist.

The hourly only model necessarily benefits insurance companies at the expense of insureds—particularly in small losses. If an insured with a small loss is required to hire someone on an hourly basis and does not have the access to the court

system with the accompanying right to pursue attorney's fees under section 627.428, Florida Statutes, the appraisal process will be stacked heavily against insured.

STANDARD OF REVIEW

The order appealed from contains both findings of fact and conclusions of law, therefore, a mixed standard of review applies. *Florida Ins. Guar. Ass'n, Inc. v. Castilla*, 18 So.3d 703, 704 (Fla. 4th 2009). "With regard to an order compelling appraisal, we review the trial court's factual findings under a competent, substantial evidence standard. Our review of the trial court's application of the law to the facts is *de novo*." *Florida Ins. Guar. Ass'n, Inc. v. Lustre*, 163 So.3d 624 (Fla. 3d DCA 2015) (citing *Castilla*, 18 So.3d at 704).

ARGUMENT

I. THE TRIAL COURT CORRECTLY RULED THAT GEORGE KEYS WAS QUALIFIED TO SERVE AS PARRISH'S APPRAISER

State Farm contends the trial court erred in concluding Mr. Keys is not qualified to serve as Mr. Parrish's adjuster because he is not "disinterested." (I.B. at pg. 16). State Farm makes this assertion even though its policy does not mention how either the insured or insurer must pay its appraiser. This peculiar because since 1998, the controlling law in Florida has been that the terms "disinterested," "impartial," and "independent" can't preclude an insured from paying its appraiser a contingency fee. *Rios v. Tri-State Ins. Co.*, 714 So. 2d 547 (Fla. 3d DCA 1998); *Galvis v. Allstate Ins. Co.*, 721 So. 2d 421 (Fla. 3d DCA 1998); *Brickell Harbour*

Condo. Ass'n, Inc. v. Hamilton Specialty Ins. Co., 256 So. 3d 245 (Fla. 3d DCA 2018).

Certainly, if State Farm desired such a prohibition, it, as the master of its own policy, could have included language that limited how Mr. Parrish paid his appointed appraiser. *See Berkshire Life Ins. Co. v. Adelberg*, 698 So. 2d 828, 830 (Fla. 1997) (discussing how insurers bear the burden of incorporating unambiguous language into its policy). Such limiting language is not foreign to State Farm; indeed, State Farm placed limitations on how the parties paid the umpire. (R. 40.) State Farm cannot use the judicial process to engage in post-loss underwriting. State Farm must live with the same interpretation of "disinterested" set forth in *Rios*, *Galvis*, and *Brickell Harbour*: that "disinterested" does not preclude an insured from paying an appraiser a contingency fee.

Recognizing that no Florida state court has adopted this blanket prohibition, State Farm then argues *Fla. Ins. Guar. Ass'n v. Branco*, 148 So. 3d 488 (Fla. 5th DCA 2014), applies because the attorney-client relationship at issue in *Branco* is no different than the duty an appraiser, who is also a public adjuster, owes an insured.

Each of the aforementioned arguments fail. The trial court correctly ruled that a contingency fee agreement does not preclude an appraiser from being "disinterested" as a matter of law. The trial court also correctly ruled that a public

adjuster does not have the same fiduciary obligations an attorney owes his or her client. Thus, Mr. Parrish requests that this Court affirm.

A. PAYING AN APPRAISER A CONTINGENCY FEE DOES NOT PRECLUDE AN APPRAISER FROM BEING DISINTERESTED AS A MATTER OF LAW.

Florida's Third District is the only state court to address the question of whether a contingency fee precludes an appraiser from being "disinterested" or "impartial." *Rios*, 714 So. 2d 547; *Galvis*, 721 So. 2d 421; *Brickell Harbour*, 256 So. 3d 245. Without waiver, the Third District has held paying an appraiser a contingency fee does not preclude an appraiser from being "disinterested," "impartial," or "independent." *Rios*, 714 So. 2d at 549-50; *Galvis*, 721 So. 2d at 421; *Brickell Harbour*, 256 So. 3d at 248-49.

In *Rios*, the appointed appraiser was "to be compensated on a contingency percentage of the award." *Rios*, 714 So. 2d at 549. The court stated that "[t]he threshold question presented by the parties is how to interpret the term 'independent appraiser' as used in the policy." *Id.* Like State Farm argues here, the insurer in *Rios* urged the court to "rule that an appraiser cannot be 'independent' whose pay is based, in whole or in part, on a contingent fee percentage of the award." *Id.* The insurer, like State Farm, argued "that a contingent fee arrangement gives the appraiser a direct financial interest in the award, and renders the appraiser not 'independent' under this insurance contract." *Id.*

The court rejected the insurer's argument for two reasons. *Id.* First, "the appraisal clause now before us states that '*each appraiser shall be paid by the party selecting that appraiser.' It does not limit the type of compensation which may be paid*." *Id.* (emphasis added). Applying Florida's well-established rule requiring an insurance policy be interpreted in favor of the insured, the court refused to interpret the term "independent" to limit how a party compensates its appointed appraiser. *Id.* at 549-50.

Second, the court used the framework set forth in the code of ethics for arbitrators as a guidepost for appraisals. *Id.* at 550. The court noted that under the arbitration ethics code, an arbitrator must disclose a direct or indirect financial interest in the outcome. *Id.* Disclosure, according to the court, cures any prejudice and prevents needless court intervention. *Id.*

Shortly after deciding *Rios*, the Third District considered *Galvis*. *Galvis* presented the same issue as *Rios*. *Galvis*, 721 So. 2d at 421. The only difference between *Rios* and *Galvis* was that the policy in *Galvis* required "each party to select a 'competent and *disinterested* appraiser,'" rather than an "independent one." *Id.* The court held the distinction did not make "any legal difference." *Id.* (emphasis added). Thus, for the reasons set forth in *Rios*, *Galvis* declined to adopt a blanket rule that a contingency fee renders an appraiser incompetent and interested. *Id.*

Twenty years later, the Third District, again, discussed the impact of a contingency fee arrangement and whether such an arrangement rends an appraiser partial, interested, or incompetent. *Brickell Harbour*, 256 So. 3d at 248-49. For a third time, the court held "an appraiser's 'direct or indirect financial interest in the outcome of the arbitration,' including an arrangement for a contingent fee, requires disclosure rather than disqualification in the case of an appraiser." *Id.* at 249. The court premised this holding on the policy's requirement that the respective parties pay for their own appraiser:

> But tellingly, the appraisal provision in the Policy states that "Each party will: a. Pay its chosen appraiser; and b. Bear the other expenses of the appraisal and umpire equally." The tie-breaking third appraiser—often referred to as the "umpire" (as in the Policy before us) or "neutral"—provides the real impartiality. If an appraiser acts unprofessionally, skews what should be objective calculations regarding materials and labor costs, and puts the proverbial thumb on the scale, the umpire is the safeguard empowered to reject such efforts by siding with the other party-appointed appraiser. Alternatively, a professionally-qualified umpire may negotiate one or both of the party-appointed appraisers into a reasonable compromise.
>
> We conclude, after consulting our own decision in *Rios*… that 'impartiality' means something other than the 'dictionary definition' as it relates to appraisers appointed and paid by the parties.

Id.

Like, *Rios*, *Galvis*, and *Brickell Harbour*, the policy's appraisal provision requires each party to pay for its own appraiser. (R. 9). And, similar to *Rios*, *Galvis*, and *Brickell Harbour*, the policy does not address how a party pays its appraiser. (R.

9). Finally, like, *Rios*, *Galvis*, and *Brickell Harbour*, the policy does not define the term State Farm contends precludes a contingency fee—"disinterested." (R. 9). Thus, as in *Rios*, *Galvis*, and *Brickell Harbour* the term "disinterested" cannot be interpreted to "limit the type of compensation which can be paid." *Rios*, 714 So. 2d at 549-50; *Galvis*, 721 So. 2d at 421; *Brickell Harbour*, 256 So. 3d at 249.

State Farm characterizes *Rios* and *Galvis* as outdated because those cases "incorrectly placed substantial reliance on the Code of Ethics," which has since changed. (I.B. at pg. 28-30). State Farm overlooks that *Branco* did not disagree with the policy interpretation analysis conducted by *Rios*, *Galvis*, and *Brickell Harbour* in deriving the meaning of "independent," "disinterested," and "impartial." Indeed, *Branco* did not concern an appraiser paid on a contingency fee. Regardless of how this Court addresses the appraisal versus arbitration analogy, *Branco* does not undermine the true rationale of *Rios*, *Galvis*, and *Brickell Harbour*: an undefined term ("independent," "disinterested," and "impartial") cannot limit how a party pays its appointed appraiser where the policy requires each party to pay for its own in appraiser without express limitation. *Rios*, 714 So. 2d at 549-50; *Galvis*, 721 So. 2d at 421; *Brickell Harbour*, 256 So. 3d at 249.

Verneus v. Axis Surplus Ins. Co., 2018 WL 3417905 (S.D. Fla. 2018), does not compel a different conclusion. First, *Verneus* did not concern interpretation of an insurance policy—it concerned the application of a court order. *Id.* at *4-5.

Therefore, the rules of interpretation used in *Rios*, *Galvis*, and *Brickell Harbour* did not apply. This, in turn, caused the court to disregard the policy interpretation analysis used in *Rios*, *Galvis*, and *Brickell Harbour*.

Second, *Verneus* never held a contingency fee rendered an appraiser interested or partial as a matter of law. *Id.* at *5. The court indicated that if, as here, the assessment was limited to an appraiser being paid on a contingency fee basis, then the appraiser could, in fact, serve as an appraiser. *Id.* In sum, *Verneus* is a federal decision "[b]ased on the unique and special combination of circumstances…" that do not exist here, and, therefore, does not require Mr. Keys be disqualified as Mr. Parrish's appraiser because he is paid a contingency fee. *Id.* at *7.

Despite its self-professed unique circumstances, the two cases State Farm filed as supplemental authority purport to follow *Verneus*. These decisions incorrectly apply *Verneus*. Though purportedly relying on *Verneus*, the court in *Landmark American Ins. Co. v. Richardt*, 2019 WL 2462865 (M.D. Fla. 2019), disregarded *Verneus'* statement that if the only issue was an appraiser being paid on a contingency fee, then the appraiser should not be disqualified. *Compare*, *Richardt*, 2019 WL 2462865 at *3 *with Verneus*, 2018 WL 3417905 at *5.

Richardt also relied on *The Shores at Coco Plum Condo. Ass'n, Inc. v. Westchester Surplus Lines Ins. Co.*, 2019 WL 2223172 (S.D. Fla. 2019)—the other case State Farm filed as supplemental authority. While *The Shores* considered *Rios'*

code of ethics analysis, it never addressed the policy interpretation analysis utilized by *Rios*, *Galvis*, or *Brickell Harbour*. *The Shores*, 2019 WL 2223172 at *2. *Richardt* suffers from the same deficiency—it failed to consider the policy interpretation analysis conducted by *Rios*, *Galvis*, and *Brickell Harbor* and focused on the code of ethics analysis.

The Third District's recent decision in *State Farm Florida Insurance Company v. Sanders*, _____ So. 3d_____, 2019 WL 3309217 (Fla. 3d DCA 2019), suffers the same infirmities.[1] Though citing *Verneus*, *The Shores*, and *Branco*, *Sanders* does not cite the Third District's ***own*** decisions in *Rios*, *Galvis*, and *Brickell Harbour*. *Sanders*, 2019 WL 3309217. This is very peculiar because a district court of appeal must adhere to its prior opinions. *Sanders*, therefore, did not overrule, qualify, or recede from *Rios, Galvis,* and *Brickell Harbour*. *Rios*, *Galvis*, and *Brickell Harbour* remain the controlling authority on this issue and any statements made regarding contingency fee payment are non-binding dicta. *See Gorman v. State*, 253 So.3d 740 (Fla. 2d DCA 2018)(generally, the District Court of Appeal is bound by its earlier decisions); *Wanless v. State*, 271 So.3d 1219 (Fla. 1st DCA 2019)(the District Court of Appeal is bound to follow its own decisions unless and until an intervening decision from the state Supreme Court, the United States

[1] At the time of filing this brief, a Motion for Rehearing, Motion for Rehearing En Banc, and Motion for Clarification are pending and the Third District has not yet issued its mandate.

Supreme Court, or the District Court of Appeal sitting *en banc* compels otherwise). *Sanders* is best understood as a case holding an appointed appraiser cannot exercise his independent judgment in evaluating the loss because *the contract* between the appointed appraiser and insured *contained language* that created a principal/agency relationship and a resulting fiduciary duty.

Courts that conduct a policy interpretation analysis, however, arrive at the same conclusion as *Rios*, *Galvis*, and *Brickell Harbour*. In *Owners Ins. Co. v. Dakota Station II Condo., Ass'n, Inc.*, 2019 WL 2571645 (Colo. 2019), the Colorado Supreme Court considered whether a contingency fee agreement rendered an appraiser partial as a matter of law. *Id.* at *7-8. The Colorado Supreme Court "decline[d] to hold that [contingency fee incentives] render appraisers partial as a matter of law." *Id.* at *8.

In *White v. State Farm Fire & Cas. Co.*, 809 N.W. 2d 637 (Mich. Ct. App. 2011), State Farm, like it does here, argued that an insured's appraiser was not "independent" because the insured paid the appointed appraiser a contingency fee. *Id.* at 421. In *White*, like here, the appointed appraiser was a public adjuster that had a signed agreement with the insured for ten (10) percent of the overall amount paid by State Farm. *Id.* at 424. The court looked to other jurisdictions for assistance and turned to *Rios* and *Galvis*. *Id.* at 426. The *White* Court cited *Rios* and *Galvis* as cases where the terms "independent" and "disinterested" did not prevent an appraiser from

receiving a contingency fee for the appraisal. *Id.* Ultimately, the *White* Court followed *Rios* and held "that a contingency-fee arrangement does not prevent an appraiser from being 'independent'…." *Id.* at 428.

Similarly, in *Hozlock v. Donegal Companies/Donegal Mut. Ins. Co.*, 745 A. 2d 1261 (Pa. Super. Ct. 2000), the court addressed "whether the mere existence of a contingency fee agreement between a party and his appointed appraiser renders the appraiser *per se* unfit…." *Id.* at 1263. The court held "that the mere existence of a contingency fee agreement does not, in and of itself, render an otherwise 'competent' appraiser unfit." *Id.* at 1265. In support, the court cited *Rios*. *Id.*

In its opinion, the *Hozlock* Court cited a *Branco-esq* decision: *Donegal Ins. Co. v. Longo*, 610 A. 2d 466 (Pa. Super. Ct. 1992). *Longo*, like *Branco*, involved a case where the insured attempted to appoint his attorney was his appraiser. *Longo*, at 468. The *Longo* Court held that fiduciary relationship imposed by the attorney-client relationship precluded the attorney from exercising fair judgment in evaluating the loss. *Id.* at 468-69. The *Hozlock* Court distinguished the fiduciary duty flowing from the attorney-client relationship from the typical insured-appraiser relationship. *Hozlock*, 745 A. 2d at 1264.

Collectively, *Rios*, *Galvis*, *Brickell Harbour*, *Branco*, *Sanders*, *Hozlock*, *Longo*, *White*, *Dakota Station*, and even *Verneus* are harmonized to hold that the dispositive question in determining partiality or interest is whether the appointed appraiser can

exercise his or her independent judgment in rendering the value of the loss. Each of these cases recognize that compensation on a contingency fee basis, though perhaps undesirable, does not, in and of itself, render an appointed appraiser partial, interested, or incompetent as a matter of law.

Regardless, at a minimum, even if this Court disagrees with this analysis, a conflict exists between *Verneus*, *The Shores*, *Richardt*, and *Sanders* on the one hand and *Rios*, *Galvis*, *Brickell Harbour* on the other, which is proof that the phrase "disinterested" is ambiguous. *See Security Ins. Co. of Hartford v. Investors Diversified Ltd., Inc.*, 407 So. 2d 314, 316 (Fla. 4th DCA 1981) (finding policy provision ambiguous and citing as "proof of that pudding the fact that the Supreme Court of California and the Fifth Circuit in New Orleans have arrived at opposite conclusions from a study of essentially the same language."). Florida's rules of insurance policy interpretation require this ambiguity be resolved in favor or Mr. Parrish to mean "disinterested" does not preclude him from paying Mr. Keys on a contingency fee.

A contrary rule, like State Farm's, fails to recognize the reality that "in most cases, an appraiser will have at least some bias towards his appointing party, an appraiser paid with a contingency fee will not necessarily be more biased towards his appointor than one paid with a flat fee." *Hozlock*, 745 A. 2d at 1265. "Caselaw should reflect that reality" *Id.* Thus, even State Farm's preferred hourly-only

approach involves some level of bias because an individual or company hired by the hour necessarily has their judgment influenced by the possibility of future work. *Id.*

B. MR. KEYS IS CAPABLE OF EXERCISING HIS OWN INDEPENDENT JUDGMENT IN EVALUATING THE LOSS.

Recognizing the frailty of its contingency fee mandates disqualification argument, State Farm then argues Mr. Keys is incapable from exercising his independent judgment in evaluating the loss because: (1) a fiduciary relationship exists between him and Mr. Parrish and (2) Mr. Keys is duty bound to adhere to the KCC estimate. Both arguments fail.

1. NEITHER THE ALL RISK AGREEMENT NOR FLORIDA LAW CREATES A FIDUCIARY DUTY OWED BY MR. KEYS TO MR. PARRISH.

State Farm relies on *Branco* and will undoubtedly rely upon *Sanders* to support its position that Mr. Keys owes Mr. Parrish a fiduciary duty. A careful reading of these decisions, however, reveals that a fiduciary relationship does not exist between Mr. Keys and Mr. Parrish.

In *Home Ins. Co. v. Crawford & Co.*, 890 So. 2d 1186 (Fla. 4th DCA 2005), *abrogated on other grounds by*, *Westgate Miami Beach, LTD. v. Newport Operating Corp.*, 55 So. 3d 567 (Fla. 2010), Home Insurance Company ("Home") retained Crawford & Company insurance adjuster, Rinker, to service its insurance claims, including a December 1992 automobile accident involving Home's insured, Mr. James. Home only extended $99,000 in settlement authority to Rinker. Home

required Rinker to obtain Home's direct involvement for any claim that exceeded this authority. Rinker failed to timely advise Home of the James claim. The James claim went to trial and resulted in a verdict of $743,857 in favor of James. Rinkers' alleged mishandling of the James claim forced Home to settle with James for the full verdict amount. *Home*, 890 So.2d 1186, at 1187. Home then sued Rinker for breach of contract, fraudulent concealment, and breach of fiduciary duty. The trial court granted directed verdict on Home's claims for fraudulent concealment and breach of fiduciary duty. The jury, however, found in favor of Home on the contract claim and awarded the full amount claimed for compensatory damages of $243,537. *Id.*

In defining Home's remedies against Rinker, the Fourth District centered its analysis on the parties' contractual relationship. The court noted that under Florida law, an independent insurance adjuster's duties arise out of the contract between the company and adjuster. *Id.*, at 1189 (citing *King v. Nat'l Sec. Fire & Cas. Co.,* 656 So.2d 1338, 1339 (Fla. 4th DCA 1995)). "An insurance adjuster acts on behalf of the insurer. The duties of an insurance adjuster vary and are defined by the terms of the contract between the insurer and the adjuster." *Id.* (citations omitted). "[B]reach of this duty subjects the adjuster to liability for the insurer's resulting loss and the insurer can seek indemnity for liability accruing from the adjuster's negligence." *Id.* The *Home* Court then opined:

> In this case, the contract between the parties imposes contractual duties upon Crawford. *It did not impose any fiduciary duties*. The parties were

> dealing at arm's length. Neither can be considered unsophisticated. There was no evidence that the failure to notify Home of the verdict for sixty-six days was anything other than negligent. A final judgment in the amount obtained was not going to be concealed.

Home, at 1188 (emphasis applied).

Home holds that a fiduciary relationship does not exist between an adjuster and person or entity by operation of law. If, as State Farm contends, Florida's Administrative Code or the Ethical Requirements for All Adjusters automatically imposed on an adjuster a fiduciary duty, then *Home* need not have engaged in the contract analysis it did. That *Home* resorted to a contractual analysis shows the failings in State Farm's reliance on Florida's Administrative Code or the Ethical Requirements for All Adjusters.[2] As illustrated by *Home* then, any attempt by State Farm to analogize public adjusters to lawyers, like in *Branco*, fails. *Home* instructs that a fiduciary obligation, if any, must flow from the contract between the adjuster and insured or insurer.

Consistent with *Home*, the Third District employed a contractual language analysis in *Sanders* to ascertain the existence of a fiduciary duty. In *Sanders,* State Farm and its insureds disagreed over the value of a submitted property damage

[2] The regulations do not describe: (i) the insurance adjuster as an "agent" of the insured, (ii) recognize the insured as being the "weaker party" in the insured/insured adjuster relationship, or (iii) otherwise describe the insurance adjuster's role as one of dispensing advice or counsel. The regulations do not demand the insurance adjuster's loyalty to an insured, or even prioritization of the insured's interests, but, rather, only mandates a fair and honest treatment of the insured.

claim, which prompted the insureds' suit for breach of contract. State Farm moved to invoke appraisal, and the parties ultimately entered into an agreed order requiring appraisal in accordance with the insurance policy's appraisal provision, i.e., the selection of a "…. qualified, disinterested appraiser…". *Sanders,* 2019 WL 3309217, at *1. State Farm subsequently objected to the insureds' designation of their retained public adjuster, Mr. Debernardi of 911 Claims Corporation ("Debernardi"), as their appraiser.

State Farm argued that Debernardi was not "disinterested" because: (1) an agent/principal relationship existed between him and the insureds, (2) his contingency fee, and (3) his prior estimate of damages. *Id.* It was undisputed that the original contract between the insureds and Debernardi specified that in exchange for an assigned 10% of the insureds' recovery amount, Debernardi agreed to serve as "…*the agent and representative* [of the insureds]…to adjust, appraise, advise and assist in the settlement of the loss" under the State Farm policy. *Id*. (emphasis added). Debernardi had been involved with the insureds' claim from inception; he inspected the loss, reported the claim to State Farm, and prepared the written $88,536.41 loss estimate. *Id.* at *3. The trial court overruled State Farm's objection and entered an order permitting Debernardi to serve as the insureds' "disinterested" appraiser. *Id.* at *1.

State Farm appealed. On appeal, the Third District quashed the trial court's ruling. The court premised its ruling on the provision in the contract that identified Debernardi as the insureds' "agent." The court used the agency relationship between the insureds and Debernardi to conclude that Debernardi owed a fiduciary duty to the insureds. Upon finding a fiduciary duty existed, the court, citing *Branco*, then held that "…. a fiduciary, such as a public adjuster *who was in a contractual agent-principal relationship with the insureds*, cannot be a disinterested appraiser as a matter of law." *Id.,* at *4 (emphasis added).

But here, unlike *Sanders*, nothing exists in the All Risk Agreement that creates a principal/agent relationship between Mr. Keys and Mr. Parrish. Unlike in *Sanders*, the All Risk Agreement does not state Mr. Keys shall be Mr. Parrish's agent. And, unlike *Sanders*, the All Risk Agreement does not state that KCC shall be Mr. Parrish's agent.

Instead, like *Home*, the All Risk Agreement makes clear that KCC is an independent party and that KCC does not provide any legal representation, legal advice, or legal interpretations. Indeed, the All Risk Agreement gives KCC the exclusive right to designate "…[e]xperts who may be necessary to properly evaluate the damages…" and "…incur expert costs KCC deems necessary to substantiate this claim." Mr. Parrish, a former lawyer, and KCC are sophisticated parties—just like in *Home*. (R. 144:2-3). Thus, as in *Home*, an arms-length transaction between

sophisticated parties resulted in Mr. Keys becoming Mr. Parrish's appraiser. And business relationships are not confidential relationships that impose a fiduciary duty. *See, Linville v. Ginn Real Estate Co., LLC*, 697 F. Supp. 2d 1302 (M.D. Fla. 2010) (applying Florida law).

But if this Court finds *Home* and *Sanders* conflict, the conflict should be resolved in favor of *Home*. Unlike *Sanders*, *Home* involved a case where the party alleged to owe the fiduciary duty participated in the entire process such that the *Home* Court received the benefit of briefing from all interested parties—not a situation like *Sanders*.

2. MR. KEYS HAS HAD NO INVOLVEMENT IN THIS CLAIM; THUS, STATE FARM CAN PRESENT NO VIABLE EVIDENCE OF A PRE-APPRAISAL BIAS.

The second fact that distinguishes this case from *Sanders* is that Mr. Keys had no role in the adjustment or evaluation of Mr. Parrish's claim prior to the appraisal demand being made. In *Sanders*, Debernardi, the appointed appraiser, personally inspected the insureds' property, reported the insureds' claim to State Farm, and prepared a written estimate for the insureds' claim. *Sanders*, 2019 WL 3309217 at *3. Here, unlike *Sanders*, State Farm cites no evidence that Mr. Keys had any involvement in: (i) assessing those damages arising out of the September 10, 2017 loss, (ii) reporting the claim to State Farm, and/or (iii) preparing and submitting the January 8, 2018 the Sworn Statement In Proof Of Loss.

Now, State Farm will likely argue that because Casey Sims, Bobby Sims, and John Waligora are all KCC employees and they played a role in the evaluation, reporting, and submission of Mr. Parrish's claim, Mr. Keys is nonetheless disqualified. The problem with this argument is that the Third District rejected it in *Brickell Harbour*. In *Brickell Harbour*, the insurer hired JS Held to inspect the insured's loss. *Brickell Harbour*, 256 So. 3d at 248-49. JS Held sent Matthew Flax to conduct an inspection. *Id.* Eventually, the claim proceeded to appraisal and the insurer appointed Mr. Flax's boss, Randy Ison, as its party-designated appraiser. *Id.* at 248. The insurer claimed Mr. Ison could not be "impartial" because he was Mr. Flax's boss. *Id.* The court rejected that argument. *Id.* at 248-49.

But, similar to *Brickell Harbour*, State Farm does and cannot show that Mr. Keys planned to abandon his own independent judgment in the ensuing appraisal process. Specifically, there is no evidence to suggest that Mr. Keys would: (i) blindly accept the initial valuation of Mr. Parrish's loss without further review or evaluation; (ii) refuse to reconsider or re-evaluate Mr. Parrish's loss in light of any new information received during the course of the appraisal proceedings; (iii) refuse to work with State Farm's appointed appraiser to narrow the issues, identify "undisputed" aspects of the loss, or resolve the claim; or (iv) place his interests above. Under these facts and in the absence of any evidence demonstrating Mr. Keys' pre-appraisal bias, *Sanders*, *Verneus*, *Landmark American*, and *The Shores*

are inapplicable.

3. PROHIBITING PUBLIC ADJUSTERS FROM SERVING AS APPRAISERS WILL DENY ACCESS TO APPRAISAL FOR INSUREDS AND ALLOW INSURERS TO TAKE ADVANTAGE OF INSUREDS.

Insurance companies possess superior economic power to the majority of Florida insureds. *See Ivey v. Allstate Ins. Co.*, 774 So. 2d 679, 684 (Fla. 2000). "[T]o level the playing field so that the economic power of insurance companies is not so overwhelming that injustice may be encouraged because people will not have the necessary means to seek redress in the courts," Florida enacted section 627.428, Florida Statutes. *Id.* Appraisal does not have a fee-shifting provision like section 627.428.

Galvis and *Rios*, however, rectify this problem by permitting insureds to pay their appointed appraisers a contingency fee. Contingency fee payment enables insureds of limited economic means to access competent individuals thereby leveling the playing field. Adopting State Farm's hourly only rule tips embraces a framework favoring insurance companies that have the economic means to pay for representation on an hourly basis. Most insureds, however, cannot afford to pay an appraiser an hourly rate to evaluate their claims will not be able to avail themselves of the appraisal process typically available under property insurance contracts. Thus, insurance companies, like State Farm, are incentivized to invoke appraisal when it

knows an insured cannot afford to pay an appraiser as a coercive tactic to induce an insured to accept the insurer's evaluation of the amount of loss.

The effect of such a rule becomes particularly wanting when viewed through the lens of smaller claims—the reality of the overwhelming majority of residential property claims. In such cases, a contingency fee actually provides the insured with the most economic protection because the contingency fee percentage pales in comparison to the hourly cost. In such instances, the appraiser benefits from the hourly arrangement—not the insured. Thus, the economic incentive premise underlying State Farm's prohibit contingency fee payment argument, still exists in the hourly context because the appraiser derives a greater economic benefit by thoroughly investigating and evaluating the loss. This reality also exists in the not uncommon scenario where appraisal becomes drawn out.

Finally, State Farm's purported rule creates an untenable process because if the insured cannot represent him or herself, and an insured cannot ask a lawyer to be its appraiser, *Branco*, 148 So. 3d at 495-96, and, under State Farm's rule, cannot appoint a public adjuster, then an insured is left without any to appoint as an appraiser.

CONCLUSION

The trial court properly ordered State Farm to proceed to an appraisal of this case with Mr. Keys serving as Mr. Parrish's appointed appraiser. Accordingly, Mr. Parrish requests that this Court should affirm.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

This brief complies with font requirements; it is typed in Times New Roman 14 point font, and is proportionately spaced type.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail to the below for service and all parties listed on the Second District Court of Appeals' eDCA Portal on September 3, 2019.

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IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

STATE FARM FLORIDA
INSURANCE COMPANY,

Appellant, CASE NO.: 2D19-130

vs.

JON PARRISH,

Appellee.
_____/

MOTION FOR ATTORNEYS' FEES

COMES NOW, Appellee, JOHN PARRISH, by and through the undersigned counsel, and pursuant to Rule 9.400(b), Florida Rules of Appellate Procedure, and Section 627.428, Florida Statutes, requests this Court award it appellate attorneys' fees and in support states:

1. The issues before this Court relate to claims made against Appellee's insurer, STATE FARM FLORIDA INSURANCE COMPANY.
2. Section 627.428, Florida Statutes, provides a one-way street offering attorneys' fees to a successful insured who prevails on a claim against an insurer. FLA. STAT. §627.428(1); *Lumbermens Mut. Cas. Co. v. Percefull*, 638 So. 2d 1026, 1029-30 (Fla. 4th DCA 1994); *see First National Ins. Co. of Am. v. Devine*, 211 So. 2d 587 (Fla. 2d DCA 1968).

3. Attorneys' fees are available to an insured who prevails on an appeal. FLA. STAT. §627.428(1); *Molyett v. Society Nat. Life Ins. Co.*, 452 So. 2d 1114 (Fla. 2d DCA 1984).
4. Appellee is the named insured on the contract of insurance issued by Appellant. (R. 19.)
5. Therefore, Section 627.428, Florida Statutes, provides a basis for the recovery of Appellee's attorneys' fees from Appellant.
6. Having prevailed below, Appellee is entitled to an unconditional order granting him entitlement to recovery of his attorneys' fees incurred on this appeal from Appellant, in the event he prevails in this appeal. FLA. STAT. §627.428(1).

WHEREFORE, Appellee, respectfully requests that this Court grant his Motion for Attorneys' Fees and enter an order finding he is entitled to appellate attorneys' fees along with any other relief this Court deems necessary and just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail to the below for service and all parties listed on the Second District Court of Appeals' eDCA Portal on September 11, 2019.

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT

CASE NO.: 2D19-0130
LT CASE NO.: 11-2018-CA-01198-0001

STATE FARM FLORIDA
INSURANCE COMPANY,

Appellant,

vs.

JON PARRISH,

Appellee.
_____/

On Appeal from the Circuit Court of the 20th Judicial Circuit in and for Collier County, Florida

---

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TABLE OF CONTENTS

TABLE OF AUTHORITIES……...iii

ARGUMENT IN REPLY…….....1

THE TRIAL COURT ERRED IN DENYING STATE FARM'S PETITION BECAUSE KCC DOES NOT MEET THE CONTRACT'S PLAIN REQUIREMENT THAT PARRISH'S APPRAISER BE "DISINTERESTED"…...…1

A. Standard of Review……...1
B. "Disinterested" Means "Disinterested": Many Factors Confirm KCC's Interest, Including the Contingent Fee...1
C. This Court Should Follow Sanders*……...6*
D. Branco *Remains Instructive……11*
E. The Record Does Not Support Parrish's "Access Denial" Argument; this Appeal to Sympathy Provides No Basis for Straying from the Language of the Contract……..13

CONCLUSION……...15

CERTIFICATE OF SERVICE……16

CERTIFICATE OF COMPLIANCE……...17

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TABLE OF AUTHORITIES

Cases

Barakat v. Broward Cnty. Hous. Auth.,
771 So. 2d 1193 (Fla. 4th DCA 2000)……..14

Brickell Harbour Condominium Association v. Hamilton Specialty Insurance Co.,
256 So. 3d 245 (Fla. 3d DCA 2018)……..3, 4, 5, 8

Capital Bank v. MVB, Inc.,
644 So. 2d 515 (Fla. 3d DCA 1994)……...……7

Donado v. PennyMac Corp.,
174 So. 3d 1041 (Fla. 4th DCA 2015)……...…….6

Fisher v. Grady,
131 Fla. 1, 178 So. 852 (Fla. 1937)…….……7

Fla. Ins. Guar. Ass'n v. Branco,
148 So. 3d 488 (Fla. 5th DCA 2014)……..……1, 3, 7, 11, 13

Galvis v. Allstate Ins. Co.,
721 So. 2d 421 (Fla. 3d DCA 1998)……...……..3, 4, 6, 11

Home Ins. Co. v. Crawford & Co.,
890 So. 2d 1186 (Fla. 4th DCA 2005)…….…….10

Kortum v. Sink,
No. 2009 CA 3926,
2010 WL 6020710 (Fla. 2d Jud. Cir. May 10, 2010),
rev'd on other grounds, 54 So. 3d 1012 (Fla. 1st DCA 2010)……..……10

Kraay v. State,
148 So. 3d 789 (Fla. 1st DCA 2014)…….……..6

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Landmark Am. Ins. Co. v. H. Anton Richardt, DDS, PA,
No. 2:18-cv-600-FtM-29UAM,
2019 WL 2462865 (M.D. Fla. June 13, 2019)……...…….5, 6

Panama City Beach Condos., Ltd. P'ship v. Adjusters Int'l Colo., Inc.,
No. 4:08cv369-RH-WCS,
2009 WL 10674033 (N.D. Fla. July 28, 2009)…….……12

Parkerson v. Nanton,
876 So. 2d 1228 (Fla. 1st DCA 2004)……...……..1

Rios v. Tri-State Ins. Co.,
714 So. 2d 547 (Fla. 3d DCA 1998)…….3, 4, 6, 11

Ruiz v. State Farm Fla. Ins. Co., No. 2018-025910-CA-01
(Fla. 11th Cir. Ct. May 30, 2019)……...…….3

State Farm Florida Ins. Co. v. Sanders,
44 Fla. L. Weekly D1901 (Fla. 3d DCA July 24, 2019)...6, 7, 8, 9, 10, 11, 13

Shores at Coco Plum Condo. Ass'n, Inc. v. Westchester Surplus Lines Ins. Co.,
No. 18-23910-Civ-COOKE/GOODMAN,
2019 WL 2223172 (S.D. Fla. Apr. 29, 2019)…….…….5, 6

Other Authorities:

Florida Administrative Code Rule 69B-220-201(3) (2015)……..7

R. Regulating Fla. Bar 4-3.3…….....12

Section 626.854, Florida Statutes (2018)……...…….....7, 11

Section 626.854(11), Florida Statutes……...…….…….12

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ARGUMENT IN REPLY

THE TRIAL COURT ERRED IN DENYING STATE FARM'S PETITION BECAUSE KCC DOES NOT MEET THE CONTRACT'S PLAIN REQUIREMENT THAT PARRISH'S APPRAISER BE "DISINTERESTED"

A. Standard of Review

This Court's standard of review is not "mixed." (A.B. 6).[1] The trial court adjudicated the sole question before it directly on State Farm's Petition and Parrish's Response, based on the undisputed facts. (R. 7-61, 72-89, 126-79). The trial court did not (nor could it) make "factual findings" in this context. *See generally* Fla. R. Civ. P. 1.510(c); *Parkerson v. Nanton*, 876 So. 2d 1228, 1230 (Fla. 1st DCA 2004). Accordingly, review is *de novo*. *Fla. Ins. Guar. Ass'n v. Branco*, 148 So. 3d 488, 495 (Fla. 5th DCA 2014).

B. *"Disinterested" Means "Disinterested": Many Factors Confirm KCC's Interest, Including the Contingent Fee.*

Parrish attempts to fault State Farm for not defining the term "disinterested" as expressly excluding appraisers who are compensated on a contingency fee basis. This contention seeks to impose a drafting burden on State Farm that is not found in the law. The word "disinterested" is unambiguous and its plain meaning excludes those with a pecuniary interest in the outcome. *Branco*, 148 So. 3d at 496

[1] Citations to Parrish's Answer Brief are denoted as "A.B. [page number]."

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n.9 ("'Disinterested' is defined as . . . not having a pecuniary interest . . . ."). Parrish's argument that State Farm should have defined "disinterested" to prohibit certain (contingency) fee arrangements overlooks that the purpose of having "disinterested" appraisers is not *solely* to exclude persons with a disqualifying *financial* interest in the outcome of the appraisal process.

Here, KCC's definitional attack attempts to deter the Court from the many factors confirming KCC's interest in the appraisal's outcome: it previously prepared Parrish's estimate, and contractually agreed to a biased/agency role in the claim's adjustment as the insured's public adjuster. Parrish's effort to narrow State Farm's challenge to KCC's "interest" in the matter solely to KCC's financial, contingent-fee interest is myopic and fails to recognize the additional reasons KCC is not "disinterested." Still, KCC's contingent fee interest in the *outcome* of the appraisal process is a significant reason for concern.

As Eleventh Judicial Circuit Judge Michael Hanzman recently explained, a financial interest in the *outcome* of a process in which one has been tasked with performing a neutral evaluation is inconsistent with being "disinterested":

> Even putting aside the fact that the parties bound themselves to this qualification, the Court sees no reason why appraisal/arbitration proceedings should be tainted by self-interest—a taint that affects any outcome and—equally importantly—undermines the public's respect for, and confidence in, this adversarial process. Where parties have

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> expressly agreed to have a dispute decided by neutral fact finders, courts should enthusiastically enforce that agreement—not look for ways to thwart it through over analysis and judicial wheel-spinning. Indeed, the Court finds it ironic that for over fifty years we (meaning the judiciary) have chastised insurance carriers for failing to draft policies "so that the average person can clearly understand" them, and have repeatedly warned that if policies continue to be "drawn in such a manner that it requires the proverbial Philadelphia Lawyer to comprehend the terms" the judicial will continue to construe them liberally in favor of insureds. Then when a carrier heeds that warning, and drafts a plain term understandable to any common man, we dance on the head of a pin in a struggle to "interpret" that which needs no interpretation.
>
> The bottom line is that these parties bargained for "disinterested" appraisers and this Court will enforce that bargain as clearly written—no more or less.

Ruiz v. State Farm Fla. Ins. Co., No. 2018-025910-CA-01 (Fla. 11th Cir. Ct. May 30, 2019) (citation omitted).

In urging for affirmance, Parrish suggests this Court should follow the outdated opinions from the Third District in *Rios v. Tri-State Ins. Co.*, 714 So. 2d 547 (Fla. 3d DCA 1998) and *Galvis v. Allstate Ins. Co.*, 721 So. 2d 421 (Fla. 3d DCA 1998), and its more recent decision in *Brickell Harbour Condominium Association v. Hamilton Specialty Insurance Co.*, 256 So. 3d 245 (Fla. 3d DCA 2018). Parrish's heavy reliance on *Rios* and *Galvis* is unpersuasive in the face of the Fifth District's decision in *Branco* which explained why *Rios* and *Galvis* retain

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limited, if any, continued utility. 148 So. 3d at 495 (holding that version of Code of Ethics for Arbitrators in Commercial Disputes applied in *Rios* and *Galvis* "did not explicitly address the neutrality of arbitrators, but simply required disclosure of any direct or indirect financial interest in the outcome of the proceedings," while revised 2004 Code of Ethics established a presumption of neutrality "thus, undercutting the continued viability of the holding in *Rios*").

Parrish's suggestion that *Brickell Harbour Condominium Association v. Hamilton Specialty Insurance Co*., 256 So. 3d 245 (Fla. 3d DCA 2018) supports an appraiser's ability to be compensated on a contingency fee basis, and still "disinterested," deserves close scrutiny. The appraiser at issue in *Brickell Harbour* was not compensated on a contingency fee basis at all. *Id.* at 248 ("There is no indication in the record, however, that Mr. Ison himself was directly paid by the Insurer, or that any part of Mr. Ison's or J.S. Held's compensation for work on the appraisal or the Association's claim would include a contingent fee."). And yet, the Third District identified a contingent fee interest as a "factor" in evaluating an appraiser's partiality. *Id.* at 248 n.4.

Further, to say that the *Brickell Harbour* court "rejected" the importance of a chosen appraiser whose colleague, boss, or employee previously inspected the loss (A.B. 23) is a bit of a stretch. Insofar as shown by the Third District's opinion, the

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record in *Brickell Harbour* was lacking as to what Mr. Flax (the employee) had done on the claim, and more importantly, the insured's argument was tainted by its "circularity" stemming from the fact that the employee was the subject of a fraud inquiry that had been initiated by the insured's public adjuster. *Id.* at 248.

To the merits of *Brickell Harbour*'s holding, the "disclosure" approach of *Brickell Harbour* has never been applied outside the Third District. It is based on the use of a Code of Ethics applied by the Third District in its earlier decisions (*Rios* and *Galvis*), that is now obsolete. Simply, "disclosure" does not equal "disinterested." What good is disclosure if it cannot be acted upon. Deeming KCC "disinterested" because the reason for his "interest" is known or disclosed to State Farm renders the policy's requirement of "disinterested" appraisers completely meaningless. Knowledge without the ability to seek judicial redress has no value.

Contrary to Parrish's argument, the federal cases that State Farm has filed as supplemental authorities wholly support KCC's contingent fee interest as a significant reason that KCC cannot serve as Parrish's "disinterested" appraiser. *Landmark Am. Ins. Co. v. H. Anton Richardt, DDS, PA,* No. 2:18-cv-600-FtM-29UAM, 2019 WL 2462865 (M.D. Fla. June 13, 2019) (holding appraiser was not impartial because "[a] pecuniary interest in the outcome is by definition a personal interest that favors one side over the other"); *Shores at Coco Plum Condo. Ass'n,*

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Inc. v. Westchester Surplus Lines Ins. Co., No. 18-23910-Civ-COOKE/GOODMAN, 2019 WL 2223172 (S.D. Fla. Apr. 29, 2019) (appraiser was not "impartial" because "[b]y virtue of the contingency compensation plan, Mr. Downs has a vested interest in appraising the Property at the highest possible recovery because his compensation will be a percentage of the appraisal."). Parrish's attempt to distinguish *Richardt* and *Coco Plum* on the ground that they did not consider "policy interpretation" makes no sense; both courts considered the plain meaning of the word "impartial." Here, State Farm's policy requires each appraiser to be "disinterested," but the analysis remains the same.

C. *This Court Should Follow* Sanders

Significantly, after State Farm filed its Initial Brief here, the Third District decided *State Farm Florida Ins. Co. v. Sanders*, 44 Fla. L. Weekly D1901 (Fla. 3d DCA July 24, 2019).[2] Parrish attempts to marginalize *Sanders* on the grounds that the Third District did not cite to its prior decisions in *Rios* and *Galvis* and that his contract with KCC contained different language than the contract between the insured and the public adjuster in *Sanders*. These are unpersuasive reasons for this

[2] Parrish correctly points out that the Respondent's post-opinion motions are pending in *Sanders*. However, "[t]he effective date of an appellate decision is the date appearing on the face of the decision, even though most decisions do not actually become final until after the time has expired for filing a motion for rehearing[.]" *Donado v. PennyMac Corp.*, 174 So. 3d 1041, 1043 (Fla. 4th DCA 2015); *see also Kraay v. State*, 148 So. 3d 789, 790 n.1 (Fla. 1st DCA 2014).

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Court to sideline *Sanders*. *Sanders* is the most factually analogous opinion issued by a District Court of Appeal to date and should be followed here.

In *Sanders*, the insureds' public adjuster, Mr. Debernardi, was their "agent" pursuant to the public adjusting contract. *Sanders*, 44 Fla. L. Weekly D1901, at *1. The public adjusting contract assigned 10% of the amount recovered to Mr. Debernardi's employer, 911 Claims Corporation. In addition, Mr. Debernardi had reported the claim to State Farm and prepared an estimate that was the subject of the amount-of-loss dispute between State Farm and its insureds. *Id.* The Third District relied on each of these facts to conclude that Mr. Debernardi could not serve as the insureds' "disinterested" appraiser as a matter of law:

> In the case before us, the contract language between the insureds and Mr. Debernardi made Mr. Debernardi the insureds' agent. The insureds then selected Mr. Debernardi to be their "disinterested" appraiser. We find that the distinguishing fact that the disinterested appraiser in *Branco* was an attorney, as opposed to here, an agent, is irrelevant. Florida law is clear that an agent owes a fiduciary duty to his or her principal. *See Fisher v. Grady*, 131 Fla. 1, 178 So. 852, 860 (Fla. 1937); *Capital Bank v. MVB, Inc.*, 644 So. 2d 515, 518 (Fla. 3d DCA 1994). Moreover, Florida law regulates public adjusters. *See* § 626.854, Fla. Stat. (2018). Florida Administrative Code Rule 69B-220-201(3) (2015), Ethical Requirements for All Adjusters and Public Adjuster Apprentices, states, "The work of adjusting insurance claims engages the public trust. An adjuster shall put the honest treatment of the claimant above the adjuster's own interests in every instance." Consequently, *Branco*'s holding is applicable to the case before us. Because Mr. Debernardi is

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> the insured's agent, he cannot be named their disinterested appraiser.
>
> In addition, State Farm contends in its petition that Mr. Debernardi was involved with the insureds' claim from the beginning. He inspected the loss at the insureds' property, reported the claim to State Farm, and prepared the written estimate for the $88,536.41 claim. Moreover, Mr. Debernardi has a financial interest in the insurance claim. Under his agency contract with the insureds, he stands to earn a 10% contingency fee of whatever amount the insureds recover from State Farm. *See Brickell Harbour Condo. Ass'n v. Hamilton Specialty Ins. Co.*, 256 So.3d 245, 248 n.4 (Fla. 3d DCA 2018) ("The existence of a contingent fee payable to the party-appointed appraiser has been identified as a 'factor' in assessing partiality . . . ."). As such, Mr. Debernardi cannot be disinterested, as he has a financial interest in whether or not the insureds recover from State Farm and how much they recover.
>
> . . . .
>
> [I]n the case before us, Mr. Debernardi has previously inspected the loss, and he was the person who prepared the written estimate of damages the insureds used to file their claim. It is hard to imagine that Mr. Debernardi is going to reach a different amount for the initial $88,536.41 estimate he already reached.
>
> Accordingly, we hold that fiduciary, such as a public adjuster who is in a contractual agent-principal relationship with the insureds, cannot be a disinterested appraiser as a matter of law.

Both insurance contracts in *Sanders* and in this appeal contain identical contractual terms requiring "disinterested" appraisers. Like Mr. Debernardi and 911 Claims in *Sanders*, KCC is in a relationship of trust and confidence with

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Parrish, has a contingent fee interest in the claim, and its employee, Mr. Sims, has previously scoped, formed opinions regarding, and prepared an estimate of the amount of Parrish's loss used to further negotiations on Parrish's claim. Given these similarities, the Court should find itself hard-pressed to accept Parrish's invitation for *Sanders* to be relegated as inapplicable.

Parrish argues that *Sanders* "is best understood as a case holding an appointed appraiser cannot exercise his independent judgment in evaluating the loss because *the contract* between the appointed appraiser and insured *contained language* that created a principal/agency relationship and a resulting fiduciary duty." (A.B. 14). Although Parrish's contract with KCC does not explicitly call KCC Parrish's "agent," the distinction is insufficient to negate *Sanders*' applicability. Here, the All Risk Agreement dictates that KCC "will prepare a detailed accounting of the damages and present them to the insurance company[,] "will negotiate the damages with the insurance company representative(s)," and provides in advance that KCC is to be named as Parrish's appraiser once there is an amount-of-loss dispute and KCC demands appraisal. (R. 25). The undisputed facts also demonstrate that Parrish executed a Sworn Proof of Loss, adopting the amount claimed by KCC's estimate as his own statement to State Farm. (R. 29-30). The authorization by Parrish to KCC to assess the amount of loss and negotiate its

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amount with State Farm creates the same type of agency relationship as the Third District determined in *Sanders*.

The public adjuster-insured relationship is unique *in ways that matter* relating to whether a public adjuster who has prepared an estimate and has a contingency-fee interest in the appraisal's outcome qualifies as "disinterested":

> A public adjuster is a licensed professional that is a fiduciary to the insured. The public adjuster, while hired by contract, is in an agency relationship with the insured to resolve the entire claim. The evidence establishes that in most cases the public adjuster shares in the settlement proceeds and in most cases the settlement check is payable jointly to the adjuster and the insured. In most cases the settlement cannot take place without the consent of the public adjuster. The public adjuster occupies a unique position with the insured.

Kortum v. Sink, No. 2009 CA 3926, 2010 WL 6020710 (Fla. 2d Jud. Cir. May 10, 2010), *rev'd on other grounds*, 54 So. 3d 1012 (Fla. 1st DCA 2010). No public adjusting relationship was at issue in *Home Ins. Co. v. Crawford & Co.*, 890 So. 2d 1186 (Fla. 4th DCA 2005), and there is no conflict between *Sanders* and *Home* relevant to this appeal.[3] *Cf. Sanders*, 44 Fla. L. Weekly D1901, at *3.

[3] Parrish oddly suggests that, in *Sanders*, the Third District did not "receive[] the benefit of briefing from all interested parties." (A.B. 22). The "interested parties," of course, were State Farm and Sanders. To the extent Parrish implies that courts in the first-party insurance context should hear from allegedly "disinterested" appraisers, that would likely result in cumbersome procedures and duplicative arguments. And yet, assuming that a motion to intervene under Rule 1.230 may be

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D. Branco *Remains Instructive*

Parrish also argues that the Fifth District's decision in *Branco* "does not undermine the true rationale" of *Rios* and *Galvis* and that "any attempt by State Farm to analogize public adjusters to lawyers" fails. (A.B. 11, 19). While an attorney-client relationship is not identical to a public adjuster-insured relationship, there are similarities between these legal relations that bear on whether a public adjuster—particularly one who has the characteristics of KCC here—cannot serve as an insured's "disinterested" appraiser.

In *Branco*, the Fifth District held that an appraiser who owes his or her nominating party a "fiduciary duty of loyalty" creates a disqualifying likelihood that the appraiser "will be incapable of rendering a fair judgment." *Branco*, 148 So. 3d at 495. The nature of the relationship between a public adjuster and insured such as KCC and Parrish falls squarely within this rationale. Parrish retained KCC to estimate the damages, negotiate the damages with State Farm, and to be his appraiser if appraisal was invoked. (R. 25). Like Parrish's counsel, KCC and its representatives are advocates who is ethically and contractually barred from taking actions that would harm Parrish's interests. On the other hand, yet also like Parrish's counsel, KCC must perform certain tasks in the course of its

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made, it is difficult to conceive of why the fact that this did not occur in *Sanders* should prejudice State Farm.

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representation of Parrish (such as prepare an estimate, *see* § 626.854(11), Fla. Stat. and communicate with State Farm) to meet a minimal standard of professional competence, and keep Parrish reasonably informed of the progress of his claim. KCC also cannot settle Parrish's claim without his consent and exercises control over monies he may be paid by State Farm.

Because of this relationship of trust and confidence and Parrish's need to rely on KCC's adjusting expertise, the legislature "has explicitly found that 'it is necessary for the protection of the public to regulate' public adjusters"—analogous to the regulation of attorneys by The Florida Bar. *Panama City Beach Condos., Ltd. P'ship v. Adjusters Int'l Colo., Inc*., No. 4:08cv369-RH-WCS, 2009 WL 10674033 (N.D. Fla. July 28, 2009) (citation omitted). KCC, and its president George Keys, have an "interest" in the claim and its outcome and hold preconceived opinions regarding the scope and amount of loss. Like a public adjuster in Mr. Keys' shoes, attorneys are vigorous, partisan client advocates while simultaneously being bound by duties such as that of candor to the tribunal. *See, e.g.*, R. Regulating Fla. Bar 4-3.3. Although Parrish takes pains to distance George Keys from KCC's prior work on the claim, he falls far short of demonstrating why naming the president of the financially-interested company who has previously inspected the loss should be condoned for an alternative dispute resolution process

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in which the parties bargained for neutral, "disinterested" fact-finders. Mr. Keys is not Mr. Sims' friend or colleague, or an independent contractor, in which an appraiser's "interest" could become more fact-intensive and case-specific. He is the president. Parrish's notion that Mr. Keys bears no allegiance to the $495,079.25 estimate already prepared by KCC is implausible as a matter of law.

Thus—in addition to *Sanders—Branco*'s application is readily apparent and this Court should apply it to the relationship between KCC and Parrish in this case.

E. *The Record Does Not Support Parrish's "Access Denial" Argument; this Appeal to Sympathy Provides No Basis for Straying from the Language of the Contract*.

Lastly, with no legal support, Parrish also complains that objectively applying the word "disinterested" will place the onerous burden on insureds to pay appraisers on an hourly basis, making participation in the appraisal process cost-prohibitive. (A.B. 24-25). There is, however, no record evidence of a payment arrangement between Parrish and an entity or appraiser other than KCC. It is, accordingly, speculative to submit that a different appraiser will only accept payment on an hourly basis—an appraiser may also work for a flat fee.[4] Even more importantly, Parrish is imploring this Court not to enforce the plain meaning of an

[4] Parrish incorrectly suggests it is State Farm's exclusive position that an insured must pay an appraiser on an hourly basis, ignoring that there are other permissible payment arrangements. (A.B. 5).

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insurance policy provision on thin public policy grounds. However, this is far from a situation where public policy can step in to relieve a party of his contractual promise. *See generally Barakat v. Broward Cnty. Hous. Auth.*, 771 So. 2d 1193, 1195 (Fla. 4th DCA 2000) ("Contracts are to be construed in accordance with the plain meaning of the words contained therein. . . . It is never the role of a trial court to rewrite a contract to make it more reasonable for one of the parties or to relieve a party from what turns out to be bad bargain.").

Furthermore, no evidence exists of Parrish's dramatic "gloom-and-doom" pronouncements, like the incorrect statement that insureds will be "left without any[one] to appoint as an appraiser." (A.B. 25). Such a logical fallacy, and Parrish's generalized statements about the alleged impoverishment of many insureds, ring hollow in the face of the many hundreds of ongoing appraisals in first-party property claims throughout Florida on any given day. And yet, even if one were to presume (although there is no record basis for doing so) that hiring an appraiser other than a public adjuster causes the hypothetical insured a financial hardship, this still provides no legally-recognized exception to the Court's need to enforce the plain language of the word "disinterested." *If*—and only if—legitimate studies (not the ruminations of counsel) were to give rise to a colorable socio-

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political inquiry concerning economic inequality in the appraisal process, it would be a matter for the Legislature, not the courts.

While retention of a "disinterested" appraiser may involve payment of a fee, the appraisal process provides vast global savings and expediency for the insured compared to the alternative—years of costly expert-driven litigation.

CONCLUSION

This Court must answer the sole legal question—Is George Keys of KCC a "disinterested" appraiser as plainly required by the contract?"— with a resounding "No." As Parrish's public adjuster, one whose company has acted as a partisan and advocate, one who owes Parrish ethical and fiduciary duties of loyalty, one with a direct financial interest in the *outcome* of the appraisal process he is tasked with participating in, and whose employee previously prepared an estimate and formed opinions regarding the scope and extent of loss, George Keys and KCC are anything but "disinterested" in Parrish's claim and this dispute.

State Farm respectfully requests that this Court reverse the Order on State Farm's Petition, order that the Petition be granted, and order that Parrish select a "qualified, disinterested" appraiser who is not affiliated with KCC as required by the insurance contract.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing has been furnished via email this 1st day of October, 2019 to: **Theodore A. Corless, Esq.** and **Mary Catherine Lamoureux, Esq.**, Corless Barfield Trial Group, 6812 W. Linebaugh Avenue, Tampa, FL 33625 (service@corlessbarfield.com); **Gregory L. Evans, Esq.**, **Alicia M. Lopez, Esq.**, and **Mark A. Boyle, Esq.**, Boyle Leonard & Anderson, P.A., 2050 McGregor Boulevard, Fort Myers, FL 33901 (eservice@insurance-counsel.com; gevans@insurance-counsel.com; alopez@insurance-counsel.com; mboyle@insurance-counsel.com).

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared in Microsoft Word, Times New Roman 14-point font and complies with the requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ Kara Berard Rockenbach
Kara Berard Rockenbach, Esq.

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT, POST OFFICE BOX 327, LAKELAND, FL 33802-0327

December 04, 2019

CASE NO.: 2D19-0130
L.T. No.: 2018-CA-1198

STATE FARM FLORIDA INSURANCE COMPANY	v.	JON PARRISH
Appellant / Petitioner(s),		Appellee / Respondent(s).

BY ORDER OF THE COURT:

This case is provisionally set for oral argument on **TUESDAY, FEBRUARY 04, 2020**, at **11:00 A.M.**, before: Judge Darryl C. Casanueva, Judge Patricia J. Kelly, Judge Matthew C. Lucas. Oral argument will occur at the Second District Court of Appeal, Tampa Branch Headquarters, in the courtroom of the Stetson University College Of Law, Tampa Campus, First Floor, 1700 North Tampa Street, Tampa, Florida. The court calendars can be viewed on this court's website at www.2dca.org. Counsel or parties are requested to make their presence known to the receptionist by fifteen minutes prior to the time listed above.

The panel is subject to change without notice. Should the assigned panel of judges decide that the court will not benefit from oral argument in this proceeding, the attorneys or parties will be notified by order no less than two weeks before the scheduled date.

Please review the notice regarding oral argument in the Second District Court of Appeal. A copy has been furnished with this order and may also be found on this court's website.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

Mark A. Boyle, Esq.	Gregory L. Evans, Esq.	Theodore A. Corless, Esq.
Alicia Maria Lopez, Esq.	Kara Berard Rockenbach, Esq.	Daniel M. Schwarz, Esq.
Mary C. Lamoureux, Esq.	Lynn S. Alfano, Esq.	Robert A. Kingsford, Esq.

jc

Mary Elizabeth Kuenzel
Mary Elizabeth Kuenzel
Clerk

RECEIVED, 12/12/2019 11:12:15 AM, Clerk, Second District Court of Appeal

IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

2ND DCA CASE NO.: 2D19-130
LOWER CASE NO.: 11-2018-CA-01198-0001

STATE FARM FLORIDA
INSURANCE COMPANY,

Appellant,

vs.

JON PARRISH,

Appellee.
_____/

APPELLEE'S NOTICE OF FILING SUPPLEMENTAL AUTHORITY

The Appellee, JON D. PARRISH, by and through his undersigned counsel, pursuant to Rule 9.225, Florida Rules of Appellate Procedure, submits as supplementary authority the decision of *State Farm Florida Insurance Company v Joseph Valenti, Jr.*, No.: 4D19-205 (Fla. 4th DCA Dec. 11, 2019), which is attached hereto as Exhibit "A". The supplemental authority is pertinent to the issue the meaning of "disinterested appraiser" which might impact this appeal.

Respectfully submitted,

By: /s/ *Mark A. Boyle*
Gregory L. Evans, Esquire
Florida Bar No.: 0767824
Mark A. Boyle, Esquire
Florida Bar No.: 5886
Counsel for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of December, 2019, a true and correct copy of the forgoing has been electronically filed using the E-Portal filing system to: Theodore A. Corless, Esquire, Mary Catherine Lamoureux, Esquire, Corless Barfield Trial Group, 6812 W. Linebaugh Avenue, Tampa, Florida 33625 at service@corlessbarfield.com AND Lynn S. Alfano, Esquire, Robert A. Kingsford, Esquire, Kristen McMullen, Esquire, Alfano Kingsford, P.A., 1060 Maitland Center Commons Boulevard, Suite 180, Maitland, Florida 32751 at lalfano@alfanokingsford.com and pleadings@alfanokingsford.com.

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By: /s/ *Mark A. Boyle*
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Florida Bar No.: 5886

0178
EXHIBIT A

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

STATE FARM FLORIDA INSURANCE COMPANY,
Appellant,

v.

JOSEPH VALENTI, JR.,
Appellee.

No. 4D19-205

[December 11, 2019]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; William W. Haury, Jr., Judge; L.T. Case No. CACE-18-004015.

Kara Berard Rockenbach, David A. Noel, and Daniel M. Schwarz of Link & Rockenbach, PA, West Palm Beach, for appellant.

Matthew G. Struble and Christine D. Skubala of Struble, P.A., Fort Lauderdale, for appellee

PER CURIAM.

An insurer appeals a final judgment entered against it in favor of its insured. The sole issue on appeal relates to the meaning of "disinterested appraiser" in the insurance policy's appraisal clause. Can an insured's public adjuster later be appointed the insured's disinterested appraiser? The circuit court found that the public adjuster could. On the facts here, we disagree and reverse the circuit court's judgment.

A leak in the insured's home caused water damage. Two weeks later, the insured signed an agreement with a public adjuster. As part of the agreement, the insured assigned 20% of any recovery from the insurance company to the public adjuster. The agreement stated that "[a]s security for payment of policyholder's obligations to the [public adjuster]. . . , the Policyholder hereby assigns the [public adjuster] that portion of the insurance proceeds sufficient to pay the [public adjuster]'s fees . . . ."

After the insured retained the public adjuster, the public adjuster contacted the insurer about the claim, attended the property inspection,

and sent follow-up correspondence about the inspection to the insurer. Ultimately, the insurer sent payment for its valuation of the loss and demanded appraisal to resolve any remaining dispute about the valuation. The appraisal clause in the insurance policy controls the process and states in part:

> ***Each party will select a qualified, disinterested appraiser and notify the other of the appraiser's identity within 20 days of receipt of the written demand***. Each party shall be responsible for the compensation of their selected appraiser. The two appraisers shall then select a qualified, disinterested umpire. If the two appraisers are unable to agree upon an umpire within 15 days, you or we can ask a judge of a court of record in the state where the residence premises is located to select an umpire. Reasonable expenses of the appraisal and the reasonable compensation of the umpire shall be paid equally by you and us.

(emphasis added).

After the demand for appraisal, the public adjuster sent a letter to the insurer naming himself the insured's appraiser. The insurer objected to the public adjuster's appointment of himself, arguing that the appointment of the public adjuster violated the policy's requirement that the parties select a "qualified, disinterested appraiser." The insured disagreed and filed an action for declaratory relief in the circuit court.

After a hearing, the circuit court entered summary judgment in the insured's favor, finding "as a matter of law that [the insured's] public adjuster can be his 'disinterested' appraiser." That conclusion was generally based on two opinions from the Third District with now-questionable futures—*Rios v. Tri-State Insurance Co.*, 714 So. 2d 547 (Fla. 3d DCA 1998), and *Galvis v. Allstate Insurance Co.*, 721 So. 2d 421 (Fla. 3d DCA 1998). *See State Farm Fla. Ins. Co. v. Sanders*, 44 Fla. L. Weekly D1901 (Fla. 3d DCA July 24, 2019) (finding the insured's public adjuster could not act as a disinterested appraiser under the insurance policy where the public adjuster, by separate contract, would receive 10% of any insurance recovery).[1]

The insurer asks that we conclude, as a matter of law, that an insured's public adjuster cannot later be appointed the insured's disinterested appraiser where there is a contingency-fee arrangement. But we can

[1] A motion for rehearing en banc remains pending in *Sanders*.

resolve this issue on narrower grounds: the actions of the insured's appraiser combined with his financial interest.

Here, the insured signed a contract with the public adjuster entitling the public adjuster to a portion of any recovery from the insurer and assigning a portion of the claim to the public adjuster. Next, the public adjuster inspected the property and submitted the claim to the insurance company. Later, the public adjuster sent a letter appointing himself the appraiser.

On the facts of this case, we easily conclude the public adjuster was not "disinterested" and reverse the circuit court's judgment. On remand, the circuit court should enter judgment for the insurer on the issue of this specific public adjuster's ability to serve as the disinterested appraiser for this insured.

Reversed and remanded.

CONNER, KLINGENSMITH and KUNTZ, JJ., concur.
KUNTZ, J., concurs specially with opinion.
CONNER, J., concurs specially with opinion.

KUNTZ, J., concurring specially.

I join the Court's opinion in full. But I would also directly address the broader—and simple—question the insurer raises: Is a person disinterested in an insurance claim if the person is entitled to a percentage of the recovery from the same insurance claim? The answer, like the question, is simple: No. This conclusion is supported by the policy's plain language as well as case law assessing an appraiser's disinterest.

I. Appraisal

Appraisal is a contractual process controlled by the terms of an insurance policy. *Fla. Ins. Guar. Ass'n v. Branco*, 148 So. 3d 488, 491 (Fla. 5th DCA 2014) (citation omitted); *see also Allstate Ins. Co. v. Suarez*, 833 So. 2d 762, 766 (Fla. 2002).

Typically, those terms are in the insurance policy's appraisal clause. "Appraisal clauses are preferred, as they provide a mechanism for prompt resolution of claims and discourage the filing of needless lawsuits." *Fla. Ins. Guar. Ass'n v. Olympus Ass'n*, 34 So. 3d 791, 794 (Fla. 4th DCA 2010) (citation omitted). The appraisal process determines "the amount of a loss" but leaves questions of coverage for the court. *State Farm Fire & Cas. Co.*

v. Licea, 685 So. 2d 1285, 1287-88 (Fla. 1996); *see also Olympus Ass'n*, 34 So. 3d at 796.

II. Disinterested Appraisers

i. Disinterested Defined

The insurance policy in this case requires the appointment of a qualified and disinterested appraiser. But the word disinterested is not defined in the policy. When a word in an insurance policy is not defined, "the first step towards discerning the plain meaning of the [word] is to 'consult references [that are] commonly relied upon to supply the accepted meaning of [the] word[].'" *Penzer v. Transp. Ins. Co.*, 29 So. 3d 1000, 1005 (Fla. 2010) (second and third alterations in original) (quoting *Garcia v. Fed. Ins. Co.*, 969 So. 2d 288, 292 (Fla. 2007)).

"Indeed, in construing terms appearing in insurance policies, Florida courts commonly adopt the plain meaning of words contained in legal and non-legal dictionaries." *Barcelona Hotel, LLC v. Nova Cas. Co.*, 57 So. 3d 228, 231 (Fla. 3d DCA 2011) (internal quotation marks and citation omitted); *see also Gov't Emps. Ins. Co. v. Macedo*, 228 So. 3d 1111, 1113 (Fla. 2017).

Turning to legal and non-legal dictionaries, the term disinterested is defined as "not having the mind or feelings engaged," "no longer interested," and "free from selfish motive or interest." *Disinterested*, *Merriam-Webster's Collegiate Dictionary* 358 (11th ed. 2003). The American Heritage Dictionary of the English Language defines disinterested as "[f]ree of bias and self-interest; impartial," and, in a usage note, elaborates that "[t]raditionally, disinterested can only mean 'having no stake in an outcome[.]' . . ." *Disinterested*, *The American Heritage Dictionary of the English Language* 518 (5th ed. 2016) (emphasis removed).

Similarly, Garner's Modern English Usage explains that "[a] disinterested observer is not merely 'impartial' but has nothing to gain from taking a stand on the issue in question." Bryan A. Garner, *Garner's Modern English Usage* 290 (4th ed. 2016). That matches the meaning in legal dictionaries, which define disinterested as "not having a pecuniary interest in the matter at hand." *Disinterested*, *Black's Law Dictionary* (11th ed. 2019).

These sources are clear that the plain and ordinary meaning of disinterested includes free of self-interest or pecuniary interest. When an

appraiser has a direct financial interest in the outcome of the appraisal, the appraiser is not disinterested.

ii. Caselaw Analyzing the Disinterested Appraiser

In addition to the policy's plain meaning, opinions analyzing the ability of a person to serve as a disinterested appraiser support my conclusion that a person entitled to a percentage of any recovery is not disinterested.

Although "appraisers do not violate their commitment [to the process] by acting as advocates for their respective selecting parties," appraisers "should be in a position to act fairly and be free from suspicion or unknown interest." *Cent. Life Ins. Co. v. Aetna Cas. & Sur. Co.*, 466 N.W.2d 257, 261 (Iowa 1991). In *Central Life Insurance Co.*, the Iowa Supreme Court held that "[d]ue to the contingent fee arrangement, Central's appraiser was interested because he had a direct financial interest in the dispute." *Id.*

In reaching a contrary conclusion, the circuit court in this case cited two decisions from the Third District: *Rios v. Tri-State Insurance Co.*, 714 So. 2d 547 (Fla. 3d DCA 1998), and a one-paragraph decision, *Galvis v. Allstate Insurance Co.*, 721 So. 2d 421 (Fla. 3d DCA 1998). In *Rios*, the insurance policy required the selection of a "competent, independent appraiser." 714 So. 2d at 548 (emphasis removed). The threshold question before the court was "how to interpret the term 'independent appraiser' as used in the insurance policy." *Id.* at 549. Turning to the dictionary definition of "independent," the court concluded that "independent appraiser" meant "that a party cannot appoint himself, herself, or itself, . . . nor can a party appoint the party's employee." *Id.* (internal citation omitted).

There, like in this case, the insurer asked the court to conclude that an appraiser "whose pay is based, in whole or in part, on a contingent fee percentage of the award" cannot be independent. *Id.* The Third District declined to do so, relying on the then-current version of the Code of Ethics for Arbitrators in Commercial Disputes, "promulgated jointly" by the American Arbitration Association and American Bar Association. *Id.* at 550. The court concluded the Code of Ethics required disclosure of an interest in the outcome and held that an appraiser was not impartial if the interest was properly disclosed. *Id.*

In *Galvis*, the Third District cited *Rios* and concluded an appraiser is not disinterested simply because of a contingency-fee agreement. 721 So. 2d at 421. That decision provided little analysis and failed to explain why a change in the wording of the policy to require a "competent and

disinterested appraiser" was irrelevant to the conclusion. But in a later case, Judge Cope, the author of the *Rios* opinion, stated that if an insurer wants neutral appraisers, the insurer should amend the policy language. *Citizens Prop. Ins. Corp. v. M.A. & F.H. Props., Ltd.*, 948 So. 2d 1017, 1021 (Fla. 3d DCA 2007) (Cope, C.J., concurring). Judge Cope was correct, and it seems amending the policy language is what the insurer did here. The policy language should resolve this issue and, in this case, the policy requires a disinterested appraiser.

Regardless, "*Rios* was largely premised on the then-existing version" of the arbitrators' Code of Ethics. *Shores at Coco Plum Condo. Ass'n v. Westchester Surplus Lines Ins. Co.*, No. 18-23910-Civ-COOKE/GOODMAN, 2019 WL 2223172, at *2 (S.D. Fla. Apr. 29, 2019) (citing *Branco*, 148 So. 3d at 495). Since *Rios*, the Florida Supreme Court has held that appraisal is not arbitration and that "the formal procedures of the Arbitration Code" do not govern an appraisal. *Suarez*, 833 So. 2d at 766.

I believe the *Rios* and *Galvis* decisions are distinguishable based on their reliance on the arbitration code. If they are not distinguishable, I believe they were incorrectly decided.

So too might the Third District, based on in its decision in *State Farm Florida Insurance Co. v. Sanders*, 44 Fla. L. Weekly D1901 (Fla. 3d DCA July 24, 2019). There, the insurer petitioned to quash a circuit court order allowing the insureds' public adjuster to serve as their disinterested appraiser. *Id.* The public adjuster was also the insureds' agent under a contract allowing "the agent and representative, under the insurance contract by State Farm Insurance . . . to adjust, appraise, advise, and assist in the settlement of the loss." *Id.*

For at least three reasons, the Third District found the public adjuster was interested. *Id.* (citing *Branco*, 148 So. 3d at 491). First, the court relied on the contract between the insureds and the public adjuster. *Id.* Second, the court noted that Florida law regulates public adjusters, *see* § 626.854, Fla. Stat. (2018), and requires public adjusters to "put the honest treatment of the claimant above the adjuster's own interests in every instance," *Sanders*, 44 Fla. L. Weekly D1901 (quoting Fla. Admin. Code R. 69B-220-201(3) (2015)). Third, the court determined that the public adjuster's contingency fee disqualified him. *Id.*

The *Sanders* court also relied, in large part, on the Fifth District's decision in *Branco*. In *Branco*, the insured suffered sinkhole damages and reported a claim to the insurer. 148 So. 3d at 490. Once the Florida

Insurance Guaranty Association assumed responsibility for the claim, it acknowledged coverage, and the insureds demanded appraisal. *Id.* That appraisal clause required each party to select a "competent and disinterested appraiser." *Id.* at 491 (emphasis removed). Despite the policy language, the insureds chose their attorney to serve as their disinterested appraiser. *Id.* at 494.

The Fifth District concluded the insureds' attorney could not serve as their disinterested appraiser. *Id.* at 496. The court distinguished *Rios* on the basis that it "was in large part premised on, and extensively quoted from, the then-existing version of the Code of Ethics for Arbitrators in Commercial Disputes . . . ." *Id.* at 495 (citing *Rios*, 714 So. 2d at 550). But the *Branco* court noted:

> That version of the Code of Ethics did not explicitly address the neutrality of arbitrators, but simply required disclosure of any direct or indirect financial interest in the outcome of the proceeding. However, the revised Code of Ethics adopted by AAA and ABA, effective since March 1, 2004, changes the landscape considerably, thus, undercutting the continued viability of the holding in *Rios*.

Id. The court held that "[t]he policy provision, which requires a 'disinterested appraiser,' expresses the parties' clear intention to restrict appraisers to people who are, in fact, disinterested." *Id.* at 496. Based on the duty of loyalty an attorney owes to her client, that attorney cannot serve as a disinterested appraiser. *Id.* (footnote and citations omitted).

I agree with the portions of the opinions in *Branco* and *Sanders* discussed above. It is simple: A person with a direct financial interest in the outcome is not disinterested.

We need not limit our review to those few Florida state court decisions. The policy at issue in *Verneus v. Axis Surplus Insurance Co.* required the selection of a competent appraiser, but when the court ordered appraisal, it required the selection of a competent and impartial appraiser. No. 16-21863-CIV-MARTINEZ/GOODMAN, 2018 WL 3417905, at *2,*4,*5 (S.D. Fla. July 13, 2018). The insurance company challenged the insured's selected appraiser because the appraiser had acted as an adjuster for the insured and even submitted the claim. *Id.* at *6. In addition, the appraiser owned the adjusting firm, and there was an extensive history between the appraiser and the insured's counsel. *Id.* at *7. Based on these and other factors, the court concluded the appraiser was not impartial. *Id.*

In another case, the court reached the same conclusion when applying a policy that required the appointment of a competent and impartial appraiser. *See Shores at Coco Plum*, 2019 WL 2223172, at *2. The court held that "[i]t is well-settled that an appraiser with a financial interest in the outcome of an appraisal is not impartial":

> Simply put, Mr. Downs is not an impartial appraiser. Here, Coco Plum admits that it intends that Mr. Downs be compensated on a contingency fee basis. Further, Coco Plum does not dispute that Mr. Downs has already prepared an estimate of the Property. By virtue of the contingency compensation plan, Mr. Downs has a vested interest in appraising the Property at the highest possible recovery because his compensation will be a percentage of the appraisal.

Id. at *2 (citations omitted).

Similarly, in *Landmark American Insurance Co. v. H. Anton Richardt, DDS, PA*, the court explained that a "pecuniary interest in the outcome is by definition a personal interest that favors one side over the other." No. 2:18-cv-600-FtM-29UAM, 2019 WL 2462865, at *3 (M.D. Fla. June 13, 2019). As a result, the court held that a person with a contingency fee agreement could not serve as the impartial appraiser. *Id.*

The court in *Harris v. American Modern Homes Insurance Co.* explained that "an appraiser becomes interested or biased by having a direct or indirect financial interest in the outcome of the appraisal." 571 F. Supp. 2d 1066, 1078 (E.D. Mo. 2008) (citation omitted). That court held "appraisers are not required to be entirely impartial." *Id.* (citation omitted). But "[w]hile an appraiser may receive a flat or hourly fee, he may not receive a contingent fee; the appraiser's fee may not be based on a percentage of the settled loss." *Id.* (citations omitted). In *Harris*, the appraiser's fee was $300 plus 15% of the final appraised value. *Id.* at 1079. The court held that the contingent fee gave the appraiser "a direct financial interest in the ultimate appraisal award, a fee that would increase as the appraisal amount increased." *Id.* The appraiser's contingent fee rendered him interested and ineligible to serve as a disinterested appraiser. *Id.*

I recognize that there is some disagreement on this issue beyond the language found in *Rios*. But, as in *Rios*, much of the disagreement turns on the specific contractual language in the policy or on facts that are not like those in this case. *See, e.g.*, *Hatter v. Guardian Ins. Co.*, No. 1:18-cv-

00041, 2019 WL 1509995, at *2-3 (D.V.I. Apr. 5, 2019); *Prien Props., LLC v. Allstate Ins. Co.*, No. 07 CV 845, 2008 WL 1733591, at *3, *4 (W.D. La. Apr. 14, 2008); *Dawes v. Cont'l Ins. Co. of City of N.Y.*, 1 F. Supp. 603, 605 (E.D. La. 1932); *Hozlock v. Donegal Cos./Donegal Mut. Ins. Co.*, 745 A.2d 1261, 1265 (Pa. Super. Ct. 2000).

With minimal exception, these cases discuss a prior relationship between the parties. That, in my opinion, differs from a person with a direct financial interest in the insurance recovery. I find the authority concluding that a party with a financial interest cannot be disinterested to be more persuasive. When a person receives more money based on the amount of the award, the person has a direct interest in the outcome. While that person might be a competent appraiser, he is not a disinterested appraiser.

III. Conclusion

I would hold that a person with a direct financial interest in the amount recovered from an insurance claim cannot be disinterested. But, because the panel's opinion reaches the same result, and on grounds that I also agree with, I join the panel's opinion reversing the circuit court's judgment.

CONNER, J., concurring specially.

I agree with much of the analysis presented by Judge Kuntz's special concurrence. But I am not so sure the question of whether a contingency fee makes an appraiser "interested," instead of "disinterested," is as simple as Judge Kuntz suggests.

For me, there are two factors which establish the insured's public adjuster in this case was not "disinterested." First, the partial assignment of the claim puts the public adjuster to some extent in the shoes of the insured, and for me there is no doubt that a party to the claim is not "disinterested." Thus, it is significant that the public adjuster picked himself to be one of the appraisers to resolve the claim. Second, the fact that the compensation paid to the public adjuster for his work is keyed to a percentage of the recovery by the insured leads me to conclude the public adjuster is not "disinterested," because his fee arrangement arguably gives him a financial incentive to be less objective.

But the interplay between financial interest in the claim and the status of being "disinterested" is a bit complicated. One of the problems in this case is that on appeal, the insured raised policy arguments about the contingency fee arrangement that were not addressed in the summary

judgment. More specifically, the insured argued, particularly at oral argument, that if this Court takes a categorical position and declares that a contingency fee arrangement with an appraiser disqualifies the appraiser for not being "disinterested," insureds will have a difficult time hiring appraisers. In addition to the trial court not addressing the argument, there was no summary judgment evidence to support the argument. For that reason, I am hesitant to take a categorical position on the issue of a contingency fee being a disqualifier. To me, it is better to wait for another case to decide that issue where the record is better developed.

Additionally, I struggle with the notion that a contingency fee arrangement categorically makes one more financially interested in the outcome of the case than a flat fee arrangement. Just as it is frequently the case in personal injury cases that experts are hired more often by one side or the other, I suspect the same is true with appraisers for property insurance claims. Is an appraiser that seeks to be hired regularly by one side more objective than the appraiser who is hired on a contingency fee arrangement?

In addition to the two factors discussed above which persuade me to conclude that the public adjuster in this case was not "disinterested," there is an additional reason for my conclusion. The insurance policy provides that the appraisal process can be invoked only *after* there is a disagreement between the parties on the amount to be paid for the loss. That would typically mean that someone on each side has evaluated and determined an estimated value for the loss, after reviewing the premises and determining what needs to be replaced or repaired. Under the appraisal process, the timing of the sequence of events leads me to conclude that the intent of the parties, in agreeing that "disinterested" appraisers are to be selected, was for the selected appraisers to provide a fresh set of eyes or new perspective to evaluate the value of the claim. Aside from the fact that the public adjuster in this case picked himself to be an appraiser, it is clear from the record that the public adjuster would not have provided a fresh set of eyes or new perspective to the valuation process.

For the reasons expressed above, I agree the public appraiser in this case could not properly serve as a "disinterested" appraiser and concur with the majority opinion.

* * *

Not final until disposition of timely filed motion for rehearing.

RECEIVED, 12/12/2019 11:59:34 AM, Clerk, Second District Court of Appeal

IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

Appellate Case No.: 2D19-130
LT Case No.: 11-2018-CA-01198-0001

STATE FARM FLORIDA
INSURANCE COMPANY,

Appellant,

vs.

JON PARRISH,

Appellee.
_____/

NOTICE OF SUPPLEMENTAL AUTHORITY

Appellant, STATE FARM FLORIDA INSURANCE COMPANY, files the following supplemental authority in support of its appeal, pursuant to Florida Rule of Appellate Procedure 9.225:

State Farm Florida Insurance Company v. Joseph Valenti, Jr., Case no.: 4D19-205, (December 11, 2019).

The Fourth District Court of Appeal's decision issued December 11, 2019, directly relates to the sole issue on appeal before this Court of whether an insured's public adjuster with a contingency fee agreement and "direct financial interest" in the outcome of the appraisal award meets the contractual requirement of being "disinterested."

CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing has been furnished to the attorneys listed on below on this 12th day of December, 2019, through the Florida Courts e-filing portal pursuant to Florida Rule of Judicial Administration 2.516(b)(1): **Theodore A. Corless, Esq.** and **Mary Catherine Lamoureux, Esq.**, Corless Barfield Trial Group, 6812 W. Linebaugh Ave., Tampa, FL 33625, Email: service@corlessbarfield.com; *Counsel for Appellee*; **Justin M. Thomas, Esq.**, **Gregory L. Evans, Esq.**, and **Mark A. Boyle, Esq.**, Boyle & Leonard, P.A., 2050 McGregor Blvd., Fort Myers, FL 33901 (eservice@insurance-counsel.com; jthomas@insurance-counsel.com; gevans@insuranec-counsel.com; mboyle@insurance-counsel.com); and **Lynn S. Alfano, Esq.** and **Robert A. Kingsford, Esq.**, Alfano Kingsford, P.A., 1060 Maitland Center Commons Blvd., Suite 180, Maitland, FL 32751, Emails: lalfano@alfanokingsford.com and pleadings@alfanokingsford.com; *Trial Counsel for Appellant*.

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DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

STATE FARM FLORIDA INSURANCE COMPANY,
Appellant,

v.

JOSEPH VALENTI, JR.,
Appellee.

No. 4D19-205

[December 11, 2019]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; William W. Haury, Jr., Judge; L.T. Case No. CACE-18-004015.

Kara Berard Rockenbach, David A. Noel, and Daniel M. Schwarz of Link & Rockenbach, PA, West Palm Beach, for appellant.

Matthew G. Struble and Christine D. Skubala of Struble, P.A., Fort Lauderdale, for appellee

PER CURIAM.

An insurer appeals a final judgment entered against it in favor of its insured. The sole issue on appeal relates to the meaning of "disinterested appraiser" in the insurance policy's appraisal clause. Can an insured's public adjuster later be appointed the insured's disinterested appraiser? The circuit court found that the public adjuster could. On the facts here, we disagree and reverse the circuit court's judgment.

A leak in the insured's home caused water damage. Two weeks later, the insured signed an agreement with a public adjuster. As part of the agreement, the insured assigned 20% of any recovery from the insurance company to the public adjuster. The agreement stated that "[a]s security for payment of policyholder's obligations to the [public adjuster]. . . , the Policyholder hereby assigns the [public adjuster] that portion of the insurance proceeds sufficient to pay the [public adjuster]'s fees . . . ."

After the insured retained the public adjuster, the public adjuster contacted the insurer about the claim, attended the property inspection,

and sent follow-up correspondence about the inspection to the insurer. Ultimately, the insurer sent payment for its valuation of the loss and demanded appraisal to resolve any remaining dispute about the valuation. The appraisal clause in the insurance policy controls the process and states in part:

> ***Each party will select a qualified, disinterested appraiser and notify the other of the appraiser's identity within 20 days of receipt of the written demand***. Each party shall be responsible for the compensation of their selected appraiser. The two appraisers shall then select a qualified, disinterested umpire. If the two appraisers are unable to agree upon an umpire within 15 days, you or we can ask a judge of a court of record in the state where the residence premises is located to select an umpire. Reasonable expenses of the appraisal and the reasonable compensation of the umpire shall be paid equally by you and us.

(emphasis added).

After the demand for appraisal, the public adjuster sent a letter to the insurer naming himself the insured's appraiser. The insurer objected to the public adjuster's appointment of himself, arguing that the appointment of the public adjuster violated the policy's requirement that the parties select a "qualified, disinterested appraiser." The insured disagreed and filed an action for declaratory relief in the circuit court.

After a hearing, the circuit court entered summary judgment in the insured's favor, finding "as a matter of law that [the insured's] public adjuster can be his 'disinterested' appraiser." That conclusion was generally based on two opinions from the Third District with now-questionable futures—*Rios v. Tri-State Insurance Co.*, 714 So. 2d 547 (Fla. 3d DCA 1998), and *Galvis v. Allstate Insurance Co.*, 721 So. 2d 421 (Fla. 3d DCA 1998). *See State Farm Fla. Ins. Co. v. Sanders*, 44 Fla. L. Weekly D1901 (Fla. 3d DCA July 24, 2019) (finding the insured's public adjuster could not act as a disinterested appraiser under the insurance policy where the public adjuster, by separate contract, would receive 10% of any insurance recovery).[1]

The insurer asks that we conclude, as a matter of law, that an insured's public adjuster cannot later be appointed the insured's disinterested appraiser where there is a contingency-fee arrangement. But we can

[1] A motion for rehearing en banc remains pending in *Sanders*.

resolve this issue on narrower grounds: the actions of the insured's appraiser combined with his financial interest.

Here, the insured signed a contract with the public adjuster entitling the public adjuster to a portion of any recovery from the insurer and assigning a portion of the claim to the public adjuster. Next, the public adjuster inspected the property and submitted the claim to the insurance company. Later, the public adjuster sent a letter appointing himself the appraiser.

On the facts of this case, we easily conclude the public adjuster was not "disinterested" and reverse the circuit court's judgment. On remand, the circuit court should enter judgment for the insurer on the issue of this specific public adjuster's ability to serve as the disinterested appraiser for this insured.

Reversed and remanded.

CONNER, KLINGENSMITH and KUNTZ, JJ., concur.
KUNTZ, J., concurs specially with opinion.
CONNER, J., concurs specially with opinion.

KUNTZ, J., concurring specially.

I join the Court's opinion in full. But I would also directly address the broader—and simple—question the insurer raises: Is a person disinterested in an insurance claim if the person is entitled to a percentage of the recovery from the same insurance claim? The answer, like the question, is simple: No. This conclusion is supported by the policy's plain language as well as case law assessing an appraiser's disinterest.

I. Appraisal

Appraisal is a contractual process controlled by the terms of an insurance policy. *Fla. Ins. Guar. Ass'n v. Branco*, 148 So. 3d 488, 491 (Fla. 5th DCA 2014) (citation omitted); *see also Allstate Ins. Co. v. Suarez*, 833 So. 2d 762, 766 (Fla. 2002).

Typically, those terms are in the insurance policy's appraisal clause. "Appraisal clauses are preferred, as they provide a mechanism for prompt resolution of claims and discourage the filing of needless lawsuits." *Fla. Ins. Guar. Ass'n v. Olympus Ass'n*, 34 So. 3d 791, 794 (Fla. 4th DCA 2010) (citation omitted). The appraisal process determines "the amount of a loss" but leaves questions of coverage for the court. *State Farm Fire & Cas. Co.*

v. Licea, 685 So. 2d 1285, 1287-88 (Fla. 1996); *see also Olympus Ass'n*, 34 So. 3d at 796.

II. Disinterested Appraisers

i. Disinterested Defined

The insurance policy in this case requires the appointment of a qualified and disinterested appraiser. But the word disinterested is not defined in the policy. When a word in an insurance policy is not defined, "the first step towards discerning the plain meaning of the [word] is to 'consult references [that are] commonly relied upon to supply the accepted meaning of [the] word[].'" *Penzer v. Transp. Ins. Co.*, 29 So. 3d 1000, 1005 (Fla. 2010) (second and third alterations in original) (quoting *Garcia v. Fed. Ins. Co.*, 969 So. 2d 288, 292 (Fla. 2007)).

"Indeed, in construing terms appearing in insurance policies, Florida courts commonly adopt the plain meaning of words contained in legal and non-legal dictionaries." *Barcelona Hotel, LLC v. Nova Cas. Co.*, 57 So. 3d 228, 231 (Fla. 3d DCA 2011) (internal quotation marks and citation omitted); *see also Gov't Emps. Ins. Co. v. Macedo*, 228 So. 3d 1111, 1113 (Fla. 2017).

Turning to legal and non-legal dictionaries, the term disinterested is defined as "not having the mind or feelings engaged," "no longer interested," and "free from selfish motive or interest." *Disinterested*, *Merriam-Webster's Collegiate Dictionary* 358 (11th ed. 2003). The American Heritage Dictionary of the English Language defines disinterested as "[f]ree of bias and self-interest; impartial," and, in a usage note, elaborates that "[t]raditionally, disinterested can only mean 'having no stake in an outcome[.]' . . ." *Disinterested*, *The American Heritage Dictionary of the English Language* 518 (5th ed. 2016) (emphasis removed).

Similarly, Garner's Modern English Usage explains that "[a] disinterested observer is not merely 'impartial' but has nothing to gain from taking a stand on the issue in question." Bryan A. Garner, *Garner's Modern English Usage* 290 (4th ed. 2016). That matches the meaning in legal dictionaries, which define disinterested as "not having a pecuniary interest in the matter at hand." *Disinterested*, *Black's Law Dictionary* (11th ed. 2019).

These sources are clear that the plain and ordinary meaning of disinterested includes free of self-interest or pecuniary interest. When an

appraiser has a direct financial interest in the outcome of the appraisal, the appraiser is not disinterested.

ii. Caselaw Analyzing the Disinterested Appraiser

In addition to the policy's plain meaning, opinions analyzing the ability of a person to serve as a disinterested appraiser support my conclusion that a person entitled to a percentage of any recovery is not disinterested.

Although "appraisers do not violate their commitment [to the process] by acting as advocates for their respective selecting parties," appraisers "should be in a position to act fairly and be free from suspicion or unknown interest." *Cent. Life Ins. Co. v. Aetna Cas. & Sur. Co.*, 466 N.W.2d 257, 261 (Iowa 1991). In *Central Life Insurance Co.*, the Iowa Supreme Court held that "[d]ue to the contingent fee arrangement, Central's appraiser was interested because he had a direct financial interest in the dispute." *Id.*

In reaching a contrary conclusion, the circuit court in this case cited two decisions from the Third District: *Rios v. Tri-State Insurance Co.*, 714 So. 2d 547 (Fla. 3d DCA 1998), and a one-paragraph decision, *Galvis v. Allstate Insurance Co.*, 721 So. 2d 421 (Fla. 3d DCA 1998). In *Rios*, the insurance policy required the selection of a "competent, independent appraiser." 714 So. 2d at 548 (emphasis removed). The threshold question before the court was "how to interpret the term 'independent appraiser' as used in the insurance policy." *Id.* at 549. Turning to the dictionary definition of "independent," the court concluded that "independent appraiser" meant "that a party cannot appoint himself, herself, or itself, . . . nor can a party appoint the party's employee." *Id.* (internal citation omitted).

There, like in this case, the insurer asked the court to conclude that an appraiser "whose pay is based, in whole or in part, on a contingent fee percentage of the award" cannot be independent. *Id.* The Third District declined to do so, relying on the then-current version of the Code of Ethics for Arbitrators in Commercial Disputes, "promulgated jointly" by the American Arbitration Association and American Bar Association. *Id.* at 550. The court concluded the Code of Ethics required disclosure of an interest in the outcome and held that an appraiser was not impartial if the interest was properly disclosed. *Id.*

In *Galvis*, the Third District cited *Rios* and concluded an appraiser is not disinterested simply because of a contingency-fee agreement. 721 So. 2d at 421. That decision provided little analysis and failed to explain why a change in the wording of the policy to require a "competent and

disinterested appraiser" was irrelevant to the conclusion. But in a later case, Judge Cope, the author of the *Rios* opinion, stated that if an insurer wants neutral appraisers, the insurer should amend the policy language. *Citizens Prop. Ins. Corp. v. M.A. & F.H. Props., Ltd.*, 948 So. 2d 1017, 1021 (Fla. 3d DCA 2007) (Cope, C.J., concurring). Judge Cope was correct, and it seems amending the policy language is what the insurer did here. The policy language should resolve this issue and, in this case, the policy requires a disinterested appraiser.

Regardless, "*Rios* was largely premised on the then-existing version" of the arbitrators' Code of Ethics. *Shores at Coco Plum Condo. Ass'n v. Westchester Surplus Lines Ins. Co.*, No. 18-23910-Civ-COOKE/GOODMAN, 2019 WL 2223172, at *2 (S.D. Fla. Apr. 29, 2019) (citing *Branco*, 148 So. 3d at 495). Since *Rios*, the Florida Supreme Court has held that appraisal is not arbitration and that "the formal procedures of the Arbitration Code" do not govern an appraisal. *Suarez*, 833 So. 2d at 766.

I believe the *Rios* and *Galvis* decisions are distinguishable based on their reliance on the arbitration code. If they are not distinguishable, I believe they were incorrectly decided.

So too might the Third District, based on in its decision in *State Farm Florida Insurance Co. v. Sanders*, 44 Fla. L. Weekly D1901 (Fla. 3d DCA July 24, 2019). There, the insurer petitioned to quash a circuit court order allowing the insureds' public adjuster to serve as their disinterested appraiser. *Id.* The public adjuster was also the insureds' agent under a contract allowing "the agent and representative, under the insurance contract by State Farm Insurance . . . to adjust, appraise, advise, and assist in the settlement of the loss." *Id.*

For at least three reasons, the Third District found the public adjuster was interested. *Id.* (citing *Branco*, 148 So. 3d at 491). First, the court relied on the contract between the insureds and the public adjuster. *Id.* Second, the court noted that Florida law regulates public adjusters, *see* § 626.854, Fla. Stat. (2018), and requires public adjusters to "put the honest treatment of the claimant above the adjuster's own interests in every instance," *Sanders*, 44 Fla. L. Weekly D1901 (quoting Fla. Admin. Code R. 69B-220-201(3) (2015)). Third, the court determined that the public adjuster's contingency fee disqualified him. *Id.*

The *Sanders* court also relied, in large part, on the Fifth District's decision in *Branco*. In *Branco*, the insured suffered sinkhole damages and reported a claim to the insurer. 148 So. 3d at 490. Once the Florida

Insurance Guaranty Association assumed responsibility for the claim, it acknowledged coverage, and the insureds demanded appraisal. *Id.* That appraisal clause required each party to select a "competent and disinterested appraiser." *Id.* at 491 (emphasis removed). Despite the policy language, the insureds chose their attorney to serve as their disinterested appraiser. *Id.* at 494.

The Fifth District concluded the insureds' attorney could not serve as their disinterested appraiser. *Id.* at 496. The court distinguished *Rios* on the basis that it "was in large part premised on, and extensively quoted from, the then-existing version of the Code of Ethics for Arbitrators in Commercial Disputes . . . ." *Id.* at 495 (citing *Rios*, 714 So. 2d at 550). But the *Branco* court noted:

> That version of the Code of Ethics did not explicitly address the neutrality of arbitrators, but simply required disclosure of any direct or indirect financial interest in the outcome of the proceeding. However, the revised Code of Ethics adopted by AAA and ABA, effective since March 1, 2004, changes the landscape considerably, thus, undercutting the continued viability of the holding in *Rios*.

Id. The court held that "[t]he policy provision, which requires a 'disinterested appraiser,' expresses the parties' clear intention to restrict appraisers to people who are, in fact, disinterested." *Id.* at 496. Based on the duty of loyalty an attorney owes to her client, that attorney cannot serve as a disinterested appraiser. *Id.* (footnote and citations omitted).

I agree with the portions of the opinions in *Branco* and *Sanders* discussed above. It is simple: A person with a direct financial interest in the outcome is not disinterested.

We need not limit our review to those few Florida state court decisions. The policy at issue in *Verneus v. Axis Surplus Insurance Co.* required the selection of a competent appraiser, but when the court ordered appraisal, it required the selection of a competent and impartial appraiser. No. 16-21863-CIV-MARTINEZ/GOODMAN, 2018 WL 3417905, at *2,*4,*5 (S.D. Fla. July 13, 2018). The insurance company challenged the insured's selected appraiser because the appraiser had acted as an adjuster for the insured and even submitted the claim. *Id.* at *6. In addition, the appraiser owned the adjusting firm, and there was an extensive history between the appraiser and the insured's counsel. *Id.* at *7. Based on these and other factors, the court concluded the appraiser was not impartial. *Id.*

In another case, the court reached the same conclusion when applying a policy that required the appointment of a competent and impartial appraiser. *See Shores at Coco Plum*, 2019 WL 2223172, at *2. The court held that "[i]t is well-settled that an appraiser with a financial interest in the outcome of an appraisal is not impartial":

> Simply put, Mr. Downs is not an impartial appraiser. Here, Coco Plum admits that it intends that Mr. Downs be compensated on a contingency fee basis. Further, Coco Plum does not dispute that Mr. Downs has already prepared an estimate of the Property. By virtue of the contingency compensation plan, Mr. Downs has a vested interest in appraising the Property at the highest possible recovery because his compensation will be a percentage of the appraisal.

Id. at *2 (citations omitted).

Similarly, in *Landmark American Insurance Co. v. H. Anton Richardt, DDS, PA*, the court explained that a "pecuniary interest in the outcome is by definition a personal interest that favors one side over the other." No. 2:18-cv-600-FtM-29UAM, 2019 WL 2462865, at *3 (M.D. Fla. June 13, 2019). As a result, the court held that a person with a contingency fee agreement could not serve as the impartial appraiser. *Id.*

The court in *Harris v. American Modern Homes Insurance Co.* explained that "an appraiser becomes interested or biased by having a direct or indirect financial interest in the outcome of the appraisal." 571 F. Supp. 2d 1066, 1078 (E.D. Mo. 2008) (citation omitted). That court held "appraisers are not required to be entirely impartial." *Id.* (citation omitted). But "[w]hile an appraiser may receive a flat or hourly fee, he may not receive a contingent fee; the appraiser's fee may not be based on a percentage of the settled loss." *Id.* (citations omitted). In *Harris*, the appraiser's fee was $300 plus 15% of the final appraised value. *Id.* at 1079. The court held that the contingent fee gave the appraiser "a direct financial interest in the ultimate appraisal award, a fee that would increase as the appraisal amount increased." *Id.* The appraiser's contingent fee rendered him interested and ineligible to serve as a disinterested appraiser. *Id.*

I recognize that there is some disagreement on this issue beyond the language found in *Rios*. But, as in *Rios*, much of the disagreement turns on the specific contractual language in the policy or on facts that are not like those in this case. *See, e.g.*, *Hatter v. Guardian Ins. Co.*, No. 1:18-cv-

00041, 2019 WL 1509995, at *2-3 (D.V.I. Apr. 5, 2019); *Prien Props., LLC v. Allstate Ins. Co.*, No. 07 CV 845, 2008 WL 1733591, at *3, *4 (W.D. La. Apr. 14, 2008); *Dawes v. Cont'l Ins. Co. of City of N.Y.*, 1 F. Supp. 603, 605 (E.D. La. 1932); *Hozlock v. Donegal Cos./Donegal Mut. Ins. Co.*, 745 A.2d 1261, 1265 (Pa. Super. Ct. 2000).

With minimal exception, these cases discuss a prior relationship between the parties. That, in my opinion, differs from a person with a direct financial interest in the insurance recovery. I find the authority concluding that a party with a financial interest cannot be disinterested to be more persuasive. When a person receives more money based on the amount of the award, the person has a direct interest in the outcome. While that person might be a competent appraiser, he is not a disinterested appraiser.

III. Conclusion

I would hold that a person with a direct financial interest in the amount recovered from an insurance claim cannot be disinterested. But, because the panel's opinion reaches the same result, and on grounds that I also agree with, I join the panel's opinion reversing the circuit court's judgment.

CONNER, J., concurring specially.

I agree with much of the analysis presented by Judge Kuntz's special concurrence. But I am not so sure the question of whether a contingency fee makes an appraiser "interested," instead of "disinterested," is as simple as Judge Kuntz suggests.

For me, there are two factors which establish the insured's public adjuster in this case was not "disinterested." First, the partial assignment of the claim puts the public adjuster to some extent in the shoes of the insured, and for me there is no doubt that a party to the claim is not "disinterested." Thus, it is significant that the public adjuster picked himself to be one of the appraisers to resolve the claim. Second, the fact that the compensation paid to the public adjuster for his work is keyed to a percentage of the recovery by the insured leads me to conclude the public adjuster is not "disinterested," because his fee arrangement arguably gives him a financial incentive to be less objective.

But the interplay between financial interest in the claim and the status of being "disinterested" is a bit complicated. One of the problems in this case is that on appeal, the insured raised policy arguments about the contingency fee arrangement that were not addressed in the summary

judgment. More specifically, the insured argued, particularly at oral argument, that if this Court takes a categorical position and declares that a contingency fee arrangement with an appraiser disqualifies the appraiser for not being "disinterested," insureds will have a difficult time hiring appraisers. In addition to the trial court not addressing the argument, there was no summary judgment evidence to support the argument. For that reason, I am hesitant to take a categorical position on the issue of a contingency fee being a disqualifier. To me, it is better to wait for another case to decide that issue where the record is better developed.

Additionally, I struggle with the notion that a contingency fee arrangement categorically makes one more financially interested in the outcome of the case than a flat fee arrangement. Just as it is frequently the case in personal injury cases that experts are hired more often by one side or the other, I suspect the same is true with appraisers for property insurance claims. Is an appraiser that seeks to be hired regularly by one side more objective than the appraiser who is hired on a contingency fee arrangement?

In addition to the two factors discussed above which persuade me to conclude that the public adjuster in this case was not "disinterested," there is an additional reason for my conclusion. The insurance policy provides that the appraisal process can be invoked only *after* there is a disagreement between the parties on the amount to be paid for the loss. That would typically mean that someone on each side has evaluated and determined an estimated value for the loss, after reviewing the premises and determining what needs to be replaced or repaired. Under the appraisal process, the timing of the sequence of events leads me to conclude that the intent of the parties, in agreeing that "disinterested" appraisers are to be selected, was for the selected appraisers to provide a fresh set of eyes or new perspective to evaluate the value of the claim. Aside from the fact that the public adjuster in this case picked himself to be an appraiser, it is clear from the record that the public adjuster would not have provided a fresh set of eyes or new perspective to the valuation process.

For the reasons expressed above, I agree the public appraiser in this case could not properly serve as a "disinterested" appraiser and concur with the majority opinion.

* * *

Not final until disposition of timely filed motion for rehearing.

RECEIVED, 12/31/2019 12:28:30 PM, Clerk, Second District Court of Appeal

IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

Appellate Case No.: 2D19-130
LT Case No.: 11-2018-CA-01198-0001

STATE FARM FLORIDA
INSURANCE COMPANY,

Appellant,

vs.

JON PARRISH,

Appellee.
_____/

NOTICE OF CHANGE OF NAME

PLEASE TAKE NOTICE that Appellate counsel for Appellant, Kara Rockenbach Link, Esquire of Link & Rockenbach, PA files this Notice of Change of Name from Kara Berard Rockenbach to Kara Rockenbach Link, Esquire.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing has been furnished via email this 31st day of December, 2019 to: **Theodore A. Corless, Esq.** and **Mary Catherine Lamoureux, Esq.**, Corless Barfield Trial Group, 6812 W. Linebaugh Ave., Tampa, FL 33625, Email: service@corlessbarfield.com; *Counsel for Appellee*; **Justin M. Thomas, Esq.**, **Gregory L. Evans, Esq.**, and **Mark A. Boyle, Esq.**, Boyle & Leonard, P.A., 2050 McGregor Blvd., Fort Myers, FL 33901 (eservice@insurance-counsel.com; jthomas@insurance-counsel.com; gevans@insuranec-counsel.com; mboyle@insurance-counsel.com).

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RECEIVED, 01/27/2020 04:21:35 PM, Clerk, Second District Court of Appeal

IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

2ND DCA CASE NO.: 2D19-130
LOWER CASE NO.: 11-2018-CA-01198-0001

STATE FARM FLORIDA INSURANCE COMPANY,

Appellant,

vs.

JON PARRISH,

Appellee.

_____/

APPELLEE'S NOTICE OF FILING SUPPLEMENTAL AUTHORITY

The Appellee, JON D. PARRISH, by and through his undersigned counsel, pursuant to Rule 9.225. Florida Rules of Appellate Procedure, submits as supplemental authority the decision of *Great Lakes Insurance SE v. Boat Rental Miami, Inc.* Case No.: 19-20623-CIV-ALTONAGA/Goodman, 2020 WL 264674 (S.D. Fla. Jan. 17, 2020), which is attached hereto as Exhibit "A". The supplemental authority supports Appellee's position that no fiduciary relationship exists between the Appellee and his nominated appraiser, as raised in section I.B.1 of Appellee's Answer Brief.

Respectfully submitted,

By: */s/ Mark A. Boyle*
Gregory L. Evans, Esquire
Florida Bar No.: 0767824
Mark A. Boyle, Esquire
Florida Bar No.: 5886
Counsel for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of January, 2020, a true and correct copy of the forgoing has been electronically filed using the E-Portal filing system to: Theodore A. Corless, Esquire, Mary Catherine Lamoureux, Esquire, Corless Barfield Trial Group, 6812 W. Linebaugh Avenue, Tampa, Florida 33625 at service@corlessbarfield.com AND Lynn S. Alfano, Esquire, Robert A. Kingsford, Esquire, Kristen McMullen, Esquire, Alfano Kingsford, P.A., 1060 Maitland Center Commons Boulevard, Suite 180, Maitland, Florida 32751 at lalfano@alfanokingsford.com and pleadings@alfanokingsford.com.

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United States District Court, S.D. Florida.

GREAT LAKES INSURANCE SE, Plaintiff,
v.
BOAT RENTAL MIAMI, INC.; et al., Defendants.

CASE NO. 19-20623-CIV-ALTONAGA/Goodman
|
Signed 01/17/2020

Attorneys and Law Firms

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Robert John Hanreck, Robert J. Hanreck, P.A., Miami, FL, for Defendant Claudia Baerlin-Gallegos.

ORDER

CECILIA M. ALTONAGA, UNITED STATES DISTRICT JUDGE

*1 **THIS CAUSE** is before the Court on Plaintiff/Counter-Defendant, Great Lakes Insurance SE's ("Great Lakes['s]") Partial Motion to Dismiss Counts II and IV of BRM and MBR's Amended Counterclaim and Motion to Reconsider Court's Choice-of-Law Ruling [ECF No. 82]. Defendants/Counter-Plaintiffs, Boat Rental Miami, Inc. ("BMR") and Miami Boat Rental, Inc. ("MBR") (collectively "Counter-Plaintiffs") filed an Opposition [ECF No. 87]; to which Great Lakes filed a Reply [ECF No. 88]. The Court has carefully considered Counter-Plaintiffs' Answer to Plaintiff's Third[1] Amended Complaint, Affirmative Defenses, and Amended Counterclaim ("Amended Counterclaim") [ECF No. 79], the parties' written submissions, the record, and applicable law.

I. BACKGROUND

This is an insurance coverage dispute concerning Great Lakes's duty to defend Counter-Plaintiffs in a state-court personal injury lawsuit filed by Defendant, Claudia Baerlin-Gallegos. (*See generally* FAC).

Great Lakes is a German corporation with its principal place of business in Munich, Germany. (*See* FAC ¶ 6). Counter-Plaintiffs are Florida corporations with their principal places of business in Miami, Florida. (*See* Am. Countercl. ¶¶ 1–2). Counter-Plaintiffs are in the business of providing vessels for rent at the Bayside Marina in Miami, Florida. (*See id.* ¶¶ 7–8). While distinct legal entities, BRM and MBR are wholly owned by Edgardo Velez, share a common office, provide the same vessel operators, and dock their vessels on the same pier at the Bayside Marina. (*See id.* ¶¶ 6–7).

Great Lakes issued an insurance policy to MBR (the "MBR Policy") providing Hull and Machinery and Third Party Liability coverage from October 11, 2016 through October 11, 2017 (*see* FAC ¶ 10); and issued a separate insurance policy to BRM (the "BRM Policy") providing Hull and Machinery and Third Party Liability coverage for the period of December 4, 2016 through December 4, 2017 (*see id.* ¶ 12).[2] The MBR Policy (FAC, Ex. A, MBR Policy [ECF No. 75-1]) is referred to as a "Fleet Policy" and provides coverage for all vessels listed in the Policy's schedule (*see* Am. Countercl. ¶ 13); while the BRM Policy (FAC, Ex. B, BRM Policy [ECF No. 75-2]) is a "Commercial Yacht Policy" (*see* Am. Countercl. ¶ 11).[3] BRM is not named as an insured or additional insured on the MBR Policy, nor is MBR named as an insured or additional insured on the BRM Policy. (*See* FAC ¶¶ 16–17).

*2 Counter-Plaintiffs allege Velez — the sole owner of MBR and BRM — mistakenly completed the MBR Policy application. (*See* Am. Countercl. ¶ 14). Velez is not sophisticated in matters of insurance and incorrectly listed MBR as the named insured on the Policy, as well as the owner of each of the fleet vessels. (*See id.* ¶¶ 14–15). The application presented inaccurate information, as BRM was the actual owner of the fleet vessels listed on the MBR Policy schedule and should have been included in the application as a named insured. (*See id.* ¶¶ 16–18). While BRM owns the fleet vessels, MBR nonetheless has an insurable interest in the BRM vessels because of its pecuniary interest in offering the fleet vessels for charter. (*See id.* ¶ 21). Counter-Plaintiffs insist the error was irrelevant to the insurance risk, as the corporations rent the same fleet of vessels and share the same office, staff, and safety procedures. (*See id.* ¶ 19).

The MBR Policy can be updated by endorsement to

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provide coverage to new vessels and to remove vessels which have been sold and no longer need coverage. (*See id.* ¶ 22; *see also* MBR Policy 26–31). Several vessels added to the MBR Policy were owned by BRM; and despite BRM's ownership, Great Lakes agreed to provide coverage for these vessels by issuing endorsements to the MBR Policy and collecting premiums to insure the vessels. (*See* Am. Countercl. ¶¶ 27–28). The MBR Policy provides coverage for a 2017 25' Nauticstar vessel with hull identification number JNT25958J617, which was added by endorsement as a scheduled vessel under the MBR Policy. (*See id.* ¶ 37).

On July 2, 2017, MBR rented the Nauticstar to a friend of Baerlin-Gallegos. (*See id.* ¶¶ 29, 37). While MBR issued the rental contract, the Nauticstar is owned by BRM. (*See id.* ¶ 29). While preparing to board the Nauticstar, Baerlin-Gallegos slipped and fell on the dock. (*See id.* ¶ 33). Baerlin-Gallegos was not helped, and her injury was exacerbated as a result.[4] (*See id.* ¶ 34).

On September 22, 2017, Baerlin-Gallegos filed a personal injury lawsuit against BRM in state court. (*See id.* ¶ 38). Although it was apparent the state-court lawsuit was against BRM and involved a vessel insured by the MBR Policy, Great Lakes began defending the action without a reservation of rights. (*See id.* ¶¶ 39, 42). It was not until February 11, 2019, that Great Lakes sent BRM its first Reservation of Rights Letter [ECF No. 75-6] advising BRM there may not be coverage for the loss and reserving Great Lakes's right to withdraw its defense and deny indemnity to BRM. (*See* FAC ¶ 37). One week later, on February 18, 2019, Great Lakes filed its Complaint for Declaratory Relief [ECF No. 1] against BRM and Baerlin-Gallegos in this action. Despite Great Lakes's knowledge the BRM-owned Nauticstar was insured under the MBR Policy, it did not raise this issue in its original Complaint. (*See* Am. Countercl. ¶ 53; *see generally* Compl.).

Following a mediation in the state-court action, Great Lakes sent BRM a Supplemental Reservation of Rights Letter [ECF No. 75-7] advising BRM there may not be coverage for the loss because BRM is not an insured under the MBR Policy. (*See* Am. Countercl. ¶ 55). On April 18, 2019, Great Lakes sent BRM a Second Supplemental Reservation of Rights Letter [ECF No. 75-8] and filed an Amended Complaint for Declaratory Relief [ECF No. 10] including MBR as a Defendant in this action. After Great Lakes filed the Amended Complaint, Baerlin-Gallegos filed an amended complaint [ECF No. 79-3] in the state-court action to include MBR as a defendant in her state-court lawsuit. (*See* Am. Countercl. ¶ 57).

On June 27, 2019, Great Lakes filed a Third Amended Complaint [ECF No. 41]. On July 12, 2019, Counter-Plaintiffs filed an Answer to Plaintiff's Third Amended Complaint, Affirmative Defenses, and Counterclaim [ECF No. 48]; to which Great Lakes filed a Partial Motion to Dismiss Counts II and IV of BRM and MBR's Counterclaim [ECF No. 54]. Following a Hearing [ECF No. 59] — discussed below — the Court entered an Order [ECF No. 60] granting in part the Partial Motion to Dismiss and allowing Counter-Plaintiffs to file an amended counterclaim. (*See* Sept. 4, 2019 Order). On October 21, 2019, Great Lakes filed a Fourth Amended Complaint; to which BRM and MBR filed their Answer and Amended Counterclaim on November 6, 2019.

***3** The Amended Counterclaim states four claims: declaratory judgment against Great Lakes (Count I); breach of fiduciary duty on behalf of MBR (Count II); equitable estoppel (Count III); and reformation (Count IV). (*See generally* Am. Countercl.). On November 20, 2019, Great Lakes filed the present Partial Motion to Dismiss Counts II and IV of the Amended Counterclaim for failure to state claims for relief under Federal Rule of Civil Procedure 12(b)(6), with a request the Court reconsider an earlier choice-of-law ruling. (*See generally* Mot.).

II. LEGAL STANDARDS

A. Motion for Reconsideration

"Reconsideration is granted only in extraordinary circumstances and is committed to the sound discretion of the district judge." *Reiseck v. Universal Commc'ns of Miami, Inc.*, 141 F. Supp. 3d 1295, 1301 (S.D. Fla. 2015) (internal quotation marks and citations omitted). "[T]here are three major grounds which justify reconsideration: (1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice." *Burger King Corp. v. Ashland Equities, Inc.*, 181 F. Supp. 2d 1366, 1369 (S.D. Fla. 2002) (alteration added; citations omitted). "A motion for reconsideration is not an opportunity for the moving party and their counsel to instruct the court on how the court 'could have done it better' the first time." *Pres. Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Eng'rs*, 916 F. Supp. 1557, 1560 (N.D. Ga. 1995). It is "an improper use of[ ] the motion to reconsider to ask the Court to rethink what the Court ... already thought through — rightly or wrongly[.]" *Z.K. Marine Inc. v. M/V Archigetis*, 808 F. Supp. 1561, 1563 (S.D. Fla. 1992) (citations omitted; first

and last alterations added).

B. Motion to Dismiss

"To survive a motion to dismiss [under Rule 12(b)(6)], a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (alteration added; quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Although this pleading standard "does not require 'detailed factual allegations,' ... it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* (alteration added; quoting *Twombly*, 550 U.S. at 555). Pleadings must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citation omitted). Indeed, "only a complaint that states a plausible claim for relief survives a motion to dismiss." *Iqbal*, 556 U.S. at 679 (citing *Twombly*, 550 U.S. at 556).

To meet this "plausibility standard," a plaintiff must "plead[ ] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678 (alteration added; citing *Twombly*, 550 U.S. at 556). "The mere possibility the defendant acted unlawfully is insufficient to survive a motion to dismiss." *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1261 (11th Cir. 2009) (citation omitted), *abrogated on other grounds by Mohamad v. Palestinian Auth.*, 566 U.S. 449 (2012).

When reviewing a motion to dismiss, a court must construe the complaint in the light most favorable to the plaintiff and take the factual allegations therein as true. *See Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1369 (11th Cir. 1997) (citing *SEC v. ESM Grp., Inc.*, 835 F.2d 270, 272 (11th Cir. 1988)).

III. DISCUSSION

*4 Great Lakes argues the Court incorrectly applied Florida law to Counts II and IV of Counter-Plaintiffs' Counterclaim at the September 4, 2019 Hearing. (*See* Mot. 9–16).[5] Great Lakes asks the Court to reconsider its choice-of-law ruling and instead apply New York law to Counts II and IV of the Amended Counterclaim. (*See id.*). Great Lakes contends under New York law, Counts II and IV must be dismissed for failure to state claims for relief. (*See id.* 16–19, 23–26). If the Court declines to reconsider its choice-of-law decision, Great Lakes insists Count II should be dismissed for failure to state a claim under Florida law. (*See id.* 19–22). The Court addresses the arguments in turn.

A. Motion for Reconsideration

On August 9, 2019, Great Lakes filed its first Motion to Dismiss Counts II and IV of BRM and MBR's Counterclaim ("First Motion"). Great Lakes argued a choice-of-law clause in the MBR Policy[6] required the application of the substantive laws of New York to any disputes arising outside the scope of federal admiralty law. (*See generally* First Mot.). Great Lakes asserted that in applying New York law, the Court would conclude Counts II and IV of the Counterclaim should be dismissed for failure to state claims for relief. (*See generally id.*). The First Motion was fully briefed,[7] and on September 4, 2019, the Court held a Hearing to address the parties' positions.

At the Hearing, the parties discussed *Great Lakes Reinsurance (UK) PLC v. Tico Time Marine LLC*, Case No. 4:10-cv-2060, 2011 WL 1044154 (S.D. Tex. Mar. 16, 2011) ("First *Tico Time Marine* Order"), where a Texas district court found the same choice-of-law provision at issue in this case precluded a bad faith claim under Texas law because the choice-of-law provision encompassed any claims that "would not exist if there were no underlying insurance agreement." *Id.* at *4. The court found the bad faith claim existed as a result of the insurance agreement and thus, in the absence of federal admiralty law, New York law applied. *See id.* Great Lakes relied on this interpretation to argue the two clauses in the choice-of-law provision must be read together, and the language in the first clause describing "any dispute arising hereunder" would apply to the second clause of the provision describing the "insuring agreement." (*See* Mot., Ex. B, Hr'g Tr. [ECF No. 82-2] 22:22–24:12).

In response to the First *Tico Time Marine* Order, Counter-Plaintiffs cited a subsequent unpublished order ("Second *Tico Time Marine* Order") granting a partial motion for reconsideration.[8] (*See* Hr'g Tr. 9:15–11:11). Counter-Plaintiffs stated the order granting the motion for reconsideration "reversed [the court's] position" from the First *Tico Time Marine* Order cited by Great Lakes. (*Id.* 11:10 (alteration added)). In any event, Counter-Plaintiffs argued the proper interpretation of the choice-of-law provision is one which applies federal admiralty law to any dispute between the parties, but in the absence of federal admiralty law, applies New York law only to the insuring agreement. (*See id.* 23:15–26:21).

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***5** After considering the parties' briefing, as well as their oral arguments, the undersigned found:

> The language that Great Lakes Insurance relies on, the language in the [MBR] policy was chosen by Great Lakes, and it clearly states that any dispute arising under the [MBR] policy is adjudicated under federal admiralty law and where no such precedent exists, only the insuring agreement is subject to the laws of New York, the substantive laws of New York. The policy simply should have said any disputes arising between the parties will be subject to the laws of New York, and it did not say that -- it does not say that.
>
> So I agree with the Counterplaintiffs['] interpretation of this choice of law provision. And given that the policy was entered into here in Florida and insures property in Florida with Florida insureds and for all of the reasons stated in the Counterplaintiffs' position, I would agree that it is Florida law that applies where there is no federal admiralty law.

(*Id.* 27:4–18 (alterations added)).

Having determined Florida law applied to the claims at issue, the Court next addressed the breach-of-fiduciary-duty claim in Count II. (*See id.* 27:19–23). As Count II included a claim for breach of fiduciary duty on behalf of BRM — which was tantamount to a bad faith claim and not properly before the Court — the undersigned required Counter-Plaintiffs to amend to allege a claim solely on behalf of MBR. (*See id.*). Because the claim would be repleaded, the Court did not make a finding on the First Motion concerning MBR's breach-of-fiduciary-duty claim. (*See id.* 28:1–14). As to the reformation claim in Count IV, following the parties' arguments, the undersigned denied the motion to dismiss, finding Counter-Plaintiffs adequately stated a claim under Florida law. (*See id.* 41:10–17).

Great Lakes now argues the Court should reconsider its choice-of-law decision because (1) the Court heard an "inaccurate presentation of an order from a case deciding this choice-of-law issue in Great Lakes' favor" and (2) the Court's decision is inconsistent with a "number of other courts nationwide that have encountered the same or similar arguments." (Mot. 8). Counter-Plaintiffs disagree, arguing Great Lakes "is utilizing this motion as a vehicle to replace its original choice of law briefing with a much more thorough, but no more compelling, argument." (Opp'n 4). Counter-Plaintiffs argue the *Tico Time Marine* decisions have no bearing on whether reconsideration should be granted because the case is not binding on the Court, nor did the Court rely on the case. (*See id.*). Counter-Plaintiffs state there has been no change in the law or facts underlying the Court's decision and Great Lakes presents no case law that was unavailable at the time of the original briefing. (*See id.*).

The Court agrees with Counter-Plaintiffs. "The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." *Burger King Corp*, 181 F. Supp. 2d at 1369 (internal quotation marks and citation omitted). "Arguments that were or should have been raised in the first instance are not appropriate grounds for a motion for reconsideration." *Mierzwicki v. Citigroup, Inc.*, No. 14-cv-61753, 2015 WL 13388667, at *1 (S.D. Fla. Oct. 13, 2015) (citation omitted). Indeed, "[a] motion for reconsideration premised on previously rejected arguments should be denied because it does not meet the standard employed on review of a [m]otion for [r]econsideration." *Sierra Equity Grp., Inc. v. White Oak Equity Partners, LLC*, 687 F. Supp. 2d 1322, 1324 (S.D. Fla. 2009) (alterations added; internal quotation marks and citation omitted).

***6** Great Lakes explains it seeks reconsideration to "correct clear error or prevent manifest injustice" as the "Court's choice-of-law ruling was inconsistent with the holdings of at least seven cases nationwide and was based, at least in part, on an inaccurate representation of a prior order." (Mot. 3 (internal quotation marks and citation omitted)). Great Lakes expends considerable effort discussing the *Tico Time Marine* Orders and Counter-Plaintiffs' admittedly erroneous description[9] of the Second *Tico Time Marine* Order offered at the September 4, 2019 Hearing. (*See id.* 10–13). Great Lakes claims the Court "appeared to rely" on Counter-Plaintiffs' misrepresentation and the misrepresentation was "instrumental to the Court's ultimate ruling." (Reply 3). Yet, Great Lakes fails to identify any portion of the Hearing Transcript indicating the Court relied upon either of the *Tico Time Marine* Orders — which are certainly not binding — when making its choice-of-law decision. (*See generally* Mot.; Reply).

"[C]lear error or manifest injustice occurs where the Court 'has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension.... Such problems rarely arise and the motion to reconsider should be equally rare.' " *Campero USA Corp. v. ADS Foodservice, LLC*, 916 F. Supp. 2d 1284, 1292–93 (S.D. Fla. 2012) (quoting *Compania de Elaborados de Cafe v. Cardinal Capital Mgmt., Inc.*, 401 F. Supp. 2d 1270, 1283 (S.D. Fla. 2003) (first alteration added)). The facts set forth in Great Lakes's Motion "do not indicate that this Court's prior decision results in clear

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error or manifest injustice." *Mierzwicki*, 2015 WL 13388667, at *2.

While Counter-Plaintiffs misrepresented the scope of the "undisclosed and unbriefed" Second *Tico Time Marine* Order (Reply 3), nothing Counter-Plaintiffs discussed was relevant to the choice-of-law issue in this case (*see* Hr'g Tr. 10:5–11:11). Indeed, Great Lakes brought this to the Court's attention during the September 4, 2019 Hearing when counsel advised: "I didn't hear anything that addressed the central part of what we were -- what we cited the March 11th order for, which was that you have to read this choice of law provision in its entirety." (*Id.* 23:5–8). The undersigned's choice-of-law determination does not rely on, or even reference, the non-binding, Second *Tico Time Marine* Order, which addressed a separate issue of contract interpretation not before the Court. (*See generally* Hr'g Tr.).

As stated, the Court's choice-of-law determination was based on the clear language of the MBR Policy, not Counter-Plaintiffs' erroneous description of the Second *Tico Time Marine* Order. (*See id.* 27:4–12) ("[T]he language in the [MBR] policy was chosen by Great Lakes, and it clearly states that any dispute arising under the [MBR] policy is adjudicated under federal admiralty law and where no such precedent exists, only the insuring agreement is subject to ... the substantive laws of New York. The policy simply should have said any disputes arising between the parties will be subject to the laws of New York, and ... it does not say that." (alterations added)).

To the extent Great Lakes seeks reconsideration because the Court's choice-of-law ruling "was inconsistent with the holdings of at least seven cases nationwide" (Mot. 9), this argument is not well-taken. "In order to demonstrate clear error, the movant must do more than simply restate his or her previous arguments, and any arguments the movant failed to raise in the earlier motion will be deemed waived." *Compania de Elaborados de Cafe*, 401 F. Supp. 2d at 1283 (citation omitted); *see also Colomar v. Mercy Hosp., Inc.*, 242 F.R.D. 671, 684 (S.D. Fla. 2007) ("[T]o the extent [the movant] merely reargues points previously considered and rejected by the Court, or tries to raise new arguments and point to new evidence that could have been raised earlier, this is insufficient grounds to satisfy the clear error or manifest injustice standard for granting a motion for reconsideration." (alterations added; citations omitted)).

*7 As the authorities cited in the Motion were available to Great Lakes prior to the Court's choice-of-law decision, they are not appropriately raised in a motion for reconsideration. *See Z.K. Marine Inc.*, 808 F. Supp. at 1563 ("A motion for reconsideration should not be used as a vehicle to present authorities available at the time of the first decision or to reiterate arguments previously made[.]" (alteration added)). "[C]ourts and litigants cannot be repeatedly called upon to backtrack through the paths of litigation which are often laced with close questions." *Burger King Corp.*, 181 F. Supp. 2d at 1370 (alteration added; citation omitted). Because Great Lakes fails to show the Court committed clear error or manifest injustice, the Court declines to reconsider its choice-of-law decision.[10]

B. Breach of Fiduciary Duty (Count II)

Great Lakes argues MBR's breach-of-fiduciary duty claim is a surrogate for a bad faith claim and must be dismissed as premature under Florida law. (*See* Mot. 19–21). If MBR's breach-of-fiduciary-duty claim is not a surrogate for a bad faith claim, Great Lakes insists the claim must still be dismissed because there was no fiduciary relationship between MBR and Great Lakes when the alleged wrong occurred. (*See id.*; Reply 9–10). While MBR admits a breach-of-fiduciary-duty claim brought against an insurer under Florida law is generally treated as duplicative of a bad faith claim, it argues the elements for a bad faith claim are not identical to the elements of a breach-of-fiduciary-duty claim; circumstances therefore may arise where the claims exist independent of one another. (*See* Opp'n 12–14).

MBR states its allegations against Great Lakes in its breach-of-fiduciary-duty claim are not related to the Policy and "do not relate to a failure to defend, to investigate, or to settle a claim." (*Id.* 13). According to MBR, this action is unique because while MBR was the named insured on the disputed Policy, it "had not been sued, nor had any claim been made against MBR or by MBR to Great Lakes for coverage." (*Id.*). MBR argues its breach-of-fiduciary-duty claim arises from the allegations that: (1) MBR is the named insured on the MBR Policy; (2) Great Lakes was defending BRM in the state-court lawsuit; (3) Great Lakes filed a declaratory judgment action against BRM without including MBR; and (4) following mediation in the state-court action, although MBR made no claim for coverage, Great Lakes added MBR to the declaratory judgment action, prompting Baerlin-Gallegos to sue MBR in the state-court action. (*See id.*). According to MBR, none of these events happened in the context of handling a claim on MBR's behalf, as MBR did not have a claim until it was added as a defendant in the state-court lawsuit. (*See id.*).

To state a claim for breach of fiduciary duty under Florida law, MBR must show: (1) the existence of a fiduciary duty; (2) a breach of that duty;[11] and (3) damages incurred as a result of the breach. *See Gracey v. Eaker*, 837 So. 2d 348, 353 (Fla. 2002). "A cause of action for breach of a fiduciary duty is founded on a fiduciary relationship." *Taylor Woodrow Homes Fla., Inc. v. 4/46-A Corp.*, 850 So. 2d 536, 540 (Fla. 5th DCA 2003). A fiduciary relationship arises where "a relation of trust and confidence exists between the parties (that is to say, where confidence is reposed by one party and a trust accepted by the other, or where confidence has been acquired and abused) ...." *Doe v. Evans*, 814 So. 2d 370, 374 (Fla. 2002) (alteration added; citation and emphasis omitted). But "[w]hen the parties are dealing at arm's length, a fiduciary relationship does not exist because there is no duty imposed on either party to protect or benefit the other." *Taylor Woodrow Homes Fla., Inc.*, 850 So. 2d at 541 (alteration added; citations omitted).

***8** MBR states "Florida law holds that an insurer has a fiduciary duty to its insured in the third party liability context." (Opp'n 12). Not quite. This conclusory assertion ignores the specific factual circumstances surrounding the insurer and insured which create the fiduciary relationship in this context. When discussing an insurer's fiduciary duty in the third-party liability context, the Florida Supreme Court has found:

> [when] insurance companies took on the obligation of defending the insured, which, in turn, made insureds dependent on the acts of the insurers; insurers had the power to settle and foreclose an insured's exposure or to refuse to settle and leave the insured exposed to liability in excess of policy limits.... *This placed insurers in a fiduciary relationship* with their insureds similar to that which exists between an attorney and client.

State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So. 2d 55, 58 (Fla. 1995) (alterations and emphasis added; citations omitted). Where "the insured has surrendered to the insurer all control over the handling of the claim, including all decisions with regard to litigation and settlement, *then the insurer must assume a duty* to exercise such control and make such decisions in good faith and with due regard for the interests of the insured." *Macola v. Gov't Emps. Ins. Co.*, 953 So. 2d 451, 455 (Fla. 2006) (alteration and emphasis added; citations omitted).

While a fiduciary relationship may be implied by law, it is "premised upon the specific factual situation surrounding the transaction and the relationship of the parties." *Doe*, 814 So.2d at 374 (internal quotation marks and citation omitted). In the third-party liability context, it is the handling of the claim by the insurer on behalf of the insured that leads to the creation of a fiduciary relationship. *See Maldonado v. First Liberty Ins. Corp.*, 546 F. Supp. 2d 1347, 1352–53 (S.D. Fla. 2008) ("When an insurer undertakes the defense of an insured, the insured becomes dependent upon the acts of the insurer.... *This places the insurer in a fiduciary relationship with the insured*, and the insurer thus owes a duty to the insured to refrain from acting solely on the basis of the insurer's own best interest in considering a settlement.") (alteration and emphasis added; citation omitted).

As MBR insists its allegations in Count II are unrelated to Great Lakes's handling of MBR's insurance claim (*see* Opp'n 13), the Court is not persuaded by MBR's argument concerning the existence of a fiduciary relationship. "To establish a fiduciary relationship, a party must allege some degree of dependency on one side and some degree of undertaking on the other side to advise, counsel, and protect the weaker party." *Watkins v. NCNB Nat'l Bank of Fla., N.A.*, 622 So. 2d 1063, 1065 (Fla. 3d DCA 1993) (internal quotation marks and citation omitted). This, MBR has failed to do.

There are no factual allegations establishing an undertaking by Great Lakes or any degree of dependence by MBR prior to Great Lakes's handling of MBR's insurance claim. (*See generally* Am. Countercl.). When the alleged breach occurred, the parties were dealing with each other at arm's length and a fiduciary relationship "[did] not exist because there [was] no duty imposed on either party to protect or benefit the other." *Taylor Woodrow Homes Fla., Inc.*, 850 So. 2d at 541 (alterations added; citations omitted). Accordingly, MBR's claim for breach of fiduciary duty is dismissed without prejudice.

IV. CONCLUSION

***9** For the foregoing reasons, it is

ORDERED AND ADJUDGED that Plaintiff/Counter-Defendant, Great Lakes Insurance SE's

Partial Motion to Dismiss Counts II and IV of BRM and MBR's Amended Counterclaim and Motion to Reconsider Court's Choice-of-Law Ruling **[ECF No. 82]** is **GRANTED in part** as follows:

1. The Motion is **DENIED** as to reconsideration of the Court's choice-of-law ruling.

2. The Motion is **GRANTED** as to Count II of the Amended Counterclaim. MBR's claim for breach of fiduciary duty is **DISMISSED** without prejudice.

3. The Motion is **DENIED** as to Count IV of the Amended Counterclaim.

DONE AND ORDERED in Miami, Florida, this 17th day of January, 2020.

All Citations

Slip Copy, 2020 WL 264674

Footnotes

1 While Counter-Plaintiffs title the document as an answer to the Third Amended Complaint, it is, in fact, an answer to Great Lakes's Fourth Amended Complaint ("FAC") [ECF No. 75].

2 The issuing entity appears on the MBR Policy and BRM Policy as "Great Lakes Reinsurance (UK) SE." (FAC ¶ 14). On December 30, 2016, Great Lakes Reinsurance (UK) SE redomiciled from London, United Kingdom to Munich, Germany and changed its name to Great Lakes Insurance SE. (*See id.*). Great Lakes Reinsurance (UK) SE and Great Lakes Insurance SE are the same company and share the same rights, duties, and obligations. (*See id.*).

3 Great Lakes separately issued MBR a Commercial Yacht Policy which is not relevant to this action. (*See* Am. Countercl. ¶¶ 11–12).

4 Counter-Plaintiffs dispute Baerlin-Gallegos's factual allegations. (*See* Am. Countercl. ¶ 35).

5 The Court relies on the pagination generated by the Case Management/Electronic Case Files system, which appears as a header on all filings.

6 The choice-of-law clause in the MBR Policy states:

> It is hereby agreed that any dispute arising hereunder shall be adjudicated according to well established, entrenched principles and precedents of substantive United States Federal Admiralty law and practice but where no such well established, entrenched precedent exists, this insuring agreement is subject to the substantive laws of the State of New York.

(MBR Policy 18 (bold omitted)).

7 Counter-Plaintiffs filed an Opposition [ECF No. 57]; to which Great Lakes filed a Reply [ECF No. 58].

8 The Second *Tico Time Marine* Order, entered April 28, 2011, is not available on Westlaw but is attached as Exhibit A to the Motion. (*See* Mot., Ex. A, Second *Tico Time Marine* Order [ECF No. 82-1]).

9 Counter-Plaintiffs' counsel acknowledges she "misinterpreted the breadth of the order and stated at oral argument that the court had reversed its position[.] ... This misrepresentation was in error." (Opp'n 4 n.1 (alterations added)).

10 The undersigned previously determined Counter-Plaintiffs adequately stated a claim for reformation under Florida law. (*See* Hr'g Tr. 41:10–17). Great Lakes predicates its argument concerning the dismissal of Counter-Plaintiffs' reformation claim entirely on the application of New York law. (*See* Mot. 23–26). While Great Lakes bolsters its argument as to why New York law applies, it fails to provide any additional arguments concerning reconsideration. (*See id.*). Again, the Court declines to reconsider its choice-of-law ruling. Consequently, Great Lakes's motion to dismiss the reformation claim is denied as moot.

11 Great Lakes allegedly breached its fiduciary duty when it amended its Complaint to include MBR as a defendant in this action. (*See* Am. Countercl. ¶ 120). As MBR is the named insured on the Policy (*see id.* ¶ 43), and MBR has an "insurable interest" arising from its "pecuniary interest" in offering the insured vessels for charter (*id.* ¶ 21), it appears MBR is a necessary party in this action. *See* *Amerisure Ins. Co. v. R.L. Lantana Boatyard, Ltd.*, No. 10-80429, 2010 WL 4628231, at *2 (S.D. Fla. Nov. 8, 2010) ("Under federal law, declaratory-judgment actions should include all

'parties having adverse legal interests,' ... and parties whose 'interests would be prejudiced' were the case allowed to proceed without them." (alteration added; citations and footnote call number omitted)). While the parties do not address the issue in their briefing, the Court is skeptical the inclusion of a necessary party constitutes a breach of fiduciary duty under Florida law.

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT, POST OFFICE BOX 327, LAKELAND, FL 33802-0327

February 05, 2020

CASE NO.: 2D19-0130
L.T. No.: 2018-CA-1198

STATE FARM FLORIDA INSURANCE COMPANY	v.	JON PARRISH
Appellant / Petitioner(s),		Appellee / Respondent(s).

BY ORDER OF THE COURT:

The parties shall file supplemental briefs addressing whether this court can convert this appeal to a petition for certiorari and addressing all three prongs of certiorari review. Appellant's supplemental brief shall be filed within twenty days of this order. Appellee's supplemental brief shall be filed within twenty days thereafter.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

ALICIA MARIA LOPEZ, ESQ.
GREGORY L. EVANS, ESQ.
LYNN S. ALFANO, ESQ.
MARY C. LAMOUREUX, ESQ.
THEODORE A. CORLESS, ESQ.
DANIEL M. SCHWARZ, ESQ.
KARA ROCKENBACH - LINK, ESQ.
MARK A. BOYLE, ESQ.
ROBERT A. KINGSFORD, ESQ.
CRYSTAL K. KINZEL, CLERK

ec

Mary Elizabeth Kuenzel
Mary Elizabeth Kuenzel
Clerk

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IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

2ND DCA CASE NO.: 2D19-130
LOWER CASE NO.: 11-2018-CA-01198-0001

STATE FARM FLORIDA
INSURANCE COMPANY,

Appellant,

vs.

JON PARRISH,

Appellee.

_____/

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APPELLEE'S NOTICE OF FILING SUPPLEMENTAL AUTHORITY

The Appellee, JON D. PARRISH, by and through his undersigned counsel, pursuant to Rule 9.225. Florida Rules of Appellate Procedure, submits as supplemental authority the decision of *State Farm Ins. Co. v Beth Crispin* Case No.: 5D19-249, slip op. (Fla. 5th DCA Feb. 7, 2020), which is attached hereto as Exhibit "A".

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of February, 2020, a true and correct copy of the forgoing has been electronically filed using the E-Portal filing system to:

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

STATE FARM FLORIDA INSURANCE COMPANY,

Appellant,

v.

Case No. 5D19-249

BETH CRISPIN,

Appellee.

_____/

Opinion filed February 7, 2020

Appeal from the Circuit Court
for Brevard County,
Tonya B. Rainwater, Judge.

Kara Rockenbach Link and Daniel M. Schwarz, of Link & Rockenbach, P.A., West Palm Beach, and Robert A. Kingsford and Lynn S. Alfano, of Alfano Kingsford, P.A., Maitland, for Appellant.

Matthew G. Struble and Christine Skubala, of Struble, P.A., Fort Lauderdale, for Appellee.

SASSO, J.

This case presents the issue of whether an insured's public adjuster who is entitled to a contingency fee of insurance proceeds recovered may serve as a "disinterested

appraiser" as required by an insurance contract's alternative dispute resolution process. We answer that question in the negative and reverse the final decree on appeal.

BACKGROUND

State Farm issued Beth Crispin a homeowner's insurance policy that provides for an alternative dispute resolution process—appraisal—to set a disputed amount of loss. The contract mandates a procedure for the appraisal process and states in relevant part:

> Appraisal: If you and we fail to agree on the amount of loss, either party can demand that the amount of the loss be set by appraisal.
>
> . . . .
>
> Each party will select a qualified, **disinterested appraiser** and notify the other of the appraiser's identity within 20 days of receipt of the written demand.

(Emphasis added). In September 2017, Crispin submitted a claim under the policy and retained a public adjuster to assist with the claim. Per her agreement with the adjuster, the adjuster was to serve as Crispin's "agent and representative . . . to adjust, appraise, advise and assist in the settlement of the loss locate[d] at [Crispin's property]." As payment, the agreement provided that his company was entitled to a ten percent contingency fee.

After State Farm issued payment to Crispin for a loss covered under the policy, the adjuster advised State Farm that Crispin was invoking the policy's appraisal provision. Crispin then selected the adjuster as her appraiser. State Farm objected, arguing that the adjuster was "not disinterested with respect to [Crispin's] claim." Ultimately, Crispin filed a petition for declaratory relief seeking a declaration that the adjuster could serve as her appraiser under the terms of the policy. The trial court granted the petition and entered a final decree in favor of Crispin in an unelaborated order.

STANDARD OF REVIEW

Because the trial court's determination in this case rests on a question of law, our review is de novo. *Reform Party of Fla. v. Black*, 885 So. 2d 303, 310 (Fla. 2004).

ANALYSIS

This case turns on the meaning of "disinterested" as contemplated by the parties' contractual agreement. "Where the language in an insurance contract is plain and unambiguous, a court must interpret the policy in accordance with the plain meaning so as to give effect to the policy as written." *Allstate Ins. Co. v. Orthopedic Specialists*, 212 So. 3d 973, 975-76 (Fla. 2017) (citing *Wash. Nat'l Ins. Corp. v. Ruderman*, 117 So. 3d 943, 948 (Fla. 2013)). In doing so, we give an undefined contractual term its plain and ordinary meaning. *Barcelona Hotel, LLC v. Nova Cas. Co.*, 57 So. 3d 228, 230-31 (Fla. 3d DCA 2011) (citing *State Farm Fire & Cas. Co. v. Metro. Dade Cty.*, 639 So. 2d 63, 66 (Fla. 3d DCA 1994)). And we are mindful that we may not "rewrite contracts, add meaning that is not present, or otherwise reach results contrary to the intentions of the parties." *Intervest Constr. of Jax, Inc. v. Gen. Fid. Ins. Co.*, 133 So. 3d 494, 497 (Fla. 2014) (quoting *Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.*, 913 So. 2d 528, 532 (Fla. 2005)).

Applying this framework, our sister court recently considered the precise issue presented in *State Farm Florida Insurance Co. v. Valenti*, 44 Fla. L. Weekly D2953 (Fla. 4th DCA Dec. 11, 2019). Evaluating the same contractual provision and nearly identical facts, the *Valenti* court concluded, based on the actions of the insured's appraiser combined with his financial interest, that the insured's public adjuster in that case was not "disinterested." We agree and conclude that Crispin's adjuster was not disinterested as contemplated by the parties' contract. We write to explain though, as Judge Kuntz did in

his concurring opinion, that an appraiser is not disinterested in an insurance claim if the appraiser is entitled to a percentage of the recovery from the same insurance claim. *See id.* at D2955 (Kuntz, J., concurring specially) ("It is simple: [a] person with a direct financial interest in the outcome is not disinterested.").

Our decision is consistent with our holding in *Florida Insurance Guaranty Ass'n v. Branco*, 148 So. 3d 488, 490 (Fla. 5th DCA 2014), in which we previously contemplated the meaning of "disinterested" in the context of an insurance contract. In *Branco*, this Court addressed whether an insured's attorney could serve as an appraiser under a contract requiring each party in the appraisal process to choose a "competent and disinterested appraiser." 148 So. 3d at 491. This Court noted that the policy provision requiring selection of a disinterested appraiser "expresse[d] the parties' clear intention to restrict appraisers to people who are, in fact, disinterested." *Id.* at 496. Considering the duty of loyalty owed by an attorney to a client, this Court concluded that "attorneys may not serve as their clients' arbitrators or appraisers when 'disinterested' arbitrators or appraisers are bargained for." *Id.*

The reasoning in *Branco* applies equally to the insurance contract between State Farm and Crispin. As in *Branco*, the parties here have bargained for the selection of a "disinterested appraiser." As in *Branco*, the parties' contract does not define the term "disinterested." Nevertheless, we can discern a clear meaning by interpreting the term "disinterested" according to its plain and ordinary meaning. And any ordinary meaning of the term "disinterested" precludes a financial stake in the outcome. *See Merriam-Webster's Collegiate Dictionary* 358 (11th ed. 2003) (defining "disinterested" as "not having the mind or feelings engaged," "no longer interested," and "free from selfish motive

or interest"); *The American Heritage Dictionary of the English Language* 518 (5th ed. 2016) (defining "disinterested" as "[f]ree of bias and self-interest; impartial," and, in usage note, elaborating that "[t]raditionally, disinterested can only mean 'having no stake in an outcome'") (emphasis removed); Bryan A. Garner, *Garner's Modern English Usage* 290 (4th ed. 2016) (noting that "[a] disinterested observer is not merely 'impartial' but has nothing to gain from taking a stand on the issue in question").

Crispin, relying on *Rios v. Tri-State Insurance Co.*, 714 So. 2d 547 (Fla. 3d DCA 1998), argues, inter alia, that her contingent fee appraiser qualifies as a "competent, independent appraiser." "Independent," however, carries a very different meaning than "disinterested." *Compare Independent*, Black's Law Dictionary (10th ed. 2014) (defining "independent" as "not subject to the control or influence of another"), *with Disinterested*, Black's Law Dictionary (10th ed. 2014) (defining "disinterested" as "[f]ree from bias, prejudice, or partiality . . . not having a pecuniary interest in the matter at hand"). Thus, *Rios* is not instructive. And the distinction between the terms "independent" and "disinterested," in our view, is legally significant. As such, we disagree to the extent the Third District reached a contrary conclusion in *Galvis v. Allstate Insurance Co.*, 721 So. 2d 421, 421 (Fla. 3d DCA 1998).

In sum, we conclude that "disinterested" is unambiguous, and its plain meaning excludes those with a pecuniary interest in the outcome. Consequently, Crispin's selected appraiser, who was entitled to a ten percent contingency fee of any proceeds received in the disputed claim, cannot serve as her appraiser pursuant to the parties' bargained-for agreement.

REVERSED.

COHEN and WALLIS, JJ., concur.

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IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

Appellate Case No.: 2D19-130
LT Case No.: 11-2018-CA-01198-0001

STATE FARM FLORIDA
INSURANCE COMPANY,

Appellant,

vs.

JON PARRISH,

Appellee.
_____/

NOTICE OF SUPPLEMENTAL AUTHORITY

Appellant, STATE FARM FLORIDA INSURANCE COMPANY, files the following supplemental authority in support of its appeal, pursuant to Florida Rule of Appellate Procedure 9.225:

•*State Farm Florida Insurance Company v. Beth Crispin*, 5D19-249 (Fla. 5th DCA Feb. 7, 2020).

The Fifth District Court of Appeal's decision issued February 7, 2020 directly relates to the sole issue on appeal before this Court of whether an insured's "public adjuster who is entitled to a contingency fee" may serve as a "disinterested appraiser as required by the insurance" contract.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that the foregoing has been furnished to the attorneys listed below on this 11th day of February, 2020, through the Court's e-filing portal pursuant to Florida Rule of Judicial Administration 2.516(b)(1): **Theodore A. Corless, Esq.** and **Mary Catherine Lamoureux, Esq.**, Corless Barfield Trial Group, 6812 W. Linebaugh Ave., Tampa, FL 33625, Email: service@corlessbarfield.com; *Counsel for Appellee*; **Justin M. Thomas, Esq.**, **Gregory L. Evans, Esq.**, and **Mark A. Boyle, Esq.**, Boyle & Leonard, P.A., 2050 McGregor Blvd., Fort Myers, FL 33901 (eservice@insurance-counsel.com; jthomas@insurance-counsel.com; gevans@insuranec-counsel.com; mboyle@insurance-counsel.com).

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

STATE FARM FLORIDA INSURANCE COMPANY,

Appellant,

v. Case No. 5D19-249

BETH CRISPIN,

Appellee.

_____/

Opinion filed February 7, 2020

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for Brevard County,
Tonya B. Rainwater, Judge.

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Matthew G. Struble and Christine Skubala, of Struble, P.A., Fort Lauderdale, for Appellee.

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In sum, we conclude that "disinterested" is unambiguous, and its plain meaning excludes those with a pecuniary interest in the outcome. Consequently, Crispin's selected appraiser, who was entitled to a ten percent contingency fee of any proceeds received in the disputed claim, cannot serve as her appraiser pursuant to the parties' bargained-for agreement.

REVERSED.

COHEN and WALLIS, JJ., concur.

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT

CASE NO.: 2D19-0130
LT CASE NO.: 11-2018-CA-01198-0001

STATE FARM FLORIDA
INSURANCE COMPANY,

Appellant,

vs.

JON PARRISH,

Appellee.
_____/

On Appeal from the Circuit Court of the 20th Judicial Circuit in and for Collier County, Florida

---

SUPPLEMENTAL JURISDICTIONAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES……...iii

INTRODUCTION……1

SUPPLEMENTAL ARGUMENT…….…….....3

I. THIS COURT HAS JURISDICTION TO REVIEW THE ORDER ON STATE FARM'S PETITION TO COMPEL APPRAISAL WITH DISINTERESTED APPRAISER AS A FINAL ORDER……..…3

II. ALTERNATIVELY, RULE 9.040(c) COMPELS TREATMENT OF THE APPEAL AS A PETITION FOR WRIT OF CERTIORARI…...…5

A. Standard of Exercise of Certiorari Jurisdiction……7

B. The Order Causes State Farm Irreparable Harm: State Farm Will Incur a Material Injury that Cannot be Corrected Following the Appraisal Process Because There is No Legal Vehicle or Suit…….,...…….8

C. The Order Departs from the Essential Requirements of Law Because KCC is Not a "Disinterested" Appraiser as a Matter of Law……...12

CONCLUSION……...14

CERTIFICATE OF SERVICE……15

CERTIFICATE OF COMPLIANCE……...16

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Allstate Ins. Co. v. Langston,
655 So. 2d 91 (Fla. 1995)……7

Caufield v. Cantele,
837 So. 2d 371 (Fla. 2002)……..……5

City of Winter Park v. Jones,
392 So. 2d 568 (Fla. 5th DCA 1980)……...…….12

Cooper v. Cooper,
69 So. 3d 977 (Fla. 2d DCA 2011)…….5

Fed. Nat. Ins. Co. v. Esposito,
937 So. 2d 199 (Fla. 4th DCA 2006)……..9

Gray v. Richbell,
144 So. 3d 573 (Fla. 4th DCA 2014)……..7

Martinez v. Scanlan,
582 So. 2d 1167 (Fla. 1991)……..……..4

Micklos v. State,
137 So. 3d 1034 (Fla. 2d DCA 2014)……...……..6

Olive v. Maas,
811 So. 2d 644 (Fla. 2002)……..4

Rousso v. Hannon,
146 So. 3d 66 (Fla. 3d DCA 2014)……...……..7

Shands Jacksonville Med. Ctr., Inc. v. Pusha,
254 So. 3d 1076 (Fla. 1st DCA 2018)…….9
review denied, SC18-1588, 2019 WL 290298 (Fla. Jan. 22, 2019)…...…….9

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State Farm Fire & Cas. Co. v. Higgins,
788 So. 2d 992 (Fla. 4h DCA 2001),
aff'd, 894 So. 2d 5 (Fla. 2004)……...….4

State Farm Fire & Cas. Co. v. Licea,
685 So. 2d 1285 (Fla. 1996)……...…….8

State Farm Florida Insurance Co. v. Cadet,
No. 5D19-2291, 2020 WL 855166 (Fla. 5th DCA Feb. 21, 2020)
…….2, 11, 13, 14, 15

State Farm Fla. Ins. Co. v. Crispin,
45 Fla. L. Weekly D288 (Fla. 5th DCA Feb. 7, 2020)……...…….13, 14

State Farm Florida Ins. Co. v. Gonzalez,
76 So. 3d 34 (Fla. 3d DCA 2011)…….……..9

State Farm Florida Insurance Co. v. Sanders,
44 Fla. L. Weekly D1901 (Fla. 3d DCA July 24, 2019)
……...1, 2, 10, 11, 13, 14, 15

State Farm Florida Insurance Co. v. Valenti,
285 So. 3d 958 (Fla. 4th DCA 2019)…….….13, 14

Team Richco, LLC v. Rapid Sec. Solutions, LLC,
No. 2D19-63, 2020 WL 593780 (Fla. 2d DCA Feb. 19, 2020)…….….6

Trans Health Mgmt. v. Nunziata,
159 So. 3d 850 (Fla. 2d DCA 2014)……..……6

Wolf Creek Land Dev. v. Masterpiece Homes, Inc.,
942 So. 2d 995 (Fla. 5th DCA 2006)……..……12, 14

Other Authorities:

Art. V, § 2(a), Fla. Const……..…….6

Article V, § 4(b)(1) of the Florida Constitution……...…….5

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Florida Rule of Appellate Procedure 9.030(b)(1)(A)……..…1, 3, 5, 14

Florida Rule of Appellate Procedure 9.040(c)…….…..1, 6

§ 86.011, Fla. Stat. (2018)…….……4

Fla. R. Civ. P. 1.510……..4

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INTRODUCTION

State Farm files this Supplemental Brief in response to the Court's Order seeking briefs addressing certiorari jurisdiction. In doing so, State Farm renews its request to quash or reverse the Order below and remand for Appellee, Parrish, to select an appraiser who satisfies the insurance policy's plain term of a "disinterested" appraiser. This Court can arrive at that conclusion in one of two ways.

First, the Court has jurisdiction to review the Order as final pursuant to Florida Rule of Appellate Procedure 9.030(b)(1)(A). State Farm's Petition below, in substance, presented an action for declaratory relief pursuant to chapter 86, Florida Statutes, and the Order denying State Farm's Petition is final because it contained the requisite language of finality and contemplated no further judicial labor on the merits of the sole question before the trial court.

Alternatively, Rule 9.040(c) provides authority for this Court to treat State Farm's Notice of Appeal as a Petition for Writ of Certiorari. As shown by the Third District's decision in *State Farm Florida Insurance Co. v. Sanders*, 44 Fla. L. Weekly D1901 (Fla. 3d DCA July 24, 2019), State Farm can satisfy the three jurisdictional requirements to obtain certiorari relief. First, if State Farm is compelled to proceed to an appraisal process with an "interested" appraiser, State

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Farm will have no remedy at the end of the process. Under the insurance contract and Florida law, neither party is entitled to a judgment to confirm the appraisal award, and State Farm will suffer the irreparable injury of having to pay the binding appraisal award within sixty (60) days or risk being in breach of contract, prompting a second lawsuit. Simply, there is no legal or contractual mechanism by which State Farm could seek to vacate an appraisal award. Relief in a subsequent breach of contract action filed by the insured does *not* yield the ability for State Farm to appeal *this* appraisal award. The Third District in *Sanders* recognized this precise conundrum, thereby finding extraordinary writ jurisdiction, and now the Fifth District most recently agreed with this jurisdictional route on the identical issue. *See State Farm Florida Insurance Co. v. Cadet*, No. 5D19-2291, 2020 WL 855166 (Fla. 5th DCA Feb. 21, 2020).

Finally, State Farm has proven the third prong, that the trial court departed from the essential requirements of law. *See Sanders*, 44 Fla. L. Weekly D1901. As the Third District held, "a fiduciary, such as a public adjuster who is in a contractual agent-principal relationship with the insureds, cannot be a disinterested appraiser as a matter of law. The trial court thus departed from the essential requirements of law . . . ." The essential requirements of law require courts to apply unambiguous contract terms as written. Here, in the face of the fiduciary and

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agency relationship between Parrish and KCC, KCC's prior involvement in the insurance claim, and incentive of a percentage-based, contingent fee of Parrish's recovery, the trial court's determination that KCC could serve as a "disinterested" appraiser constituted a prohibited judicial re-write of the insurance policy.

SUPPLEMENTAL ARGUMENT

I. THIS COURT HAS JURISDICTION TO REVIEW THE ORDER ON STATE FARM'S PETITION TO COMPEL APPRAISAL WITH DISINTERESTED APPRAISER AS A FINAL ORDER

Preliminarily, the Order State Farm appealed is final and reviewable pursuant to Florida Rule of Appellate Procedure 9.030(b)(1)(A) (providing that the district courts of appeal shall review, by appeal, final orders of trial courts not directly reviewable by the supreme court or a circuit court). While State Farm respects this Court's independent obligation to evaluate its jurisdiction, Parrish notably did not challenge the Court's appellate jurisdiction to review the Order as final.

Indisputably, State Farm filed a "Petition to Compel Appraisal with Disinterested Appraiser." (R. 7-17). The Petition set forth factual allegations and contained legal argument as to why KCC could not serve as Parrish's "disinterested" appraiser. In conclusion, State Farm requested the trial court to

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enter an order compelling Parrish to select a disinterested appraiser, not affiliated with KCC, within twenty (20) days. (R. 17).

In substance, State Farm's Petition was indistinguishable from a complaint for declaratory relief pursuant to chapter 86, Florida Statutes. Clearly, State Farm was in doubt about its rights, duties, and responsibilities under the appraisal provision of the insurance policy. § 86.011, Fla. Stat. (2018). A declaratory judgment action is appropriate to determine the legal effects and consequences of unambiguous policy language, as applied to the facts of a case. *State Farm Fire & Cas. Co. v. Higgins*, 788 So. 2d 992, 996-1002 (Fla. 4h DCA 2001), *aff'd*, 894 So. 2d 5 (Fla. 2004); *see also Olive v. Maas*, 811 So. 2d 644, 648 (Fla. 2002) (noting that Declaratory Judgment Act is to relieve parties from uncertainty with respect to rights, status, and other relations and is to be liberally construed); *Martinez v. Scanlan*, 582 So. 2d 1167, 1170 (Fla. 1991).

The trial court held a hearing directly on State Farm's Petition after Parrish responded. (R. 72-89, 126-79). Because the facts were undisputed and the parties needed only the trial court's resolution of a single, pure issue of law, the procedure functioned much like a final summary judgment hearing. *Cf.* Fla. R. Civ. P. 1.510.

After the hearing, the trial court entered its final order, containing Findings of Fact and Conclusions of Law. (R. 121-25). In its Order, the trial court denied

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and dismissed State Farm's Petition in its entirety and found Parrish entitled to attorneys' fees and costs. (R. 124-25). The Order is final as it contemplated no further judicial labor on State Farm's Petition. *See generally Cooper v. Cooper*, 69 So. 3d 977, 979 (Fla. 2d DCA 2011) ("While not styled as a 'final judgment' or 'final order,' it is clear from the substance of the order that the trial court intended this order to be final, i.e., to end its judicial labor.") (citing *Caufield v. Cantele*, 837 So. 2d 371, 375 (Fla. 2002) (defining a final judgment as an order that "ends the litigation between the parties and disposes of all issues involved such that no further action by the court will be necessary")).

Therefore, the Order was appealable as a matter of right by State Farm and is final and reviewable by this Court pursuant to Article V, § 4(b)(1) of the Florida Constitution and Rule 9.030(b)(1)(A).

II. ALTERNATIVELY, RULE 9.040(c) COMPELS TREATMENT OF THE APPEAL AS A PETITION FOR WRIT OF CERTIORARI

If this Court does not deem the Order on State Farm's Petition as a final, reviewable order under Rule 9.030(b)(1)(A), it is well-established that State Farm's Notice of Appeal should be treated as a Petition for Writ of Certiorari. This Court has preliminary inquired whether it "can convert this appeal to a petition for certiorari." (Feb. 5, 2020 Order). Indeed, not only "can" this Court do so, the

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conversion is mandated by law if the Court believes State Farm has sought the incorrect remedy.

The Florida Constitution requires the Supreme Court to "adopt rules" containing "a requirement that no cause shall be dismissed because an improper remedy has been sought." Art. V, § 2(a), Fla. Const. In turn, Florida Rule of Appellate Procedure 9.040(c) provides that "[i]f a party seeks an improper remedy, the cause shall be treated as if the proper remedy had been sought; provided that it shall not be the responsibility of the court to seek the proper remedy." Fla. R. App. P. 9.040(c). This Court has invoked this Rule to treat Notices of Appeal as Petitions for Writs of Certiorari on many occasions. *See generally Team Richco, LLC v. Rapid Sec. Solutions, LLC*, No. 2D19-63, 2020 WL 593780 (Fla. 2d DCA Feb. 19, 2020); *Trans Health Mgmt. v. Nunziata*, 159 So. 3d 850, 859 (Fla. 2d DCA 2014); *see also Micklos v. State*, 137 So. 3d 1034, 1036 (Fla. 2d DCA 2014) (noting that "our constitution prohibits the dismissal of a cause because the remedy sought is improper" and holding that lower court applied the incorrect law by failing to invoke Rule 9.040(c) to treat appeal as petition). Accordingly, pursuant to the plain language of Rule 9.040(c) and the ubiquity of the Court's treatment of Notices of Appeal as Petitions for Writs of Certiorari when needed, treatment of

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State Farm's Notice of Appeal as such is mandated if the Court finds that the Notice of Appeal sought an improper remedy in light of the proceedings below.

A. Standard for Exercise of Certiorari Jurisdiction

The Order on State Farm's Petition, allowing KCC to act as Parrish's "disinterested" appraiser, departs from the essential requirements of law and will cause material injury to State Farm throughout the appraisal process that cannot be remedied by plenary appeal. *See Rousso v. Hannon*, 146 So. 3d 66, 69 (Fla. 3d DCA 2014) ("To invoke an appellate court's certiorari jurisdiction, '[t]he petitioning party must demonstrate that the contested order constitutes '(1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the case[,] (3) that cannot be corrected on post-judgment appeal.'"); *Gray v. Richbell*, 144 So. 3d 573, 574 (Fla. 4th DCA 2014) ("[C]ertiorari is appropriate when a[n] . . . order departs from the essential requirements of law, causing material injury to a petitioner throughout the remainder of the proceedings below and effectively leaving no adequate remedy on appeal.") (citing *Allstate Ins. Co. v. Langston*, 655 So. 2d 91, 94 (Fla. 1995)).

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B. The Order Causes State Farm Irreparable Harm: State Farm Will Incur a Material Injury that Cannot be Corrected Following the Appraisal Process Because There is No Legal Vehicle or Suit

The Court directed State Farm to address the three prongs of certiorari jurisdiction. Both the "material injury" and "cannot be corrected on post-judgment appeal" prongs are addressed here and are interrelated.

The Order allowing KCC to act as Parrish's "disinterested" appraiser causes irreparable injury that cannot be remedied on plenary appeal because the alternative dispute resolution process of appraisal is binding and there is no post-judgment appeal because there is no "judgment." *See State Farm Fire & Cas. Co. v. Licea*, 685 So. 2d 1285, 1287–88 (Fla. 1996) ("If a court decides that coverage exists, the dollar value agreed upon under the appraisal process will be binding upon both parties."). The binding nature of appraisal is reflected in the plain language of the State Farm policy: "The appraisers shall then set the amount of the loss. . . . Written agreement signed by any two of these three shall set the amount of the loss." (R. 40).

If the appraisal proceeds with KCC as Parrish's appraiser, there is no mechanism for a "do-over" or second appraisal and certainly no lawsuit vehicle or judgment to appeal. The appraisal award is automatically binding pursuant to the

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policy language and State Farm will have forever lost its contractual right to an appraisal with two disinterested appraisers and a disinterested umpire.[1]

There is no legal basis for a trial court to confirm an appraisal award after the insurer has paid it. *State Farm Florida Ins. Co. v. Gonzalez*, 76 So. 3d 34, 37 (Fla. 3d DCA 2011) ("[T]he trial court erroneously rejected State Farm's argument that a Petition to Confirm is not authorized and that the Arbitration Code is not applicable to appraisal awards."); *Fed. Nat. Ins. Co. v. Esposito*, 937 So. 2d 199, 200–01 (Fla. 4th DCA 2006) ("The precise issue raised is whether a court should confirm an appraisal award after it has been paid. . . . Because of the laudable goal of the appraisal process—to resolve disputes without litigation—and the potential to evade that goal by resort to the court system, we hold that there is no need to confirm an appraisal award in circumstances such as those presented here.").[2]

[1] This is similar to the irreparable harm in presuit notice and screening cases – there is simply no meaningful way to enforce the "disinterested" appraiser language after a binding appraisal award is issued. *See, e.g.*, *Shands Jacksonville Med. Ctr., Inc. v. Pusha*, 254 So. 3d 1076, 1080 (Fla. 1st DCA 2018), *review denied*, SC18-1588, 2019 WL 290298 (Fla. Jan. 22, 2019).

[2] Notably, too, the litigation here concerned only State Farm's request for the trial court to compel Parrish to select a "disinterested" appraiser and there is no reservation of jurisdiction in connection with the process itself. Thus, even if the policy or Florida law permitted confirmation of or entry of judgment on an appraisal award (and neither does), such a possibility would still not present itself in light of the specific procedural facts here.

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Here, the insurance policy obligates State Farm to pay an appraisal award within 60 days. (R. 40). State Farm must (and would) comply with this obligation to avoid breaching the insurance contract. Once an appraisal award is issued, there is no judgment to confirm or appeal; simply an appraisal award to pay or ignore. State Farm can obtain no appellate relief and is caught between *Scylla* and *Charibdys*, two equally unpleasant alternatives.

In *Sanders*, the insured argued that the trial court could confirm the appraisal award, and State Farm could then move to vacate it and appeal. The Third District correctly rejected this argument, agreeing with State Farm that it had established material injury that could not be remedied on any kind of plenary appeal:

> After an insurer pays an appraisal award, the trial court is not required to confirm this award, as a petition to confirm an appraisal award is not authorized under Florida law.
>
> Moreover, according to the terms of State Farm's homeowner's insurance policy, State Farm is required to pay an appraisal award within sixty days after State Farm receives the insureds proof of loss and there is a filing of an appraisal award with State Farm. If State Farm did not comply with this term in the contract, it would be in breach. Consequently, State Farm would not have the chance to vacate the appraisal award, as the insureds argue, because the trial court would not have confirmed such award.
>
> Additionally, pursuant to the terms of the State Farm policy and Florida law, appraisal is binding on the

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> parties. The binding nature of appraisal is outlined in the "Appraisal" provision of the State Farm policy . . . For these reasons, certiorari review is proper in this case, as the harm to State Farm cannot be remedied on direct appeal.

Sanders, 44 Fla. L. Weekly D1901, at *2.

More recently, the Fifth District granted State Farm certiorari relief on the identical "disinterested" appraiser issue presented. *State Farm Fla. Ins. Co. v. Cadet*, No. 5D19-2291, 2020 WL 855166 (Fla. 5th DCA Feb. 21, 2020). The Fifth District did not expressly address the "material injury" or "irreparable harm" prongs of certiorari review, but its finding of their existence is necessarily implicit in its grant of certiorari.

Therefore, should this Court treat State Farm's Notice of Appeal as a Petition for Writ of Certiorari, the Order for which review is sought causes State Farm material injury throughout the remainder of the proceedings (the appraisal process) that cannot be remedied through post-appraisal, judicial intervention. The second lawsuit after State Farm refuses to pay the flawed appraisal award, breach of insurance contract, does not equate to remedy on plenary appeal. It would be a distinctly separate suit and is precisely why certiorari here is appropriate.

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C. The Order Departs from the Essential Requirements of Law Because KCC is Not a "Disinterested" Appraiser as a Matter of Law

State Farm relies on its Initial Brief and Reply Brief as to why the trial court erred in determining that KCC could serve as Parrish's "disinterested" appraiser. In short, KCC as Parrish's public adjuster is his agent and fiduciary, its representative scoped and prepared an estimate of the loss before the invocation of appraisal, *and* KCC has a contingent-fee *interest* in the outcome of the appraisal process. Application of these same reasons demonstrate that, not only did the trial court commit legal error; it departed from the essential requirements of law.

Simply, the Order's failure to apply the plain meaning of the controlling policy term "disinterested" easily constitutes "a violation of a clearly established principle of law resulting in a miscarriage of justice." *Wolf Creek Land Dev. v. Masterpiece Homes, Inc.*, 942 So. 2d 995, 997 (Fla. 5th DCA 2006);[3] *see also City of Winter Park v. Jones*, 392 So. 2d 568, 571 (Fla. 5th DCA 1980) (exemplifying a departure from the essential requirements of law as an error that is "so flagrant and of such magnitude that a party has been effectively denied his day in court").[4]

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[3] This "clearly established law" that, if violated, constitutes a departure from the law's essential requirements may stem from various sources, including but not limited to "case law dealing with the same issue." *Id.*

[4] It is not possible to list all possible legal errors serious enough to depart from the law's essential requirements; therefore, the district courts are permitted a

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The Fifth District in *Cadet* has necessarily determined that a public adjuster's receipt of a contingency fee from insurance proceeds recovered in the appraisal process, alone, rendered the adjuster not "disinterested," thereby departing from the essential requirements of law. *Cadet*, 2020 WL 855166 (relying on *State Farm Fla. Ins. Co. v. Crispin*, 45 Fla. L. Weekly D288 (Fla. 5th DCA Feb. 7, 2020). State Farm urges this Court to follow *Sanders* and *Cadet* to determine that KCC's entitlement to a contingency-fee interest in any insurance proceeds recovered by Parrish as a result of the appraisal process, alone, renders KCC not "disinterested." Even if the Court were to examine narrower grounds to find the departure from the law's essential requirements, multiple factors combine to reveal KCC's "interest" and thus the trial court's manifest abrogation of its duty to apply the bargained-for contract term's plain meaning. *See State Farm Florida Insurance Co. v. Valenti*, 285 So. 3d 958, 960 (Fla. 4th DCA 2019).

If the term "disinterested" is not given its plain meaning and applied to each party's choice of appraiser, then the word is redacted or rendered meaningless. Surely, the disregard of an unambiguous contractual term is a departure from the essential requirements of law.

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significant degree of discretion to judge ease case on its own merits. *Combs v. State*, 436 So. 2d 93 95-96, (Fla. 1983).

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A substantial body of case law has recently developed establishing that a public adjuster with indistinguishable characteristics vis-à-vis an insured is not "disinterested" as a matter of law. *Sanders; Valenti; Crispin; Cadet*. *See Wolf Creek*, 942 So. 2d at 997 (noting that departure from essential requirements of law can be found in existing case law). These authorities furnish a clear and solid precedential foundation for this Court to find the requisite departure from the essential requirements of law in the trial court's erroneous finding that KCC can serve as Parrish's "disinterested" appraiser.

CONCLUSION

The Order on State Farm's Petition is final and reviewable as a final order pursuant to Rule 9.030(b)(1)(A). Alternatively, the Court should treat State Farm's Notice of Appeal as a Petition for Writ of Certiorari and grant it. If certiorari review is deemed necessary, State Farm has met all three requisite prongs. If the trial court's Order is upheld, State Farm undeniably will have no remedy at the conclusion of the appraisal process because it will be **bound** to pay the award pursuant to the appraisal provision of its policy which neither the contract nor the law authorizes confirmation or the entry of judgment on the award. Without a lawsuit vehicle, State Farm can obtain no relief on plenary appeal. Additionally, the trial court's grant of permission to Parrish to select George Keys as his

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appraiser departs from the essential requirements of law in that KCC is not "disinterested" as a matter of law. *Sanders; Cadet.*

Therefore, State Farm requests this Court to 1) deem the Order appealed final and grant the relief requested by State Farm in its Initial Brief and Reply Brief; or 2) alternatively, treat State Farm's Notice of Appeal as a Petition for Writ of Certiorari, find that the jurisdictional prerequisites for the exercise of certiorari jurisdiction have been met, and grant State Farm the relief requested in its Initial Brief and Reply Brief.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that the foregoing document has been furnished to the attorneys listed below on this 25th day of February, 2020, through the Court's e-filing portal pursuant to Florida Rule of Administration 2.516(b)(1) to: **Theodore A. Corless, Esq.** and **Mary Catherine Lamoureux, Esq.**, Corless Barfield Trial Group, 6812 W. Linebaugh Avenue, Tampa, FL 33625 (service@corlessbarfield.com); **Gregory L. Evans, Esq.**, **Alicia M. Lopez, Esq.**, and **Mark A. Boyle, Esq.**, Boyle Leonard & Anderson, P.A., 2050 McGregor Boulevard, Fort Myers, FL 33901 (eservice@insurance-counsel.com; gevans@insurance-counsel.com; alopez@insurance-counsel.com; mboyle@insurance-counsel.com).

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared in Microsoft Word, Times New Roman 14-point font and complies with the requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ Kara Rockenbach Link
Kara Rockenbach Link, Esq.

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IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

APPEAL CASE NO.: 2D19-0130

STATE FARM FLORIDA INSURANCE COMPANY,

Appellant,

vs.

JON PARRISH,

Appellee.

L.T. Court Case No.: 11-2018-CA-01198-0001

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iii

ARGUMENT 1

I. STATE FARM DID NOT SEEK A DECLARATION OF RIGHTS UNDER THE POLICY 1

II. THIS COURT DOES NOT HAVE CERTIORARI JURISDICTION. EVEN IF IT DID, THE TRIAL COURT'S ORDER DOES NOT DEPART FROM THE ESSENTIAL REQUIREMENTS OF LAW 1

A. STATE FARM CAN CONTEST AN APPRAISAL AWARD AND SEEK REVIEW OF ANY PERCEIVED ERROR THROUGH A POST-JUDGMENT APPEAL 2

B. STATE FARM CANNOT IDENTIFY A MATERIAL INJURY 4

C. THE TRIAL COURT'S ORDER DOES NOT DEPART FROM THE ESSENTIAL REQUIREMENTS OF LAW 5

CONCLUSION 10

CERTIFICATE OF COMPLIANCE 11

CERTIFICATE OF SERVICE 11

TABLE OF AUTHORITIES

PAGE(s)

CASES

Arnone v. State,
701 So. 2d 577 (Fla. 2d DCA 1997).....2

Bartsch v. Costello,
170 So. 3d 83 (Fla. 5th DCA 2015).....1

Berkshire Life Ins. Co. v. Adelberg,
698 So. 2d 828 (Fla. 1997) 6

Brickell Harbour Condo. Ass'n, Inc. v. Hamilton Specialty Ins. Co.,
256 So. 3d 245 (Fla. 3d DCA 2018).....7, 8

Coastal Petroleum Co. v. American Cyanamid Co.,
492 So. 2d 339 (Fla. 1986) 10

Continental Equities, Inc. v. Jacksonville Trans. Auth.,
558 So. 2d 154 (Fla. 1st DCA 1990).....4

DeLoach v. Aird,
989 So. 2d 652 (Fla. 2d DCA 2007).....4

Fassy v. Crowley,
884 So. 2d 359 (Fla. 2d DCA 2004)..... 1, 5, 6

Florida Ins. Guaranty Ass'n v. Branco,
148 So. 3d 488 (Fla. 5th DCA 2014) 8

Galvis v. Allstate Ins. Co.,
721 So. 2d 421 (Fla. 3d DCA 1998).....7, 10

Hartnett v. Southern Ins. Co.,
181 So. 2d 524 (Fla. 1965) 6

Heritage Prop. and Cas. Ins. Co. v. Romanach,
224 So. 3d 262 (Fla. 3d DCA 2017).....3

Highland Ins. Co. v. Kravecas,
719 So. 2d 320 (Fla. 3d DCA 1998).....3

Home Ins. Co. v. Crawford & Co.,
890 So. 2d 1186 (Fla. 4th DCA 2005) 9

Hudson v. Prudential Prop. and Cas. Ins. Co.,
450 So. 2d 565 (Fla. 2d DCA 1984).....6

Ivey v. Allstate Ins. Co.,
774 So. 2d 679 (Fla. 2000) 5

Kendall Lakes Townhomes Developers, Inc. v. Agricultural Excess and Surplus Lines Ins. Co.,
916 So. 2d 12 (Fla. 3d DCA 2005).....3

Leibman v. Sportatorium, Inc.,
374 So. 2d 1124 (Fla. 4th DCA 1979) 4

Liberty American Ins. Co. v. Kennedy,
890 So. 2d 539 (Fla. 2d DCA 2005)..... 2, 3, 4

Parkway Bank v. Fort Myers Armature Works, Inc.,
658 So. 2d 646 (Fla. 2d DCA 1995).....2

Rios v. Tri-State Ins. Co.,
714 So. 2d 547 (Fla. 3d DCA 1998).....7

Security Ins. Co. of Hartford v. Investors Diversified Ltd., Inc.,
407 So. 2d 314 (Fla. 4th DCA 1981) 10

Siegel v. Abramowitz,
309 So. 2d 234 (Fla. 4th DCA 1975) 4

State Farm Fire and Cas. Co. v. Licea,
685 So. 2d 1285 (Fla. 1996) 2

State Farm Florida Ins. Co. v. Cadet,
2020 WL 855166 (Fla. 5th DCA 2020) 9, 10

State Farm Florida Ins. Co. v. Crispin,
2020 WL 593345 (Fla. 5th DCA 2020) 7, 8, 9, 10

State Farm Florida Ins. Co. v. Sanders,
2019 WL 3309217 (Fla. 3d DCA 2019)..... 7, 8, 9

State Farm Florida Ins. Co. v. Valenti,
285 So. 3d 958 (Fla. 4th DCA 2019) 7, 8, 9

X Corp. v. Y Person,
622 So. 2d 1098 (Fla. 2d DCA 1993).....1

RULES

Rule 9.030(b)(1)(A), Florida Rules of Appellate Procedure 11

ARGUMENT

I. STATE FARM DID NOT SEEK A DECLARATION OF RIGHTS UNDER THE POLICY.

State Farm goes beyond the scope of this Court's supplemental briefing order and contends that "[i]n substance [its] Petition was indistinguishable from a complaint for declaratory relief pursuant to chapter 86, Florida Statutes." (Supp. Jurisdictional Br., at pg. 4). Except State Farm did not allege a single element necessary to state a claim for declaratory relief. *Compare* (R. at pg. 7-11) *with X Corp. v. Y Person*, 622 So. 2d 1098, 1101 (Fla. 2d DCA 1993); *Bartsch v. Costello*, 170 So. 3d 83, 89 (Fla. 5th DCA 2015). State Farm did not allege any doubt concerning its rights or obligations under the Policy. (*Id.*). State Farm did not allege any existing controversy or dispute. (*Id.*). State Farm did not join or otherwise allege all potentially adverse interests were before the court. (*Id.*). There is simply nothing about State Farm's complaint that resembles a declaratory action. Thus, State Farm's contention that the trial court's order is really a final order in a declaratory judgment action fails.

II. THIS COURT DOES NOT HAVE CERTIORARI JURISDICTION. EVEN IF IT DID, THE TRIAL COURT'S ORDER DOES NOT DEPART FROM THE ESSENTIAL REQUIREMENTS OF LAW.

To obtain certiorari relief, State Farm must establish: (1) a departure from the essential requirements of law, (2) that resulted in a material, irreparable injury, which (3) cannot be corrected by post-judgment appeal. *Fassy v. Crowley*, 854 So.

2d 359, 364 (Fla. 2d DCA 2004). The existence of a material injury irreparable by post-judgment appeal is jurisdictional and must be established before this Court considers whether an order departs from the essential requirements of law. *Id.* (citing *Parkway Bank v. Fort Myers Armature Works, Inc.*, 658 So. 2d 646, 649 (Fla. 2d DCA 1995)).

A. STATE FARM CAN CONTEST AN APPRAISAL AWARD AND SEEK REVIEW OF ANY PERCEIVED ERROR THROUGH A POST-JUDGMENT APPEAL.

Certiorari jurisdiction does not exist until the petitioner establishes no adequate remedy exists on plenary appeal to correct a perceived judicial error. *Arnone v. State*, 701 So. 2d 577, 579 (Fla. 2d DCA 1997). Relying on *State Farm Fire and Cas. Co. v. Licea*, 685 So. 2d 1285 (Fla. 1996), State Farm argues that the trial court's order inflicts irreparable harm because the appraisal award is binding and must be paid. But State Farm overlooks that it can contest the appraisal award and request the claim be re-appraised.

Like State Farm, the insurer in *Liberty American Ins. Co. v. Kennedy*, 890 So. 2d 539 (Fla. 2d DCA 2005), argued that *Licea* made an appraisal award binding and beyond contest. *Id.* at 541. But, like the insurer in *Kennedy*, State Farm misinterprets *Licea*. *Kennedy*, 890 So. 2d at 541. In *Kennedy*, this Court stated that "[b]ased on the controlling principles articulated in *Licea*, we conclude that in the underlying action here the submission of the claim to appraisal *does not foreclose [the insurer]*

from challenging an element of loss….” *Id.* at 541-42 (emphasis added). Because the insurer could dispute the appraisal award, this Court held “any harm to [the insurer] is reparable on postjudgment appeal. Therefore, this Court lacks certiorari jurisdiction.” *Id.* at 542.

The wisdom of *Kennedy* bore out in *Heritage Prop. and Cas. Ins. Co. v. Romanach*, 224 So. 3d 262 (Fla. 3d DCA 2017). In *Romanach*, an insurer filed a complaint for declaratory relief that called into question the integrity of the appraisal process because of an allegedly partial umpire. *Id.* at 265. The trial court dismissed the complaint for failure to state a cause of action. *Id.* The Third District reversed. *Id.* The court reasoned that the insurer was entitled to seek a determination on “whether the appointed umpire was, in fact, competent and impartial as required by the policy.” *Id.* Importantly, *Romanach* came before the Third District on a plenary appeal in a lawsuit initiated after the issuance of an appraisal award. *Id.*

Kennedy and *Romanach* show an insurer can contest an appraisal award. *Romanach* shows the right to contest an appraisal award includes the ability to question the partiality or interest of an umpire or appraiser. If State Farm prevails, it can obtain relief in the form of a new appraisal hearing. *See Kendall Lakes Townhomes Developers, Inc. v. Agricultural Excess and Surplus Lines Ins. Co.*, 916 So. 2d 12, 16 (Fla. 3d DCA 2005); *Highland Ins. Co. v. Kravecas*, 719 So. 2d 320 (Fla. 3d DCA 1998). And, as illustrated by *Kennedy* and *Romanach*, should the trial

court rule against State Farm, State Farm can seek review of any perceived error in a post-judgment appeal. Consequently, this Court does not have certiorari jurisdiction. *Kennedy*, 890 So. 2d 540.

B. STATE FARM CANNOT IDENTIFY A MATERIAL INJURY.

The thrust of State Farm's material injury position is that it has no remedy at the end of the appraisal process because it cannot contest the appraisal award. As explained above, State Farm can contest the appraisal award and request another appraisal hearing occur. *Supra* at pg. 2-3. Thus, State Farm's purported harm is neither material nor irreparable.

In reality, State Farm wants to avoid the potential time and expense associated with appraisal and a subsequent case contesting the appraisal award. But "time, inconvenience, potential difficulty, and expense" are "insufficient to invoke [this Court's] certiorari jurisdiction." *DeLoach v. Aird*, 989 So. 2d 652, 654 (Fla. 2d DCA 2007); *Continental Equities, Inc. v. Jacksonville Trans. Auth.*, 558 So. 2d 154 (Fla. 1st DCA 1990); *Leibman v. Sportatorium, Inc.*, 374 So. 2d 1124 (Fla. 4th DCA 1979); *Siegel v. Abramowitz*, 309 So. 2d 234 (Fla. 4th DCA 1975). State Farm, therefore, cannot establish the material, irreparable injury necessary to invoke this Court's jurisdiction. *See id.*

C. THE TRIAL COURT'S ORDER DOES NOT DEPART FROM THE ESSENTIAL REQUIREMENTS OF LAW.

A departure from the essential requirements of law "is something more than a simple legal error." *Fassy*, 884 So. 2d at 364. Instead, "[t]here must be a violation of a clearly established principle of law resulting in a miscarriage of justice." *Id.* "A failure to observe the essential requirements of law has been held synonymous with a failure to apply 'the correct law.'" *Id.* (citation omitted). Importantly, however, "misapplication of the correct law or an erroneous interpretation of a law does not rise to the necessary level." *Id.* (citing *Ivey v. Allstate Ins. Co.*, 774 So. 2d 679, 682-83 (Fla. 2000)).

State Farm posits the trial court departed from the essential requirements of law by not concluding: (1) the contingency fee Mr. Parrish agreed to pay Keys Claims Consultants made George Keys interested; and (2) a fiduciary relationship existed between Mr. Keys and Mr. Parrish. State Farm's arguments fail. The trial court did not err, let alone depart from the essential requirements of law, in concluding Mr. Keys was "disinterested."

Regarding the meaning of the term "disinterested," the correct law to apply was Florida's well-established principles of insurance policy interpretation. Insurers retain control over the scope of their coverage and can alter policy language when desired or charge higher premiums for broader coverage. To that end, an insurer bears the burden on incorporating unambiguous language into its policy. *See*

Berkshire Life Ins. Co. v. Adelberg, 698 So. 2d 828, 830 (Fla. 1997). Because an insurance policy is a contract of adhesion, Florida follows the *in contra proferentem* rules of construction against the drafter. *Hudson v. Prudential Prop. and Cas. Ins. Co.*, 450 So. 2d 565, 568 (Fla. 2d DCA 1984).

Florida courts employ such a construction because an insured is "entitled to a clear explanation of terms rather than a fine distinction which was never written into his contract for insurance coverage." *Adelberg*, 698 So. 2d at 830; *Hartnett v. Southern Ins. Co.*, 181 So. 2d 524, 528 (Fla. 1965). If a phrase, provision, or term is ambiguous, Florida requires that the interpretation most favorable for the insured be adopted. *Id.*

State Farm does not contend the trial court failed to apply these well-established principles in interpreting the Policy. Instead, State Farm takes issue with the conclusion arrived at by the trial court in applying Florida's well-established rules of insurance policy interpretation. On its best day, State Farm's argument only means the trial court misapplied the correct law. "[M]isapplication of the correct law or an erroneous interpretation of a law does not rise to…" a departure from the essential requirements of law. *Fassy*, 884 So. 2d at 364. Thus, the trial court interpreting "disinterested" to not preclude Mr. Parrish from paying a contingency fee does not depart from the essential requirements of law.

In fact, for the reasons set forth in the Answer Brief, the trial court did not even err with this interpretation. Without waiver, the Third District has held paying an appraiser a contingency fee does not preclude an appraiser from being "disinterested," "impartial," or "independent." *Rios v. Tri-State Ins. Co.*, 714 So. 2d 547 (Fla. 3d DCA 1998); *Galvis v. Allstate Ins. Co.*, 721 So. 2d 421 (Fla. 3d DCA 1998); *Brickell Harbour Condo. Ass'n, Inc. v. Hamilton Specialty Ins. Co.*, 256 So. 3d 245 (Fla. 3d DCA 2018). The Third District premises this rule on Florida's rules of insurance policy interpretation. *Rios*, 714 So. 2d at 549-50. *Galvis* relied on *Rios* when it held "disinterested," the exact term at issue here, did not preclude a contingency fee payment. *Galvis*, 721 So. 2d at 421. *Galvis* was the controlling case law when the trial court ruled—and the trial court correctly followed *Galvis*.

State Farm Florida Ins. Co. v. Sanders, 2019 WL 3309217 (Fla. 3d DCA 2019), *State Farm Florida Ins. Co. v. Valenti*, 285 So. 3d 958 (Fla. 4th DCA 2019), and *State Farm Florida Ins. Co. v. Crispin*, 2020 WL 593345 (Fla. 5th DCA 2020), do not compel a different conclusion. Reason being, *Sanders*, *Valenti*, and *Crispin* did not adopt a bright-line rule that an insured cannot pay an appraiser a contingency fee. Instead, *Sanders*, *Valenti*, and *Crispin* were decided on much narrower grounds.

Valenti explicitly stated "we can resolve this issue on narrower grounds: the actions of the insured's appraiser combined with his financial interest. *Valenti*, 285 So. 3d at 960. The trial court certainly considered the contingency fee payment—it

cited *Brickell Harbour Condo. Ass'n, Inc. v. Hamilton Specialty Ins. Co.*, 256 So. 3d 245 (Fla. 3d DCA 2018), which stated "[t]he existence of a contingent fee payable to the party-appointed appraiser has been identified as a 'factor' in assessing partiality." *Id.* at 248 n.3. Unlike *Valenti*, however, Mr. Keys did not engage in any pre-appraisal conduct that made him "interested." Indeed, Mr. Keys had the same involvement as the insurer-appointed appraiser in *Brickell Harbour*—no involvement. *Brickell Harbour*, 256 So. 3d at 248 (rejecting argument that Randy Ison should be disqualified as an appraiser where a colleague at the same company had prior involvement with the claim).

Crispin is likewise inapposite because it involved nearly identical facts as *Valenti*. But, again, the facts of *Valenti* and *Crispin* do not exist here. At bottom, the fact-based holdings of *Valenti* and *Crispin* do not apply. Thus, the trial court did not err, let alone depart from the essential requirements of law, in finding Mr. Keys was "disinterested."

Crispin also relied on contractual language that made the appointed appraiser the insured's agent. *Crispin*, 2020 WL 593345 at *1. The existence of that language is critical because it triggers a fiduciary relationship, which under *Florida Ins. Guaranty Ass'n v. Branco*, 148 So. 3d 488, 490 (Fla. 5th DCA 2014), precludes an appraiser from being disinterested. *Sanders* also focused its analysis on contractual

language that made the appointed appraiser the insured's agent. *Sanders*, 2019 WL 3309217 at *3.

But State Farm concedes in its Answer Brief that there is no language in the contract that appoints Mr. Keys as Mr. Parrish's agent. (Answer Br. at pg. 9). Instead, like *Home Ins. Co. v. Crawford & Co.*, 890 So. 2d 1186 (Fla. 4th DCA 2005), the All Risk Agreement makes clear that Keys Claims Consultants and Mr. Keys are independent parties. (R. at pg. 25-26). The All Risk Agreement is clear that neither Keys Claims Consultants nor Mr. Keys provide any legal representation, legal advice, or legal interpretations. (*Id.*). Therefore, the trial court neither erred nor departed from the essential requirements of law, in finding a fiduciary relationship does not exist between Mr. Keys and Mr. Parrish.

That leaves *State Farm Florida Ins. Co. v. Cadet*, 2020 WL 855166 (Fla. 5th DCA 2020). *Cadet* lacks any factual background in the opinion. *Id.* at *1. It appears *Cadet* had the same facts as *Crispin*. *Id.* If so, then *Cadet* is inapplicable for the same reasons as *Crispin*. However, to the extent *Cadet* held contingency payment precludes an appraiser from being disinterested, it is wrongly decided. *Id. Cadet* relied on *Crispin*. *Id.* However, the portion of *Crispin* presumably cited by *Cadet* is dicta because *Crispin* based its holding on the same narrow grounds as *Valenti*:

> Evaluating the same contractual provision and nearly identical facts, the *Valenti* court concluded, based on the actions of the insured's appraiser combined with his financial interest, that the insured's public adjuster in that case was not "disinterested." We

> agree and conclude that Crispin's adjuster was not disinterested as contemplated by the parties' contract.

Crispin, 2020 WL 593345 at *2. Dicta is not binding authority. *Coastal Petroleum Co. v. American Cyanamid Co.*, 492 So. 2d 339, 344 (Fla. 1986). As such, a trial court cannot depart from the essential requirements of law by not following dicta. Therefore, *Cadet* is, with all due respect, wrongly decided and should not serve as a basis for concluding the trial court departed from the essential requirements of law.

At most, *Cadet* conflicts with *Galvis*. These conflicting interpretations are proof that the phrase "disinterested" is ambiguous. *See Security Ins. Co. of Hartford v. Investors Diversified Ltd., Inc.*, 407 So. 2d 314, 316 (Fla. 4th DCA 1981) (finding policy provision ambiguous and citing as "proof of that pudding the fact that the Supreme Court of California and the Fifth Circuit in New Orleans have arrived at opposite conclusions from a study of essentially the same language."). Florida's rules of insurance policy interpretation required the trial court interpret this ambiguity to mean "disinterested" does not preclude Mr. Parrish from paying a contingency fee. The trial court correctly followed these rules. Thus, the trial court neither erred nor departed from the essential requirements of law in finding Mr. Keys was "disinterested."

CONCLUSION

Based on the above argument and authority, Mr. Parrish respectfully requests this Court either: (a) dismiss this appeal for lack of jurisdiction; (b) should this Court

find it has jurisdiction under Rule 9.030(b)(1)(A), Florida Rules of Appellate Procedure, affirm the trial court's order; or (c) should this Court conclude it has certiorari jurisdiction, deny the petition.

Respectfully submitted,

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This brief complies with font requirements; it is typed in Times New Roman 14 point font, and is proportionately spaced type.

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IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

2ND DCA CASE NO.: 2D19-130
LOWER CASE NO.: 11-2018-CA-01198-0001

STATE FARM FLORIDA
INSURANCE COMPANY,

Appellant,

vs.

JON PARRISH,

Appellee.
_____/

APPELLEE'S NOTICE OF FILING SUPPLEMENTAL AUTHORITY

The Appellee, JON D. PARRISH, by and through his undersigned counsel, pursuant to Rule 9.225, Florida Rules of Appellate Procedure, submits as supplementary authority the decision of *State Farm Florida Insurance Company v. Charles Sanders and Diana Sanders*., No.: 3D19-927 (Fla. 3rd DCA April 15, 2020), which is attached hereto as Exhibit "A". The supplemental authority is pertinent to the issue the meaning of "disinterested appraiser" which might impact this appeal.

Respectfully submitted,

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0271
EXHIBIT A

Third District Court of Appeal

State of Florida

Opinion filed April 15, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-927
Lower Tribunal No. 18-27366

State Farm Florida Insurance Company,
Petitioner,

vs.

Charles Sanders and Diana Sanders,
Respondents.

On Petition for Writ of Certiorari from the Circuit Court for Miami-Dade County, Martin Zilber, Judge.

Link & Rockenbach, P.A., Kara Rockenbach Link and David A. Noel (West Palm Beach), for petitioner.

Marin, Eljaiek, Lopez & Martinez, P.L., Anthony M. Lopez, Steven E. Gurian and Joe De Prado, for respondents.

Brewton Plante, P.A., Wilbur E. Brewton and Kelly B. Plante (Tallahassee), for Florida Association of Public Insurance Adjusters, Inc., as amicus curiae.

Colodny Fass, Nate Wesley Strickland and L. Michael Billmeier, Jr. (Tallahassee), for Florida Property and Casualty Association, and Personal Insurance Federation of Florida, Inc., as amici curiae.

Before EMAS, C.J., and FERNANDEZ and LINDSEY, JJ.

PER CURIAM.

ON MOTION FOR REHEARING

State Farm petitioned this Court for a writ of certiorari to quash a trial court order that permitted the insureds' public adjuster to act as their "disinterested" appraiser.

In our original opinion, issued July 24, 2019, this panel granted the writ of certiorari and quashed the trial court's order. We held that a fiduciary, such as a public adjuster who is in a contractual agent-principal relationship with the insureds, cannot be a disinterested appraiser as a matter of law. We concluded that the trial court's order—which permitted the insureds' public adjuster to act as their "disinterested" appraiser—constituted a departure from the essential requirements of the law which could not be remedied on appeal.

Respondents/insureds moved for rehearing[1] and, upon consideration, we grant the motion for rehearing, withdraw our original opinion, and substitute the following opinion in its place.

INTRODUCTION

[1] Respondents also sought clarification and rehearing en banc. In light of our withdrawal of the previous opinion, and substituting the instant opinion in its place, those motions are denied as moot. This opinion will not be final until disposition of any timely post-opinion motions.

State Farm petitions this Court for a writ of certiorari to quash the trial court's April 9, 2019 order allowing the insureds' agent/public adjuster to act as their "disinterested" appraiser. We deny State Farm's petition because State Farm cannot establish that the trial court's order constituted a departure from the essential requirements of the law. Indeed, the trial court did not depart from the essential requirements of the law because its order followed this Court's existing precedent in Rios v. Tri-State Insurance Company, 714 So. 2d 547 (Fla. 3d DCA 1998) and Galvis v. Allstate Insurance Company, 721 So. 2d 421 (Fla. 3d DCA 1998).

FACTS AND PROCEDURAL HISTORY

Respondents/insureds Charles Sanders and Diana Sanders ("Sanders") had a homeowners' insurance policy with State Farm to provide coverage for property damages. The appraisal condition in State Farm's Homeowner Policy states that, "Each party will select a qualified, disinterested appraiser . . ." On August 13, 2018, the insureds filed suit against State Farm for breach of contract arising out of a Hurricane Irma property damage claim, alleging that State Farm failed to provide coverage for the loss. In response to the complaint, State Farm filed a Motion to Invoke Appraisal, claiming that there was a pre-suit dispute regarding the insureds' selected appraiser.

On December 12, 2018, the parties entered into an agreed order granting State Farm's Motion to Invoke Appraisal. The Order named Peter Patterson of VRS

Vericlaim as State Farm's appraiser and required the insureds to designate their "qualified, disinterested appraiser," as stated in State Farm's policy. The insureds selected Gian Franco Debernardi of 911 Claims Corporation as their appraiser.

Mr. Debernardi is the insureds' agent pursuant to their contract with 911 Claims Corporation, which states that he will "be the agent and representative, under the insurance contract by State Farm Insurance . . . to adjust, appraise, advise and assist in the settlement of the loss." In addition, the contract assigns 10% of the amount recovered to 911 Claims Corporation. Previously, Mr. Debernardi inspected the property, reported the insurance claim to State Farm, and prepared the $88,536.41 estimate that is the subject of the dispute between State Farm and the insureds.

On February 20, 2019, the insureds filed a Motion to Lift Stay and Compel Compliance with the Court Order, contending that appraisal should move forward with Mr. Debernardi as their appraiser. State Farm argued that Mr. Debernardi was not "disinterested" because of his agent/principal relationship with the insureds, his contingency fee, and his prior estimate of damages.[2] On April 9, 2019, the trial court granted the Motion to Lift Stay and entered an order permitting Mr. Debernardi

[2] The April 9, 2019 transcript of the trial court's hearing on the Sanders Motion to Lift Stay and Compel Compliance with the Court Order does not indicate that the trial court relied on Rios or Galvis, nor did State Farm argue to the trial court that these two cases were distinguishable from the case at hand.

to act as the insureds' "disinterested" appraiser. State Farm then filed this petition for writ of certiorari.

ANALYSIS AND DISCUSSION

In order to grant a petition for writ of certiorari, State Farm must show that the trial court's April 9, 2019 order (allowing the insureds' agent/public adjuster to act as their "disinterested" appraiser) departs from the essential requirements of the law and will cause material injury to State Farm throughout subsequent proceedings that cannot be remedied on appeal. Rousso v. Hannon, 146 So. 3d 66, 69 (Fla. 3d DCA 2014) ("To invoke an appellate court's certiorari jurisdiction, '[t]he petitioning party must demonstrate that the contested order constitutes (1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the case[,] (3) that cannot be corrected on post-judgment appeal.'"). Consequently, we recognize that we cannot grant State Farm's petition in this case because the trial court was required to follow Rios and Galvis.

Because this issue was presented to this Court by a petition for writ of certiorari, our scope and standard of review is significantly narrowed, foreclosing our authority to address the continued vitality of Rios and Galvis. It is possible that our decision might be different had the question before us been presented by way of a plenary appeal, as was the case in our sibling court's decision in State Farm Florida Insurance Company v. Valenti, 285 So. 3d 958 (Fla. 4th DCA 2019). In the instant

case, however, we cannot grant certiorari relief if the trial court's order was faithful to the existing and binding precedent of this Court. A classic example of a departure from the essential requirements of the law is a trial court's failure to follow binding precedent. See, e.g., State v. Walsh, 204 So. 3d 169 (Fla. 1st DCA 2016); Powell v. City of Sarasota, 857 So. 2d 326 (Fla. 2d DCA 2003). It is self-evident that the trial court's faithful following of our decisions in Rios and Galvis cannot constitute a departure from the essential requirements of the law. (Indeed, one might rightly conclude that had the trial court *failed* to follow those two decisions it would have constituted a departure from the essential requirements of the law.). Moreover, once we determine that the trial court's order did not depart from the essential requirements of the law, we must not venture beyond denying the petition, even if we do so in a well-intentioned effort to clarify the law in our district.

Simply put, State Farm cannot demonstrate that the trial court departed from the essential requirements of the law because the law in effect in our district at the time the trial court rendered its order allowing Mr. Debernardi to act as the insureds' disinterested appraiser, was Rios and Galvis. Those two cases, as well as their progeny, Brickell Harbour Condominium Association, Inc. v. Hamilton Specialty Insurance Company, 256 So. 3d 245, 248 (Fla. 3d DCA 2018) (where this Court applied Rios and Galvis' holdings and affirmed the appointment of an insurer's agent, an employee of a building consultant it previously hired, as a "disinterested"

appraiser), all hold that a "direct or indirect financial or personal interest in the outcome of the [appraisal]" does not require the disqualification of the party appointed appraiser. Rios, 714 So. 2d at 550. If the appraiser's financial interest is disclosed, it is acceptable for that appraiser to participate in the appraisal process. Accordingly, we must deny State Farm's petition for writ of certiorari on the basis of this Court's controlling precedent at the time of the trial court's order, articulated in Rios and Galvis.

This is true even if, as the concurring opinion discusses, this panel (or the en banc court) is of the present belief that Rios and Galvis have been undermined by subsequent developments in the law, or that Rios and Galvis and its progeny are no longer viable, or that we should recede from those decisions. See, e.g., GEICO Indem. Co. v. DeGrandchamp, 99 So. 3d 625 (Fla. 2d DCA 2012) (denying cert petition, concluding trial court did not depart from the essential requirements of the law by following existing precedent at the time the trial court entered its order, even if the district court shortly thereafter receded from that precedent).

However, we do recognize that our decisions in Rios and Galvis conflict with decisions of the Fifth District Court of Appeal in State Farm Florida Insurance Company v. Cadet, 2020 WL 855166 (Fla. 5th DCA 2020), and State Farm Florida Insurance Company v. Crispin, 2020 WL 593345 (Fla. 5th DCA 2020), as well as

the decision of the Fourth District Court of Appeal in State Farm Florida Insurance Company v. Valenti, 285 So. 3d 958 (Fla. 4th DCA 2019).

We therefore deny the petition for writ of certiorari. We further certify express conflict with State Farm Florida Insurance Company v. Cadet, 2020 WL 855166 (Fla. 5th DCA 2020), and State Farm Florida Insurance Company v. Crispin, 2020 WL 593345 (Fla. 5th DCA 2020), as well as the decision of the Fourth District Court of Appeal in State Farm Florida Insurance Company v. Valenti, 285 So. 3d 958 (Fla. 4th DCA 2019). We also certify the following question to the Florida Supreme Court to be resolved as a matter of great public importance:

> CAN A FIDUCIARY, SUCH AS A PUBLIC ADJUSTER OR APPRAISER WHO IS IN A CONTRACTUAL AGENT-PRINCIPAL RELATIONSHIP WITH THE INSUREDS AND WHO RECEIVES A CONTINGENCY FEE FROM THE APPRAISAL AWARD, BE A DISINTERESTED APPRAISER AS A MATTER OF LAW?

Petition denied, question certified.

FERNANDEZ, J. specially concurring.

I concur in the majority opinion and in the interest of uniformity of decisions in our appellate courts, and for the benefit of litigants, I write further to explain that, had this case been presented to this Court in a different procedural posture, the result would likely have been different because Rios and Galvis have been undermined by subsequent developments in the law.

In Rios v. Tri-State Insurance Co., 714 So. 2d 547 (Fla. 3d DCA 1998), the insureds petitioned for a writ of certiorari seeking to quash a discovery order entered before an appraisal under an insurance policy. Rios, 714 So. 2d at 548. The insureds sued to compel appraisal of a Hurricane Andrew claim under their homeowners' policy issued by respondent Tri-State Insurance Company, and they designated East Coast Appraisers, Inc. as their appraiser. The appraisal clause in this insurance contract required each party to select "a competent, independent appraiser." Thereafter, the two party-designated appraisers would select a "competent, impartial umpire." Id.

The insurer moved to dismiss the appraisal suit contending that the insureds' appraiser, East Coast, was not "independent," as required by the appraisal clause, because East Coast's compensation was based on a contingency percentage of the insureds' recovery. Id. at 549. The insureds refused to divulge the compensation arrangement with East Coast, so the trial court entered an order compelling

discovery of the compensation arrangement. Id. The insureds then appealed. Id. At oral argument, the insureds acknowledged that East Coast was to be compensated based on a contingency percentage of the award. Id.

On appeal, this Court turned to the Code of Ethics for Arbitrators in Commercial Disputes ("Code of Ethics"), promulgated jointly by the American Arbitration Association ("AAA") and American Bar Association ("ABA"), for guidance. The Court noted that Canon IIA(1) of the Code states that "persons who are requested to serve as arbitrators should, before accepting, disclose (1) any direct or indirect financial or personal interest in the outcome of the arbitration . . . ." Id. at 550. The Court thus held that as long as the financial interest of party-appointed appraisers is fully and voluntarily disclosed, any direct or indirect financial interest in the outcome of the arbitration does not require the disqualification of the party-appointed appraiser. Id.

Thereafter, this Court adhered to Rios in Galvis v. Allstate Insurance Company, 721 So. 2d 421 (Fla. 3d DCA 1998). In Galvis, the appraisal clause of the Allstate policy in question required each party to choose a "competent and disinterested appraiser." Id. This Court held, without significant explanation of the extension, that the contingent-fee appraiser selected by the insured was "fully qualified under the present clause." Id. Following Rios, the Court granted the insured's petition for writ of certiorari and directed that the parties make the

disclosures required by the Code of Ethics for Arbitrators. Id. This Court extended the holding in Rios to apply to disinterested appraisers and required that "contingent fee" appraisers disclose their contingency fees pursuant to the version of the AAA Code that was in effect at that time. Id. Therefore, under Rios and Galvis, as long as the appraiser's financial interest was disclosed, the party-appointed appraiser would be qualified to participate in the appraisal process.

However, in the time since our opinions in Rios and Galvis were issued, the Fifth District Court of Appeal decided Florida Insurance Guaranty Association v. Branco, 148 So. 3d 488 (Fla. 5th DCA 2014). There, the appellate court agreed with the insurer that the trial court erred in allowing the insureds to select an appraiser who was not "disinterested." Branco, 148 So. 3d at 490. At the time the Fifth District Court of Appeal decided Branco, the AAA's Code of Ethics had changed and was no longer the same as when Rios and Galvis were decided. While Galvis and Rio were and are still good law under the pre-March 1, 2004 version of the AAA's Code of Ethics, I suggest that those decisions are no longer applicable in light of the current version of the Code. I thus agree with the analysis in Branco.

In Branco, the Fifth District Court of Appeal stated that in Florida, "[a]ppraisals are creatures of contract and the subject or scope of the appraisal depends on the contract provisions." Id. at 491. The Court further noted, "Parties to a contract are free to contract for the qualifications of the decision makers in their

preferred form of alternative dispute resolution." Id. at 495 (citing Citizens Prop. Ins. Corp. v. M.A. & F.H. Props., Ltd., 948 So. 2d 1017, 1020 (Fla. 3d DCA 2007); Lee v. Marcus, 396 So. 2d 208, 210 (Fla. 3d DCA 1981)). Thus, it is clear that State Farm and the insureds were free to contract for the qualifications of the appraisers involved in their alternative dispute resolution. Here, the parties contracted for each other's appraiser to be "disinterested." State Farm's Homeowners Policy appraisal condition stated, "Each party will select a qualified, disinterested appraiser . . . ." According to Branco, this "policy provision, which requires a 'disinterested appraiser,' expresses the parties' clear intention to restrict appraisers to people who are, in fact, disinterested." Id. at 496.

Addressing the definition of "disinterested," the court in Branco stated, "'Disinterested' is defined as '[f]ree from bias, prejudice, or partiality; not having a pecuniary interest . . . .'" Id. at 496 n.9 (citing Black's Law Dictionary 536 (9th ed. 2009)). The court also stated "disinterested" meant "not having the mind or feelings engaged: not interested . . . free from selfish motives or interest: unbiased," and "the quality of being objective or impartial." [3] Id. (citing Miriam-Webster's Collegiate Dictionary 333 (10th ed. 2000)).

[3] An additional description of the term "disinterested" is provided as follows:

> [A] person may be described as "disinterested" when he or she is "[f]ree from bias, prejudice, or partiality; not having a pecuniary interest." *Black's Law Dictionary* 536 (9th ed. 2009). It follows that a

Additionally, I believe the analysis in Branco to be particularly instructive for another reason. In Branco, the insureds named one of their attorneys as an appraiser in the insureds' sinkhole claim. Id. at 494. The appellate court held that if an appraiser owes his nominating party a "fiduciary duty of loyalty" or a "confidential relationship," then "[t]he existence of such a relationship between a litigant and an [appraiser] creates too great a likelihood that the [appraiser] will be incapable of rendering a fair judgment." Id. at 495. Accordingly, the Branco court held that attorneys cannot be named as their clients' "disinterested appraisers."

In the case before us, the contract language between the insureds and Mr. Debernardi made Mr. Debernardi the insureds' agent. The insureds then selected Mr. Debernardi to be their "disinterested" appraiser. I believe that the distinguishing fact that the disinterested appraiser in Branco was an attorney, as opposed to here, where the appraiser was an agent, is irrelevant. Florida law is clear that an agent owes a fiduciary duty to his or her principal. See Fisher v. Grady, 178 So. 2d 852,

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> "disinterested witness"—as the term is used in section 733.207—refers to a person "who has no private interest in the matter at issue." *Black's Law Dictionary* 1740 (9th ed. 2009). To put it differently, a "disinterested witness" has no stake in the outcome of the matter in which he or she offers evidence. *See The American Heritage Dictionary of the English Language* 519, usage note (4th ed. 2000) ("In traditional usage, *disinterested* can only mean 'having no stake in an outcome,'....").

Smith v. DeParry, 86 So. 3d 1228, 1235 (Fla. 2d DCA 2012).

860 (Fla. 1937); Capital Bank v. MVB, Inc., 644 So. 2d 515, 518 (Fla. 3d DCA 1994). Moreover, Florida law regulates public adjusters. See § 626.854, Fla. Stat. (2018). Florida Administrative Code Rule 69B-220-201(3) (2015), Ethical Requirements for All Adjusters and Public Adjuster Apprentices, states, "The work of adjusting insurance claims engages the public trust. An adjuster shall put the honest treatment of the claimant above the adjuster's own interests in every instance." Consequently, if we were not bound to follow Rios and Galvis, I expect that we would find that Branco's holding is applicable to the case before us because Mr. Debernardi, as the insureds' agent, could not be named as their disinterested appraiser. He would not qualify as a truly "disinterested" appraiser because it cannot be said that he would not be influenced by financial consideration or by his status as agent for Sanders.

In addition, State Farm contends in its petition that Mr. Debernardi was involved with the insureds' claim from the beginning. He inspected the loss at the insureds' property, reported the claim to State Farm, and prepared the written estimate for the $88,536.41 claim. Moreover, Mr. Debernardi has a financial interest in the insurance claim. Under his agency contract with the insureds, he stands to earn a 10% contingency fee of whatever amount the insureds recover from State Farm. See Brickell Harbour Condo. Ass'n, Inc. v. Hamilton Specialty Ins. Co., 256 So. 3d 245, 248 n.4 (Fla. 3d DCA 2018) ("The existence of a contingent fee payable

to the party-appointed appraiser has been identified as a 'factor' in assessing partiality . . . ."). As such, Mr. Debernardi cannot be disinterested, as he has a financial interest in whether or not the insureds recover from State Farm and how much they recover.

Particularly noteworthy is Branco's discussion of the AAA's revised Code of Ethics that became effective on March 1, 2004. The Fifth District Court of Appeal stated:

> *Rios* was in large part premised on, and extensively quoted from, the then-existing version of the Code of Ethics for Arbitrators in Commercial Disputes, promulgated jointly by the American Arbitration Association ("AAA") and the American Bar Association ("ABA"). *Rios*, 714 So.2d at 550. That version of the Code of Ethics did not explicitly address the neutrality of arbitrators, but simply required disclosure of any direct or indirect financial interest in the outcome of the proceeding. However, the revised Code of Ethics adopted by AAA and ABA, effective since March 1, 2004, changes the landscape considerably, thus, undercutting the continued viability of the holding in *Rios*. The current Code of Ethics provides, in relevant part:
>
> > [I]t is preferable for all arbitrators including any party-appointed arbitrators to be neutral, that is, independent and impartial, and to comply with the same ethical standards. However, parties in certain domestic arbitrations in the United States may prefer that party-appointed arbitrators be non-neutral and governed by special ethical considerations. These special ethical considerations appear in Canon X of this Code.
> >
> > This Code establishes a presumption of neutrality for all arbitrators, including party-appointed arbitrators, which applies unless the parties' agreement, the arbitration rules agreed to by the parties or applicable laws provide otherwise.

> American Arbitration Association, The Code of Ethics for Arbitrators in Commercial Disputes (Oct. 21, 2011), https://www.adr.org/aaa/faces/arbitrators mediators/aboutarbitratorsmediators/codeofethics (follow "Code of Ethics for Arbitrators in Commercial Disputes" hyperlink).
>
> Unlike the Code of Ethics relied upon in Rios, the current Code of Ethics establishes a presumption of neutrality for all arbitrators, including party-appointed arbitrators. This fundamental change undermines the *Rios* holding, particularly when, as here, the contract requires the appointment of "disinterested" appraisers. If an appraiser owes his nominating party a "fiduciary duty of loyalty" or a "confidential relationship," as do attorneys, then "[t]he existence of such a relationship between a litigant and an [appraiser] creates too great a likelihood that the [appraiser] will be incapable of rendering a fair judgment." Donegal Ins. Co. v. Longo, 415 Pa.Super. 628, 610 A.2d 466, 468–69 (1992) (citing Bole v. Nationwide Ins. Co., 475 Pa. 187, 379 A.2d 1346, 1350 (1977) (Roberts, J., dissenting, but agreeing with majority that attorney in present employment of party cannot serve as arbitrator)); see Land v. State Farm Mut. Ins. Co., 410 Pa.Super. 579, 600 A.2d 605, 607 (1991) (holding that "indirect connection" between party and arbitrator was not objectionable, unlike attorney-client relationship); see also The Florida Bar v. Padgett, 481 So.2d 919, 919 (Fla.1986) (explaining that attorneys owe a fiduciary duty to their clients). This conclusion makes common sense.

Branco, 148 So. 3d at 495-96. This conclusion is common sense, and but for the procedural posture in which this case was presented to us, I suggest we would find that because Rios and Galvis were decided under the pre-March 1, 2004 version of the AAA's Code of Ethics, those decisions are no longer applicable under the current Code. See also Fla. Ins. Guar. Ass'n v. Hanse, 150 So. 3d 1272 (Fla. 5th DCA 2014) (extending Branco and remanding because the insured picked his own attorney as an

appraiser, concluding that the attorney was not "disinterested" as required by the language in the policy, as discussed in Branco). In addition, I agree with the Fourth District Court of Appeal's decision in State Farm Florida Insurance Company v. Valenti, 285 So. 3d 958 (Fla. 4th DCA 2019). Specifically, Judge Kuntz's astute special concurrence, wherein he posed the question, "Is a person disinterested in an insurance claim if the person is entitled to a percentage of the recovery from the same insurance claim? The answer, like the question, is simple: No." Id. at 960.

In his special concurrence, where he addressed the issue of "disinterested appraisers," Judge Kuntz noted:

> The insurance policy in this case requires the appointment of a qualified and disinterested appraiser. But the word disinterested is not defined in the policy. When a word in an insurance policy is not *961 defined, "the first step towards discerning the plain meaning of the [word] is to 'consult references [that are] commonly relied upon to supply the accepted meaning of [the] word[ ].' " Penzer v. Transp. Ins. Co., 29 So. 3d 1000, 1005 (Fla. 2010) (second and third alterations in original) (quoting Garcia v. Fed. Ins. Co., 969 So. 2d 288, 292 (Fla. 2007)).
>
> "Indeed, in construing terms appearing in insurance policies, Florida courts commonly adopt the plain meaning of words contained in legal and non-legal dictionaries." Barcelona Hotel, LLC v. Nova Cas. Co., 57 So. 3d 228, 231 (Fla. 3d DCA 2011) (internal quotation marks and citation omitted); see also Gov't Emps. Ins. Co. v. Macedo, 228 So. 3d 1111, 1113 (Fla. 2017).
>
> Turning to legal and non-legal dictionaries, the term disinterested is defined as "not having the mind or feelings engaged," "no longer interested," and "free from selfish motive or interest." Disinterested, Merriam-Webster's Collegiate Dictionary 358 (11th ed. 2003). The American Heritage Dictionary of the English Language defines disinterested as "[f]ree of bias and self-interest; impartial," and, in a

> usage note, elaborates that "[t]raditionally, disinterested can only mean 'having no stake in an outcome[.]' ..." Disinterested, The American Heritage Dictionary of the English Language 518 (5th ed. 2016) (emphasis removed).
>
> Similarly, Garner's Modern English Usage explains that "[a] disinterested observer is not merely 'impartial' but has nothing to gain from taking a stand on the issue in question." Bryan A. Garner, Garner's Modern English Usage 290 (4th ed. 2016). That matches the meaning in legal dictionaries, which define disinterested as "not having a pecuniary interest in the matter at hand." Disinterested, Black's Law Dictionary (11th ed. 2019).
>
> These sources are clear that the plain and ordinary meaning of disinterested includes free of self-interest or pecuniary interest. When an appraiser has a direct financial interest in the outcome of the appraisal, the appraiser is not disinterested.

Valenti, 285 So. 3d at 960-961. Judge Kuntz then turned his attention to Rios and Galvis:

> In addition to the policy's plain meaning, opinions analyzing the ability of a person to serve as a disinterested appraiser support my conclusion that a person entitled to a percentage of any recovery is not disinterested.
>
> Although "appraisers do not violate their commitment [to the process] by acting as advocates for their respective selecting parties," appraisers "should be in a position to act fairly and be free from suspicion or unknown interest." Cent. Life Ins. Co. v. Aetna Cas. & Sur. Co., 466 N.W.2d 257, 261 (Iowa 1991). In Central Life Insurance Co., the Iowa Supreme Court held that "[d]ue to the contingent fee arrangement, Central's appraiser was interested because he had a direct financial interest in the dispute." Id.
>
> In reaching a contrary conclusion, the circuit court in this case cited two decisions from the Third District: Rios v. Tri-State Insurance Co., 714 So. 2d 547 (Fla. 3d DCA 1998), and a one-paragraph decision, Galvis v. Allstate Insurance Co., 721 So. 2d 421 (Fla. 3d DCA 1998). In Rios,

the insurance policy required the selection of a "competent, independent appraiser." 714 So. 2d at 548 (emphasis removed). The threshold question before the court was "how to interpret the term 'independent appraiser' as used in the insurance policy." Id. at 549. Turning to the dictionary definition of "independent," the court concluded that "independent appraiser" meant "that a party cannot appoint himself, herself, or *962 itself, ... nor can a party appoint the party's employee." Id. (internal citation omitted).

There, like in this case, the insurer asked the court to conclude that an appraiser "whose pay is based, in whole or in part, on a contingent fee percentage of the award" cannot be independent. Id. The Third District declined to do so, relying on the then-current version of the Code of Ethics for Arbitrators in Commercial Disputes, "promulgated jointly" by the American Arbitration Association and American Bar Association. Id. at 550. The court concluded the Code of Ethics required disclosure of an interest in the outcome and held that an appraiser was not impartial if the interest was properly disclosed. Id.

In Galvis, the Third District cited Rios and concluded an appraiser is not disinterested simply because of a contingency-fee agreement. 721 So. 2d at 421. That decision provided little analysis and failed to explain why a change in the wording of the policy to require a "competent and disinterested appraiser" was irrelevant to the conclusion. But in a later case, Judge Cope, the author of the Rios opinion, stated that if an insurer wants neutral appraisers, the insurer should amend the policy language. Citizens Prop. Ins. Corp. v. M.A. & F.H. Props., Ltd., 948 So. 2d 1017, 1021 (Fla. 3d DCA 2007) (Cope, C.J., concurring). Judge Cope was correct, and it seems amending the policy language is what the insurer did here. The policy language should resolve this issue and, in this case, the policy requires a disinterested appraiser.

Regardless, "Rios was largely premised on the then-existing version" of the arbitrators' Code of Ethics. Shores at Coco Plum Condo. Ass'n v. Westchester Surplus Lines Ins. Co., No. 18-23910-Civ-COOKE/GOODMAN, 2019 WL 2223172, at *2 (S.D. Fla. Apr. 29, 2019) (citing Branco, 148 So. 3d at 495). Since Rios, the Florida Supreme Court has held that appraisal is not arbitration and that "the formal procedures of the Arbitration Code" do not govern an appraisal. Suarez, 833 So. 2d at 766.

> I believe the Rios and Galvis decisions are distinguishable based on their reliance on the arbitration code. If they are not distinguishable, I believe they were incorrectly decided.

Id. at 961-62.

Federal case law also supports State Farm's position. In Verneus v. Axis Surplus Ins. Co., No. 16-21863-CIV, 2018 WL 3417905, at *1 (S.D. Fla. July 13, 2018), a court order required both parties to select "competent and impartial" appraisers. The insured selected her public adjuster, who had originally inspected the loss and submitted his estimate to the insurer. The federal district court agreed with the insurance company's position that the public adjuster was not impartial. The court stated:

> Boaziz is the appraiser who already examined the property and prepared the demand for payment for Verneus. He is the one who submitted Verneus's scope of loss to the defendant insurer, Axis. So he has an interest to protect. As a professional who presumably values his reputation, Boaziz is unlikely to reach a conclusion as an appraiser that is significantly different from the work product he already produced.

Id. at *6.

Thereafter, when the magistrate judge in Verneus, disqualified the insured's public adjuster by finding he was not "disinterested," the insured went ahead and named her expert witness as her "disinterested" appraiser. Id. at *1. The magistrate also disqualified this appraiser, as well, as not "disinterested." The Court stated:

> In this case, as a paid expert for Verneus, Brizuela [the expert witness] has already taken a position about the cause of the damages and the

> scope of the damages. If chosen as the appraiser, then Brizuela would be tasked with doing so again—but, this time, he would also [be] wearing the hat of an impartial appraiser, rather than one of a party-retained expert. Yet he is unlikely to adopt a different opinion merely because he is now appointed as an appraiser. To the contrary, it seems likely that he would want to maintain his earlier opinion, especially because experts rely in significant part on their reputations, reliability, and consistency.

Verneus v. Axis Surplus Ins. Co., No. 16-21863-CIV, 2018 WL 44150933, at *3 (S.D. Fla. Aug. 29, 2018).

Similarly, in the case before us, Mr. Debernardi has previously inspected the loss, and he was the person who prepared the written estimate of damages the insureds used to file their claim. It is hard to imagine that Mr. Debernardi is going to reach an amount of loss different from the initial $88,56.41 estimate he already reached. See also Landmark Am. Ins. Co. v. H. Anton Richardt, DDS, PA, No. 2018-CV-600-FtM-29UAM, 2019 WL 2462865 at *1 (M.D. Fla. June 13, 2019); The Shores at Coco Plum Condo. Ass'n, Inc. v. Westchester Surplus Lines Ins. Co., No. 18-23910-CIV, 2019 WL 2223172 at *1 (S.D. Fla. Apr. 29, 2019).

For all of these reasons, I believe that had this case come to us on direct appeal from a final judgment in the trial court on an insurance cause of action or on a declaratory judgment, our decision would likely have been different. I agree with the majority's decision to deny the petition, and in the interest of uniformity of decisions in the Florida appellate courts, with the decision to certify a question of great public importance.

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IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

2ND DCA CASE NO.: 2D19-130
LOWER CASE NO.: 11-2018-CA-01198-0001

STATE FARM FLORIDA
INSURANCE COMPANY,

Appellant,

vs.

JON PARRISH,

Appellee.
_____/

APPELLEE'S NOTICE OF FILING SUPPLEMENTAL AUTHORITY

The Appellee, JON D. PARRISH, by and through his undersigned counsel, pursuant to Rule 9.225, Florida Rules of Appellate Procedure, submits as supplementary authority the decision of *State Farm Ins. Co. v Phyllis C. Long*, Case No.: 3D-19-1593, slip op. (Fla. 3d DCA Aug. 12, 2020), which is attached hereto as Exhibit "A". The supplemental authority is pertinent to the issue the meaning of "disinterested appraiser" which might impact this appeal.

Respectfully submitted,

By: /s/ *Mark A. Boyle*
Gregory L. Evans, Esquire
Florida Bar No.: 0767824
Mark A. Boyle, Esquire
Florida Bar No.: 5886
Counsel for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail to the below for service list and all parties listed on the Florida's E-Filing Portal on August 21, 2020.

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EXHIBIT A

Third District Court of Appeal

State of Florida

Opinion filed August 12, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-1593
Lower Tribunal No. 19-12609

State Farm Florida Insurance Company,
Petitioner,

vs.

Phyllis C. Long,
Respondent.

On Petition for Writ of Certiorari from the Circuit Court for Miami-Dade County, John W. Thornton, Jr., Judge.

Marshall Dennehey Warner Coleman & Goggin, P.C., and Michael A. Packer and Veronica N. Daniel (Fort Lauderdale); Link & Rockenbach, P.A., and Kara Rockenbach Link and David A. Noel (West Palm Beach), for petitioner.

Alvarez, Feltman, Da Silva & Costa, P.L., and Paul B. Feltman, for respondent.

Before EMAS, C.J., and HENDON and LOBREE, JJ.

HENDON, J.

For the reasons stated in State Farm Florida Insurance Co. v. Sanders, 45 Fla. L. Weekly D870 (Fla. 3d DCA Apr. 15, 2020), we deny the petition for writ of certiorari. As in Sanders, we certify express conflict with the Fifth District Court of Appeal's decisions in State Farm Florida Insurance Co. v. Cadet, 290 So. 3d 1090 (Fla. 5th DCA 2020), and State Farm Florida Insurance Co. v. Crispin, 290 So. 3d 150 (Fla. 5th DCA 2020), as well as the decision of the Fourth District Court of Appeal in State Farm Florida Insurance Co. v. Valenti, 285 So. 3d 958 (Fla. 4th DCA 2019). Further, we also certify the same question certified in Sanders as one of great public importance:

> CAN A FIDUCIARY, SUCH AS A PUBLIC ADJUSTER OR APPRAISER WHO IS IN A CONTRACTUAL AGENT-PRINCIPAL RELATIONSHIP WITH THE INSUREDS AND WHO RECEIVES A CONTINGENCY FEE FROM THE APPRAISAL AWARD, BE A DISINTERESTED APPRAISER AS A MATTER OF LAW?

Petition denied; conflict certified; question certified.

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IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

Appellate Case No.: 2D19-130
LT Case No.: 11-2018-CA-01198-0001

STATE FARM FLORIDA INSURANCE COMPANY,

Appellant,

vs.

JON PARRISH,

Appellee.
_____/

NOTICE TO THE COURT REGARDING PREVIOUSLY FILED SUPPLEMENTAL AUTHORITY

Appellant, State Farm Florida Insurance Company, pursuant to Florida Rules of Appellate Procedure 9.225 and 9.380, notifies this Court of additional proceedings with respect to Appellee's April 15, 2020, Notice of Filing Supplemental Authority, and states:

On April 15, 2020, Appellee notified this Court of a supplemental authority in the matter of *State Farm Florida Insurance Company v. Sanders*, 45 Fla. L. Weekly D870 (Fla. 3d DCA Apr. 15, 2020) ("*Sanders*"). State Farm notifies the Court that on April 24, 2020, in *Sanders*, State Farm filed a Notice to Invoke Discretionary Jurisdiction in the Florida Supreme Court, giving rise to Case No. SC20-596. In Case No. SC20-596, jurisdictional Briefs have been filed by State

Farm and the Respondent and State Farm will notify this Court once the Florida Supreme Court issues its Order on jurisdiction.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that the foregoing has been furnished to the attorneys listed below on this 25th day of August, 2020, through the Court's e-filing portal pursuant to Florida Rule of Judicial Administration 2.516(b)(1): **Theodore A. Corless, Esq.** and **Mary Catherine Lamoureux, Esq.**, Corless Barfield Trial Group, 6812 W. Linebaugh Ave., Tampa, FL 33625, Email: service@corlessbarfield.com; *Counsel for Appellee*; **Justin M. Thomas, Esq.**, **Gregory L. Evans, Esq.**, and **Mark A. Boyle, Esq.**, Boyle & Leonard, P.A., 2050 McGregor Blvd., Fort Myers, FL 33901 (eservice@insurance-counsel.com; jthomas@insurance-counsel.com; gevans@insuranec-counsel.com; mboyle@insurance-counsel.com).

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RECEIVED, 10/08/2020 02:25:30 PM, Clerk, Second District Court of Appeal

IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

Appellate Case No.: 2D19-130
LT Case No.: 11-2018-CA-01198-0001

STATE FARM FLORIDA INSURANCE COMPANY,

Appellant,

vs.

JON PARRISH,

Appellee.
_____/

NOTICE TO THE COURT REGARDING ACCEPTANCE OF JURISDICTION IN PREVIOUSLY FILED SUPPLEMENTAL AUTHORITY

Appellant, State Farm Florida Insurance Company, pursuant to Florida Rules of Appellate Procedure 9.225 and 9.380, advises this Court that, in the matter of *State Farm Florida Insurance Company v. Sanders*, 45 Fla. L. Weekly D870 (Fla. 3d DCA Apr. 15, 2020), previously filed with this Court as Supplemental Authority, on October 7, 2020, the Florida Supreme Court accepted jurisdiction to review the Third District Court of Appeal's certification of a question of great public importance and certification of express conflict with *State Farm Florida Insurance Company v. Cadet*, 2020 WL 855166 (Fla. 5th DCA 2020); *State Farm Florida Insurance Company v. Crispin*, 2020 WL 593345 (Fla. 5th DCA 2020), and *State Farm Florida Insurance Company v. Valenti*, 285 So. 3d 958 (Fla. 4th DCA 2019).

A copy of the Florida Supreme Court's October 7, 2020 Order accepting jurisdiction in Case No. SC20-596 ("*Sanders II*") is attached to this Notice.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been filed with the Florida Courts e-Filing Portal and thereby served in compliance with Florida Rule of Judicial Administration 2.516(b)(1) on this 8th day of October, 2020 upon: **Theodore A. Corless, Esq.** and **Mary Catherine Lamoureux, Esq.**, Corless Barfield Trial Group, 6812 W. Linebaugh Ave., Tampa, FL 33625, Email: service@corlessbarfield.com; *Counsel for Appellee*; **Justin M. Thomas, Esq.**, **Gregory L. Evans, Esq.**, and **Mark A. Boyle, Esq.**, Boyle & Leonard, P.A., 2050 McGregor Blvd., Fort Myers, FL 33901 (eservice@insurance-counsel.com; jthomas@insurance-counsel.com; gevans@insuranec-counsel.com; mboyle@insurance-counsel.com).

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Supreme Court of Florida

WEDNESDAY, OCTOBER 7, 2020

CASE NO.: SC20-596
Lower Tribunal No(s).:
3D19-927;
132018CA027366000001

STATE FARM FLORIDA INSURANCE COMPANY	vs.	CHARLES SANDERS, ET AL.
Petitioner(s)		Respondent(s)

The Court accepts jurisdiction of this case as to the certified question of great public importance.

Petitioner's initial brief on the merits must be served on or before October 27, 2020; respondent's answer brief on the merits must be served thirty days after service of petitioner's initial brief on the merits; and petitioner's reply brief on the merits must be served thirty days after service of respondent's answer brief on the merits.

The Clerk of the Third District Court of Appeal must file the record which must be properly indexed and paginated on or before December 7, 2020. The Clerk may provide the record in the format as currently maintained at the district court, either paper or electronic.

As jurisdiction has been accepted in the above cause, any movant who wishes to follow through on a previously-filed Notice of Intent to Appear as

CASE NO.: SC20-596
Page Two

Amicus or Amici Curiae must now proceed in compliance with Florida Rule of Appellate Procedure 9.370.

POLSTON, LABARGA, LAWSON, MUÑIZ, and COURIEL, JJ., concur.

The Court has determined that it should also accept jurisdiction as to the certified direct conflict.

POLSTON, LAWSON, MUÑIZ, and COURIEL, JJ., concur.
LABARGA, J., dissents.

Oral argument will be set by separate order. Counsel for parties will be notified of the oral argument date approximately sixty days prior to oral argument.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

kj
Served:

KANSAS R. GOODEN
STEVEN E. GURIAN
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ANTHONY M. LOPEZ
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DAVID NOEL
HON. MERCEDES M. PRIETO, CLERK

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

STATE FARM FLORIDA INSURANCE COMPANY, Appellant, v. JON PARRISH, Appellee.	)	Case No. 2D19-130

Opinion filed January 6, 2021.

Appeal from Collier County; Frederick Hart, Judge.

Kara Rockenbach Link and Daniel M. Schwarz of Link & Rockenbach, P.A., West Palm Beach; and Robert A. Kingsford and Lynn S. Alfano of Alfano Kingsford, P.A., Maitland, for Appellant.

Mark A. Boyle, Gregory L. Evans, and Alicia M. Lopez of Boyle Leonard & Anderson, P.A., Fort Myers, for Appellee.

LUCAS, Judge.

State Farm Florida Insurance Company (State Farm) and its insured, Jon Parrish, find themselves in a dispute over who can appraise the value of Mr. Parrish's covered loss. Although we question the manner in which the dispute was presented

below, because the judgment the circuit court entered was indeed a final judgment, we exercise our jurisdiction under Florida Rule of Appellate Procedure 9.030(b)(1)(A). With the benefit of the parties' briefs, oral argument, and supplemental briefs, we conclude that State Farm's argument on appeal is well taken. Mr. Parrish will need to select someone other than his public adjuster to serve as a "disinterested appraiser" of his claim.

I.

In 2017, Mr. Parrish submitted a claim to State Farm under his homeowners insurance policy, asserting that his house had sustained damage from Hurricane Irma. He retained a public adjusting company, Keys Claims Consultants, Inc. (KCC), to represent his interests regarding his claim. Pursuant to his contract with KCC, KCC agreed to "prepare a detailed accounting of the damages and present them" to State Farm. KCC would "negotiate the damages with the insurance company representative(s)" and was authorized to invoke "the Appraisal provision" under Mr. Parrish's insurance policy. In return, Mr. Parrish assigned to KCC ten percent "of all insurance funds, contractual and extra contractual, received" by Mr. Parrish. Mr. Parrish also gave KCC "a right to be paid as a joint payee" of State Farm under his contract with KCC.

On January 8, 2018, Bobby Sims, a KCC public adjuster, forwarded Mr. Parrish's executed sworn statement in proof of loss to State Farm which valued Mr. Parrish's loss at $495,079.25. Along with the sworn statement, Mr. Sims requested that any dispute over the amount of loss be submitted to appraisal pursuant to the policy.

The specific policy provision Mr. Sims was invoking on behalf of his client reads, in pertinent part, as follows:

> Appraisal. If you and we fail to agree on the amount of loss, either party can demand that the amount of the loss be set by appraisal. A demand for appraisal must be in writing. . . .
>
> Each party will select a qualified, disinterested appraiser and notify the other of the appraiser's identity within 20 days of receipt of the written demand. Each party shall be responsible for the compensation of their selected appraiser. The two appraisers shall then select a qualified disinterested umpire. . . . Reasonable expenses of the appraisal and the reasonable compensation of the umpire shall be paid equally by you and us.
>
> The appraisers shall then set the amount of the loss.

In his correspondence to State Farm, Mr. Sims designated George Keys, the president and namesake of KCC, as Mr. Parrish's "disinterested appraiser." Not surprisingly, State Farm objected to his selection; it also disagreed with the amount Mr. Parrish claimed as his loss.[1] State Farm issued its own demand for appraisal and appointed Bob Davis of Davis Claim Management as its appraiser. It also asked Mr. Parrish to choose a different appraiser. When Mr. Parrish did not respond, State Farm initiated an action—of some sort—in the circuit court.

On May 5, 2018, State Farm filed a "Petition to Compel Appraisal with Disinterested Appraiser." This "petition" set forth in enumerated paragraphs a sequence of factual allegations (not unlike a civil cause of action), a separate section of legal argument explaining why, in State Farm's view, Mr. Keys should not be allowed to serve as a disinterested appraiser under the policy, and a request that the court "enter

[1]State Farm indicated that its estimate of the loss was $295,298.70, and it offered to pay Mr. Parrish $107,156.84.

an order compelling [Mr. Parrish] to participate in appraisal with a disinterested appraiser not affiliated with Keys Claims Consulting, Inc." Mr. Parrish responded to the petition as if it were a civil action, admitting and denying the factual allegations and setting out his own "Legal Argument in Response to Petitioner's Argument." He addressed the legal issue of whether the appraiser he had named was "disinterested." Additionally, he argued that the petition should be dismissed because it was premature and because State Farm had waived its ability to object to his designation. None of his arguments, however, challenged State Farm's choice of filing what purports to be a petition to judicially compel him to appoint a different appraiser in this dispute.

The circuit court proceeded to set a hearing on State Farm's petition—though whether that was a "trial" or, as State Farm puts it, a procedure that "functioned much like a final summary judgment hearing," it is not entirely clear. Regardless, on December 18, 2018, the circuit court entered the order now before us in which the court determined that Mr. Keys could serve as a disinterested appraiser despite his company's contractual relationship with Mr. Parrish and the ten percent contingency fee KCC would earn from any payment Mr. Parrish received from his claim. The order both denied the petition and then stated that it was "hereby dismissed in its entirety." The court ordered the parties to proceed to appraisal and retained jurisdiction to award Mr. Parrish his attorney's fees and costs in connection with the petition.

State Farm now appeals that order.

II.

A.

At the outset, we confess we have some confusion, as well as reservations, about what it is we have been asked to review. Florida Statutes describe many different civil petitions that litigants may avail themselves of, but a petition to compel appraisal with a disinterested appraiser is not (yet) one of them. Nor is there a recognized common law cause of action for this kind of discrete claim. That would seem to be problematic. Cf. State Farm Fla. Ins. Co. v. Gonzalez, 76 So. 3d 34, 37, 38 (Fla. 3d DCA 2011) (reversing judgment on a "petition to confirm appraisal award" and remanding to allow petitioners to refile the action as a civil complaint because "[t]here is no rule or statute allowing for the filing of a petition to confirm an appraisal award" (emphasis omitted)).

It was because of this concern that, following oral argument, we requested supplemental briefing from the parties as to whether we should convert this appeal to a petition for a writ of certiorari. Mr. Parrish readily agreed that we should (and then, as such, deny State Farm certiorari relief). State Farm maintained that its petition to compel disinterested appraiser could be likened to a declaratory judgment action. The difficulty with that, of course, is that State Farm's petition did not actually seek a declaratory judgment or include any allegation that State Farm was in doubt of a right, status, immunity, or privilege and was entitled to have that doubt removed[2] or invoke chapter 86 of the Florida Statutes in any way—and we cannot believe that was unintentional. To the contrary, State Farm's filing was styled, framed, and constructed,

[2]See Golfrock v. Lee County, 247 So. 3d 37, 38 (Fla. 2d DCA 2018) ("To state a claim for declaratory relief, the party seeking the declaration must show that he is in doubt as to the existence or nonexistence of some right, status, immunity, power, or privilege and that he is entitled to have such doubt removed." (citing May v. Holley, 59 So. 2d 636, 638–39 (Fla. 1952))).

from beginning to end, as if there were a legally recognized, standalone cause of action to have a disinterested appraiser appointed in an insurance coverage dispute. But there isn't.

Nevertheless, despite our concerns with the filing that precipitated the circuit court's order, we will treat it as a "final order." For that is what the order appears to be. It is an order that concluded a civil case (such as it was) that had been filed with the circuit court. See S.L.T. Warehouse Co. v. Webb, 304 So. 2d 97, 99 (Fla. 1974) ("Generally, the test employed by the appellate court to determine finality of an order, judgment or decree is whether the order in question constitutes an end to the judicial labor in the cause, and nothing further remains to be done by the court to effectuate a termination of the cause as between the parties directly affected."). And because it is a final order, State Farm has a constitutional right to our review. See art. V, § 4(b)(1), Fla. Const.; In the Interest of J.B., 101 So. 3d 407, 410 (Fla. 2d DCA 2012).

B.

State Farm contends that Mr. Keys could not be a "disinterested appraiser" as that term is used in the policy. Because the facts that were put before the circuit court are not in dispute, the only issue we must decide is what this policy term means. That is an issue we review de novo. Am. S. Home Ins. Co. v. Lentini, 286 So. 3d 157, 158 n.2 (Fla. 2019); Ganzemuller v. Omega Ins. Co., 244 So. 3d 1189, 1190 (Fla. 2d DCA 2018).

The policy does not define "disinterested." We must, therefore, ascertain the plain meaning of the policy's term. See Allstate Ins. Co. v. Orthopedic Specialists, 212 So. 3d 973, 975-76 (Fla. 2017) ("Where the language in an insurance contract is

plain and unambiguous, a court must interpret the policy in accordance with the plain meaning so as to give effect to the policy as written." (quoting Wash. Nat'l Ins. Corp. v. Ruderman, 117 So. 3d 943, 948 (Fla. 2013))); Fla. Ins. Guar. Ass'n v. Branco, 148 So. 3d 488, 491 (Fla. 5th DCA 2014) ("Appraisals are creatures of contract and the subject or scope of appraisal depends on the contract provisions. Absent ambiguity, the plain meaning of an insurance policy controls." (citation omitted)); see also Lenzi v. Regency Tower Ass'n, 250 So. 3d 103, 105 (Fla. 4th DCA 2018) ("[U]nless they are defined, 'terms should be given their plain and unambiguous meaning as understood by the "man-on-the-street." ' " (quoting Harrington v. Citizens Prop. Ins. Corp., 54 So. 3d 999, 1001 (Fla. 4th DCA 2010))). Here, the term "interested" is an adjective describing an appraiser who holds an interest—that is, a stake of some sort, whether pecuniary, proprietary, or personal—in the outcome of the appraisal process. The prefix "dis" connotes its negative—so "disinterested" means an appraiser who does *not* hold an interest in the outcome of the policy's appraisal process.

As is clear from the policy provision, the conclusion of the appraisal process results in a recommended monetary award of some amount. Indeed, that is the point of the endeavor. And a contingency stake in a potential monetary award—such as this one—constitutes a pecuniary "interest." Cf. Landmark Am. Ins. Co. v. H. Anton Richardt, DDS, PA, No. 2:18-cv-600-FtM-29UAM, 2019 WL 2462865, at *2, *3 (M.D. Fla. June 13, 2019) (disqualifying insured's selected appraiser who had "a direct financial interest in the outcome of the appraisal" because "[a] pecuniary interest in the outcome is by definition a personal interest that favors one side over the other"); Shores at Coco Plum Condo. Ass'n v. Westchester Surplus Lines Ins. Co., No. 18-23910-Civ-

COOKE/GOODMAN, 2019 WL 2223172, at *2 (S.D. Fla. Apr. 29, 2019) (holding that insured's selected appraiser, who was to "be compensated on a contingency fee basis" could not serve as an impartial appraiser). An interest in the appraisal award, then, is part and parcel of an interest in the process' outcome.

Mr. Keys, as the president of Mr. Parrish's public adjusting firm, "has a vested interest in obtaining the highest possible recovery because [his] compensation will be a percentage of it." See Verneus v. Axis Surplus Ins. Co., No. 16-21863-CIV-MARTINEZ/GOODMAN, 2018 WL 3417905, at *6 (S.D. Fla. July 13, 2018). KCC's ten percent interest in the amount awarded in the appraisal process necessarily makes its president interested in the outcome of the process. For that reason alone, he is not a "disinterested appraiser." We are not the first court to reach that conclusion. See State Farm Fla. Ins. Co. v. Crispin, 290 So. 3d 150, 153 (Fla. 5th DCA 2020) ("[A]ny ordinary meaning of the term 'disinterested' precludes a financial stake in the outcome."); Landmark Am. Ins. Co., 2019 WL 2462865, at *3; Shores at Coco Plum Condo. Ass'n, 2019 WL 2223172, at *2; Verneus, 2018 WL 3417905, at *6-7; see also State Farm Fla. Ins. Co. v. Sanders, 45 Fla. L. Weekly D870, D873 (Fla. 3d DCA Apr. 15, 2020) (Fernandez, J., concurring) ("[T]he plain and ordinary meaning of disinterested includes free of self-interest or pecuniary interest. When an appraiser has a direct financial interest in the outcome of the appraisal, the appraiser is not disinterested." (quoting State Farm Fla. Ins. Co. v. Valenti, 285 So. 3d 958, 960-61 (Fla. 4th DCA 2019) (Kuntz, J., concurring))).

It is true, as Mr. Parrish points out, that the appraisal provision requires the insured and the insurer to pay their designated appraisers for their work. Mr.

Parrish will have to pay his appraiser in some fashion. It is also true that the policy does not expressly proscribe a particular method of payment (the policy simply states each party is "responsible for the compensation" of their respective appraisers). All that means, though, is that the policy's requirement of a "disinterested appraiser" does not foreclose financial remuneration for the appraiser's services and that the parties and their appraisers are free to negotiate a mutually agreed upon payment, so long as the form of payment does not give rise to an interest in the outcome of the appraisal process. Cf. City of Homestead v. Johnson, 760 So. 2d 80, 84 (Fla. 2000) (holding that courts should "read provisions of a contract harmoniously in order to give effect to all portions thereof" (citing Sugar Cane Growers Coop. of Fla., Inc., v. Pinnock, 735 So. 2d 530, 535 (Fla. 4th DCA 1999); Paddock v. Bay Concrete Indus., Inc., 154 So. 2d 313, 315 (Fla. 2d DCA 1963))).

A contingency form of payment is uniquely problematic under this provision because the amount of the appraiser's remuneration is inextricably tied to the amount of the award the appraiser will ultimately recommend. The bigger the award, the bigger the payment. It is that link between payment and award that makes the contingency-paid appraiser prohibitively interested in the outcome of the appraisal process, which is a condition the policy expressly prohibits.

Besides the interest KCC and Mr. Keys hold through KCC's ten percent stake in the appraisal award, there is also the separate, broader, and glaringly apparent interest they have in the appraisal process by virtue of the fact that *KCC is representing Mr. Parrish in the underlying dispute*. Even if KCC is not, as Mr. Parrish stresses, his "fiduciary" or his "agent" (which we need not decide), KCC is contractually bound to

negotiate with State Farm on Mr. Parrish's behalf. And as Mr. Parrish's public adjuster, KCC's adjusters are professionally bound to handle Mr. Parrish's claim "with dispatch and due diligence" and not "approach investigations, adjustments, and settlements in a manner prejudicial to the insured." See Fla. Admin. Code 69B-220-201; see also § 626.878, Fla. Stat. (2018) (requiring adjusters to subscribe to the Department of Insurance's code of ethics).

Other than nominating Mr. Parrish himself (or a member of his family), it would be difficult to imagine a more self-evidently interested person in an appraisal process than the person or firm that represents Mr. Parrish in that very process, especially since the policy's "disinterested appraiser" is essentially acting as an independent adjudicator of a dispute.[3] Cf. Branco, 148 So. 3d at 496 ("The policy provision, which requires a 'disinterested appraiser,' expresses the parties' clear intention to restrict appraisers to people who are, in fact, disinterested. Given the duty of loyalty owed by an attorney to a client, we conclude that attorneys may not serve as their clients' arbitrators or appraisers when 'disinterested' arbitrators or appraisers are bargained for.").[4] Mr. Keys cannot serve as a disinterested appraiser (in any meaningful sense of that term) in an appraisal process of his client's dispute.

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[3]The ancient natural justice maxim of *nemo judex in causa sua* holds a powerful compulsion even in proceedings outside of courtrooms. Cf. State v. Aldridge, 103 So. 835, 836 (Ala. 1925) (disqualifying certified public accountants from sitting on a review board in a license revocation proceeding they had funded and supported and observing that "the decided weight of authority" would extend the rule of judicial disqualification "to every tribunal exercising judicial or quasi-judicial functions").

[4]The conclusion Branco reached concerning an insured's attorney applies perforce to an insured's public adjuster. Although the means and methods of their work may differ, an insured hires a public adjuster or a lawyer for much the same purpose in these disputes: to maximize the insured's financial recovery on the policy.

III.

We hold that a public adjuster that has a contingency interest in an insured's appraisal award or represents an insured in an appraisal process is not a "disinterested appraiser" under this insurance policy's appraisal provision. The circuit court did not have the benefit of our decision today when it issued its ruling and instead relied upon the Third District's holding in Brickell Harbour Condominium Ass'n v. Hamilton Specialty Insurance Co., 256 So. 3d 245, 249 (Fla. 3d DCA 2018) ("[A]n appraiser's 'direct or indirect financial interest in the outcome of the arbitration,' including an arrangement for a contingent fee, requires disclosure rather than disqualification in the case of an appraiser."); accord Sanders, 45 Fla. L. Weekly at D871 (denying certiorari relief but certifying question of great public importance about whether a public adjuster "who is in a contractual agent-principal relationship with the insureds and who receives a contingency fee from the appraisal award" can be a disinterested appraiser as a matter of law). For all the reasons set forth in this opinion, we do not find Brickell's analysis persuasive. We certify conflict with Brickell to the extent it holds that a public adjuster who has a contingency interest in an insured's appraisal award or represents an insured in an appraisal process can serve as a "disinterested appraiser" under a policy's appraisal provision.

Reversed and remanded; conflict certified.

CASANUEVA and KELLY, JJ., Concur.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT, POST OFFICE BOX 327, LAKELAND, FL 33802-0327

January 06, 2021

CASE NO.: 2D19-0130
L.T. No.: 2018-CA-1198

STATE FARM FLORIDA INSURANCE COMPANY	v.	JON PARRISH
Appellant / Petitioner(s),		Appellee / Respondent(s).

BY ORDER OF THE COURT:

Parrish's motion for appellate attorney's fees, filed pursuant to section 627.428, Florida Statutes, is granted. The trial court shall determine the appropriate amount of the award. See Fla. R. App. P. 9.400(b).

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

ALICIA MARIA LOPEZ, ESQ.
GREGORY L. EVANS, ESQ.
LYNN S. ALFANO, ESQ.
MARY C. LAMOUREUX, ESQ.
THEODORE A. CORLESS, ESQ.
DANIEL M. SCHWARZ, ESQ.
KARA ROCKENBACH - LINK, ESQ.
MARK A. BOYLE, ESQ.
ROBERT A. KINGSFORD, ESQ.
CRYSTAL K. KINZEL, CLERK

sg

Mary Elizabeth Kuenzel
Mary Elizabeth Kuenzel
Clerk

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IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

Appellate Case No.: 2D19-130
LT Case No.: 11-2018-CA-01198-0001

STATE FARM FLORIDA INSURANCE COMPANY,

Appellant,

vs.

JON PARRISH,

Appellee.
_____/

APPELLANT'S MOTION FOR REHEARING OF ORDER GRANTING APPELLEE'S MOTION FOR APPELLATE ATTORNEYS' FEES

Appellant, State Farm Florida Insurance Company ("State Farm"), pursuant to Florida Rule of Appellate Procedure 9.330 and section 627.428, Florida Statutes, seeks rehearing of this Court's Order Granting Appellee's Motion for Appellate Attorneys' Fees, and states:

INTRODUCTION

On January 6, 2021, this Court reversed the trial court's final order on State Farm's Petition below, holding unequivocally that Appellee's public adjuster, George Keys and his company, Keys Claims Consultants ("KCC"), could not serve as Appellee's

"disinterested" appraiser for appraisal of the parties' insurance dispute. The ability of Mr. Keys or KCC to serve, notwithstanding the unambiguous policy term "disinterested," was the sole issue for this Court's consideration on appeal. The Court "reversed and remanded" the final Order with respect to this single appellate issue.

However, the Court also granted Appellee's Motion for Appellate Attorneys' Fees, with directions for the trial court to "determine the appropriate amount of the award." State Farm believes the Court inadvertently granted this Motion and seeks rehearing only of the Order granting Appellee's Motion. Florida law is clear that an award of appellate attorneys' fees pursuant to section 627.428, Florida Statutes, is impermissible absent "an appeal in which the insured . . . prevails." § 627.428, Fla. Stat. (2019). The Florida Supreme Court has held that "under the plain language of section 627.428(1), an appellate court may not award attorneys' fees to an insured unless the insured prevails on appeal." *Brass & Singer, P.A. v. United Auto. Ins. Co.*, 944 So. 2d 252, 254 (Fla. 2006).

Here, State Farm prevailed on appeal—Appellee did not prevail on any issue. As such, Florida law did not permit the Court's (believed

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inadvertent) grant of Appellee's Motion for Appellate Attorney's Fees, and the Order should be vacated and the Motion denied.

ARGUMENT IN SUPPORT OF REHEARING

State Farm is entitled to rehearing of the Order Granting Appellee's Motion for Appellate Attorney's Fees because Appellee did not prevail on appeal in any respect. Established Florida law provides that an insured is not entitled to an award of appellate attorneys' fees under section 627.428—not even conditionally—unless the insured prevails on appeal.

A Motion for Rehearing is appropriate where, in the opinion of the movant, the Court has overlooked points of law or fact in its decision. Fla. R. App. P. 9.330(a)(2)(A).

Section 627.428, Florida Statutes (2019) provides:

> Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court, *or in the event of an appeal in which the insured or beneficiary prevails*, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had.

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§ 627.428(1), Fla. Stat. (emphasis supplied).

The Florida Supreme Court interpreted the emphasized clause and enforced its plain language in *Brass & Singer*, 944 So. 2d 252. There, the supreme court held that this language means "that an insured that loses on appeal is not entitled to a conditional award of fees because this is not an appeal in which the insured or beneficiary prevails." *Id.* at 254 (citations and internal quotation marks omitted). The Court held that "under the plain language of section 627.428(1), an appellate court may not award attorney's fees to an insured unless the insured prevails on appeal." *Id.*

This principle has been confirmed many times since *Brass & Singer*, including by this Court. *Certified Windshield, LLC v. GEICO Gen. Ins. Co.*, 264 So. 3d 217, 218 (Fla. 2d DCA 2018) ("[T]he trial court's order was correct because Certified Windshield did not prevail on appeal in the circuit court and is therefore not entitled to fees under section 627.428 as a matter of law."); *see also, e.g.*, *United Auto. Ins. Co. v. Lopez*, 7 So. 3d 583, 585 (Fla. 3d DCA 2009); *United Auto. Ins. Co. v. Prof'l Med. Grp.*, 1 So. 3d 365 (Fla. 3d DCA 2009).

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In this case, after finding that it had jurisdiction to review the trial court's final order which would have allowed Mr. Keys and/or KCC to serve as Appellee's "disinterested" appraiser, this Court reversed that determination as a matter of law, correctly "hold[ing] that a public adjuster that has a contingency interest in an insured's appraisal award or represents an insured in an appraisal process is not a 'disinterested appraiser' under this insurance policy's appraisal provision." (Opinion, at 11). Separate from the contingency fee issue, this Court correctly determined that Mr. Keys and/or KCC were not "disinterested" in the appraisal process because "*KCC is representing Mr. Parrish in the underlying dispute*." (Opinion, at 9) (emphasis in original). Therefore, "it would be difficult to imagine a more self-evidently interested person in an appraisal process than the person or firm that represents Mr. Parrish in that very process. . . . Mr. Keys cannot serve as a disinterested appraiser (in any meaningful sense of that term) in an appraisal process of his client's dispute." (Opinion, at 10). Again, whether Mr. Keys and/or KCC were "disinterested" was the only issue (on the merits) presented to this Court for review, and

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based on the Court's decision, there can be no question that State Farm, not Appellee, prevailed on appeal.

Because Appellee did not prevail on appeal, even in part, the plain language of section 627.428, Florida Statutes, as confirmed by Florida law required the denial of Appellee's Motion for Appellate Attorneys' Fees. *Brass & Singer*, 944 So. 2d 252; *Certified Windshield*, 264 So. 3d at 218. Accordingly, grant of Rehearing, and denial of Appellee's Motion for Appellate Attorneys' Fees, must follow.

CONCLUSION

As Appellee did not prevail on appeal, this Court incorrectly granted Appellee's Motion for Appellate Attorneys' Fees. Under the circumstances, State Farm believes that the Court's grant of the Motion was inadvertent. As a result of this Court's ruling on the merits of appeal, rendering State Farm the prevailing appellate party in all respects, *Brass & Singer* compelled that Appellee's Motion for Appellate Attorneys' Fees be denied.

WHEREFORE, Appellant, STATE FARM FLORIDA INSURANCE COMPANY, respectfully requests this Court to grant this Motion for Rehearing, vacate the January 6, 2021 Order Granting Appellee's

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Motion for Appellate Attorneys' Fees, and enter an Order Denying Appellee's Motion for Appellate Attorneys' Fees in accordance with its decision on the merits.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been filed with the Florida Courts e-Filing Portal and thereby served in compliance with Florida Rule of Judicial Administration 2.516(b)(1) on this 11th day of January, 2021 upon: **Theodore A. Corless, Esq.** and **Mary Catherine Lamoureux, Esq.**, Corless Barfield Trial Group, 6812 W. Linebaugh Ave., Tampa, FL 33625, Email: service@corlessbarfield.com; *Counsel for Appellee*; **Justin M. Thomas, Esq.**, **Gregory L. Evans, Esq.**, and **Mark A. Boyle, Esq.**, Boyle & Leonard, P.A., 2050 McGregor Blvd., Fort Myers, FL 33901 (eservice@insurance-counsel.com; jthomas@insurance-counsel.com; gevans@insuranec-counsel.com; mboyle@insurance-counsel.com).

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IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

Appellate Case No.: 2D19-130
LT Case No.: 11-2018-CA-01198-0001

STATE FARM FLORIDA INSURANCE COMPANY,

Appellant,

vs.

JON PARRISH,

Appellee.
_____/

APPELLANT'S AMENDED, UNOPPOSED[1] MOTION FOR REHEARING OF ORDER GRANTING APPELLEE'S MOTION FOR APPELLATE ATTORNEYS' FEES

Appellant, State Farm Florida Insurance Company ("State Farm"), pursuant to Florida Rule of Appellate Procedure 9.330 and section 627.428, Florida Statutes, seeks rehearing of this Court's Order Granting Appellee's Motion for Appellate Attorneys' Fees, and states:

[1] State Farm amends its Motion for Rehearing to reflect the consent of counsel for Appellee, Mark Boyle, Esq., to the relief requested in this Motion, as reflected in greater detail in the Certificate of Non-Objection, *supra*.

INTRODUCTION

On January 6, 2021, this Court reversed the trial court's final order on State Farm's Petition below, holding unequivocally that Appellee's public adjuster, George Keys and his company, Keys Claims Consultants ("KCC"), could not serve as Appellee's "disinterested" appraiser for appraisal of the parties' insurance dispute. The ability of Mr. Keys or KCC to serve, notwithstanding the unambiguous policy term "disinterested," was the sole issue for this Court's consideration on appeal. The Court "reversed and remanded" the final Order with respect to this single appellate issue.

However, the Court also granted Appellee's Motion for Appellate Attorneys' Fees, with directions for the trial court to "determine the appropriate amount of the award." State Farm believes the Court inadvertently granted this Motion and seeks rehearing only of the Order granting Appellee's Motion. Florida law is clear that an award of appellate attorneys' fees pursuant to section 627.428, Florida Statutes, is impermissible absent "an appeal in which the insured . . . prevails." § 627.428, Fla. Stat. (2019). The Florida Supreme Court has held that "under the plain language of section

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627.428(1), an appellate court may not award attorneys' fees to an insured unless the insured prevails on appeal." *Brass & Singer, P.A. v. United Auto. Ins. Co.*, 944 So. 2d 252, 254 (Fla. 2006).

Here, State Farm prevailed on appeal—Appellee did not prevail on any issue. As such, Florida law did not permit the Court's (believed inadvertent) grant of Appellee's Motion for Appellate Attorney's Fees, and the Order should be vacated and the Motion denied.

ARGUMENT IN SUPPORT OF REHEARING

State Farm is entitled to rehearing of the Order Granting Appellee's Motion for Appellate Attorney's Fees because Appellee did not prevail on appeal in any respect. Established Florida law provides that an insured is not entitled to an award of appellate attorneys' fees under section 627.428—not even conditionally—unless the insured prevails on appeal.

A Motion for Rehearing is appropriate where, in the opinion of the movant, the Court has overlooked points of law or fact in its decision. Fla. R. App. P. 9.330(a)(2)(A).

Section 627.428, Florida Statutes (2019) provides:

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> Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court, *or in the event of an appeal in which the insured or beneficiary prevails*, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had.

§ 627.428(1), Fla. Stat. (emphasis supplied).

The Florida Supreme Court interpreted the emphasized clause and enforced its plain language in *Brass & Singer*, 944 So. 2d 252. There, the supreme court held that this language means "that an insured that loses on appeal is not entitled to a conditional award of fees because this is not an appeal in which the insured or beneficiary prevails." *Id.* at 254 (citations and internal quotation marks omitted). The Court held that "under the plain language of section 627.428(1), an appellate court may not award attorney's fees to an insured unless the insured prevails on appeal." *Id.*

This principle has been confirmed many times since *Brass & Singer*, including by this Court. *Certified Windshield, LLC v. GEICO Gen. Ins. Co.*, 264 So. 3d 217, 218 (Fla. 2d DCA 2018) ("[T]he trial

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court's order was correct because Certified Windshield did not prevail on appeal in the circuit court and is therefore not entitled to fees under section 627.428 as a matter of law."); *see also, e.g.*, *United Auto. Ins. Co. v. Lopez*, 7 So. 3d 583, 585 (Fla. 3d DCA 2009); *United Auto. Ins. Co. v. Prof'l Med. Grp.*, 1 So. 3d 365 (Fla. 3d DCA 2009).

In this case, after finding that it had jurisdiction to review the trial court's final order which would have allowed Mr. Keys and/or KCC to serve as Appellee's "disinterested" appraiser, this Court reversed that determination as a matter of law, correctly "hold[ing] that a public adjuster that has a contingency interest in an insured's appraisal award or represents an insured in an appraisal process is not a 'disinterested appraiser' under this insurance policy's appraisal provision." (Opinion, at 11). Separate from the contingency fee issue, this Court correctly determined that Mr. Keys and/or KCC were not "disinterested" in the appraisal process because "*KCC is representing Mr. Parrish in the underlying dispute*." (Opinion, at 9) (emphasis in original). Therefore, "it would be difficult to imagine a more self-evidently interested person in an appraisal process than the person or firm that represents Mr. Parrish in that very process. . . . Mr. Keys

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cannot serve as a disinterested appraiser (in any meaningful sense of that term) in an appraisal process of his client's dispute." (Opinion, at 10). Again, whether Mr. Keys and/or KCC were "disinterested" was the only issue (on the merits) presented to this Court for review, and based on the Court's decision, there can be no question that State Farm, not Appellee, prevailed on appeal.

Because Appellee did not prevail on appeal, even in part, the plain language of section 627.428, Florida Statutes, as confirmed by Florida law required the denial of Appellee's Motion for Appellate Attorneys' Fees. *Brass & Singer*, 944 So. 2d 252; *Certified Windshield*, 264 So. 3d at 218. Accordingly, grant of Rehearing, and denial of Appellee's Motion for Appellate Attorneys' Fees, must follow.

CONCLUSION

As Appellee did not prevail on appeal, this Court incorrectly granted Appellee's Motion for Appellate Attorneys' Fees. Under the circumstances, State Farm believes that the Court's grant of the Motion was inadvertent. As a result of this Court's ruling on the merits of appeal, rendering State Farm the prevailing appellate party

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in all respects, *Brass & Singer* compelled that Appellee's Motion for Appellate Attorneys' Fees be denied.

WHEREFORE, Appellant, STATE FARM FLORIDA INSURANCE COMPANY, respectfully requests this Court to grant this Motion for Rehearing, vacate the January 6, 2021 Order Granting Appellee's Motion for Appellate Attorneys' Fees, and enter an Order Denying Appellee's Motion for Appellate Attorneys' Fees in accordance with its decision on the merits.

CERTIFICATE OF NON-OBJECTION

The undersigned, as counsel for State Farm, certifies that prior to filing this Amended Motion, we conferred with counsel for Appellee, Mark Boyle, Esq., and as a result of this communication, are authorized to represent that counsel for Appellee also believes that this Court's Order Granting Appellee's Motion for Appellate Attorneys' Fees was inadvertently entered, and agrees to the relief requested in this Motion. However, Appellee notes that it preserves its right to seek fees for this appeal in the event this Court's opinion is quashed by the Florida Supreme Court in discretionary review proceedings to follow.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been filed with the Florida Courts e-Filing Portal and thereby served in compliance with Florida Rule of Judicial Administration 2.516(b)(1) on this 22nd day of January, 2021 upon: **Theodore A. Corless, Esq.** and **Mary Catherine Lamoureux, Esq.**, Corless Barfield Trial Group, 6812 W. Linebaugh Ave., Tampa, FL 33625, Email: service@corlessbarfield.com; *Counsel for Appellee*; **Justin M. Thomas, Esq.**, **Gregory L. Evans, Esq.**, and **Mark A. Boyle, Esq.**, Boyle & Leonard, P.A., 2050 McGregor Blvd., Fort Myers, FL 33901 (eservice@insurance-counsel.com; jthomas@insurance-counsel.com; gevans@insuranec-counsel.com; mboyle@insurance-counsel.com).

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT, POST OFFICE BOX 327, LAKELAND, FL 33802-0327

January 27, 2021

CASE NO.: 2D19-0130
L.T. No.: 2018-CA-1198

STATE FARM FLORIDA INSURANCE COMPANY	v.	JON PARRISH
Appellant / Petitioner(s),		Appellee / Respondent(s).

BY ORDER OF THE COURT:

Appellant's motion for rehearing of this court's order granting the appellee appellate attorney's fees is granted. The order granting appellate attorney's fees entered January 6, 2021, is vacated. Appellee's motion for appellate attorney's fees, filed September 11, 2019, is denied.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

ALICIA MARIA LOPEZ, ESQ.
GREGORY L. EVANS, ESQ.
LYNN S. ALFANO, ESQ.
MARY C. LAMOUREUX, ESQ.
THEODORE A. CORLESS, ESQ.
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Mary Elizabeth Kuenzel
Mary Elizabeth Kuenzel
Clerk

IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

RECEIVED, 02/05/2021 09:55:28 AM, Clerk, Second District Court of Appeal

STATE FARM FLORIDA
INSURANCE COMPANY,

Appellant,

vs.

2ND DCA CASE NO.: 2D19-130
LOWER CASE NO.: 2018-CA-01198

JON PARRISH,

Appellee.
_____/

NOTICE TO INVOKE DISCRETIONARY JURISDICTION

NOTICE IS GIVEN that, JON D. PARRISH, by and through his undersigned counsel, pursuant to Fla. R. App. P. 9.120, invokes the discretionary jurisdiction of the Supreme Court to review the review the decision of this Court rendered on January 6, 2021, which is attached as **Exhibit A**.

Pursuant to Fla. R. App. P. 9.030(a)(2), the decision is within the Supreme Court's jurisdiction to review in that it expressly and directly conflicts with the decision of another district court of appeal on the same question of law.

Respectfully submitted,

By: */s/ Mark A. Boyle*
Mark A. Boyle, Esq.
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Gregory L. Evans, Esq.
Florida Bar No.: 0767824
Counsel for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail to the below for service list and all parties listed on the Florida's E-Filing Portal on February 5, 2021.

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By: /s/ *Mark A. Boyle*
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EXHIBIT A

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

STATE FARM FLORIDA INSURANCE COMPANY, Appellant, v. JON PARRISH, Appellee.	)	Case No. 2D19-130

Opinion filed January 6, 2021.

Appeal from Collier County; Frederick Hart, Judge.

Kara Rockenbach Link and Daniel M. Schwarz of Link & Rockenbach, P.A., West Palm Beach; and Robert A. Kingsford and Lynn S. Alfano of Alfano Kingsford, P.A., Maitland, for Appellant.

Mark A. Boyle, Gregory L. Evans, and Alicia M. Lopez of Boyle Leonard & Anderson, P.A., Fort Myers, for Appellee.

LUCAS, Judge.

State Farm Florida Insurance Company (State Farm) and its insured, Jon Parrish, find themselves in a dispute over who can appraise the value of Mr. Parrish's covered loss. Although we question the manner in which the dispute was presented

below, because the judgment the circuit court entered was indeed a final judgment, we exercise our jurisdiction under Florida Rule of Appellate Procedure 9.030(b)(1)(A). With the benefit of the parties' briefs, oral argument, and supplemental briefs, we conclude that State Farm's argument on appeal is well taken. Mr. Parrish will need to select someone other than his public adjuster to serve as a "disinterested appraiser" of his claim.

I.

In 2017, Mr. Parrish submitted a claim to State Farm under his homeowners insurance policy, asserting that his house had sustained damage from Hurricane Irma. He retained a public adjusting company, Keys Claims Consultants, Inc. (KCC), to represent his interests regarding his claim. Pursuant to his contract with KCC, KCC agreed to "prepare a detailed accounting of the damages and present them" to State Farm. KCC would "negotiate the damages with the insurance company representative(s)" and was authorized to invoke "the Appraisal provision" under Mr. Parrish's insurance policy. In return, Mr. Parrish assigned to KCC ten percent "of all insurance funds, contractual and extra contractual, received" by Mr. Parrish. Mr. Parrish also gave KCC "a right to be paid as a joint payee" of State Farm under his contract with KCC.

On January 8, 2018, Bobby Sims, a KCC public adjuster, forwarded Mr. Parrish's executed sworn statement in proof of loss to State Farm which valued Mr. Parrish's loss at $495,079.25. Along with the sworn statement, Mr. Sims requested that any dispute over the amount of loss be submitted to appraisal pursuant to the policy.

The specific policy provision Mr. Sims was invoking on behalf of his client reads, in pertinent part, as follows:

> Appraisal. If you and we fail to agree on the amount of loss, either party can demand that the amount of the loss be set by appraisal. A demand for appraisal must be in writing. . . .
>
> Each party will select a qualified, disinterested appraiser and notify the other of the appraiser's identity within 20 days of receipt of the written demand. Each party shall be responsible for the compensation of their selected appraiser. The two appraisers shall then select a qualified disinterested umpire. . . . Reasonable expenses of the appraisal and the reasonable compensation of the umpire shall be paid equally by you and us.
>
> The appraisers shall then set the amount of the loss.

In his correspondence to State Farm, Mr. Sims designated George Keys, the president and namesake of KCC, as Mr. Parrish's "disinterested appraiser." Not surprisingly, State Farm objected to his selection; it also disagreed with the amount Mr. Parrish claimed as his loss.[1] State Farm issued its own demand for appraisal and appointed Bob Davis of Davis Claim Management as its appraiser. It also asked Mr. Parrish to choose a different appraiser. When Mr. Parrish did not respond, State Farm initiated an action—of some sort—in the circuit court.

On May 5, 2018, State Farm filed a "Petition to Compel Appraisal with Disinterested Appraiser." This "petition" set forth in enumerated paragraphs a sequence of factual allegations (not unlike a civil cause of action), a separate section of legal argument explaining why, in State Farm's view, Mr. Keys should not be allowed to serve as a disinterested appraiser under the policy, and a request that the court "enter

[1]State Farm indicated that its estimate of the loss was $295,298.70, and it offered to pay Mr. Parrish $107,156.84.

an order compelling [Mr. Parrish] to participate in appraisal with a disinterested appraiser not affiliated with Keys Claims Consulting, Inc." Mr. Parrish responded to the petition as if it were a civil action, admitting and denying the factual allegations and setting out his own "Legal Argument in Response to Petitioner's Argument." He addressed the legal issue of whether the appraiser he had named was "disinterested." Additionally, he argued that the petition should be dismissed because it was premature and because State Farm had waived its ability to object to his designation. None of his arguments, however, challenged State Farm's choice of filing what purports to be a petition to judicially compel him to appoint a different appraiser in this dispute.

The circuit court proceeded to set a hearing on State Farm's petition—though whether that was a "trial" or, as State Farm puts it, a procedure that "functioned much like a final summary judgment hearing," it is not entirely clear. Regardless, on December 18, 2018, the circuit court entered the order now before us in which the court determined that Mr. Keys could serve as a disinterested appraiser despite his company's contractual relationship with Mr. Parrish and the ten percent contingency fee KCC would earn from any payment Mr. Parrish received from his claim. The order both denied the petition and then stated that it was "hereby dismissed in its entirety." The court ordered the parties to proceed to appraisal and retained jurisdiction to award Mr. Parrish his attorney's fees and costs in connection with the petition.

State Farm now appeals that order.

II.

A.

At the outset, we confess we have some confusion, as well as reservations, about what it is we have been asked to review. Florida Statutes describe many different civil petitions that litigants may avail themselves of, but a petition to compel appraisal with a disinterested appraiser is not (yet) one of them. Nor is there a recognized common law cause of action for this kind of discrete claim. That would seem to be problematic. Cf. State Farm Fla. Ins. Co. v. Gonzalez, 76 So. 3d 34, 37, 38 (Fla. 3d DCA 2011) (reversing judgment on a "petition to confirm appraisal award" and remanding to allow petitioners to refile the action as a civil complaint because "[t]here is no rule or statute allowing for the filing of a petition to confirm an appraisal award" (emphasis omitted)).

It was because of this concern that, following oral argument, we requested supplemental briefing from the parties as to whether we should convert this appeal to a petition for a writ of certiorari. Mr. Parrish readily agreed that we should (and then, as such, deny State Farm certiorari relief). State Farm maintained that its petition to compel disinterested appraiser could be likened to a declaratory judgment action. The difficulty with that, of course, is that State Farm's petition did not actually seek a declaratory judgment or include any allegation that State Farm was in doubt of a right, status, immunity, or privilege and was entitled to have that doubt removed[2] or invoke chapter 86 of the Florida Statutes in any way—and we cannot believe that was unintentional. To the contrary, State Farm's filing was styled, framed, and constructed,

[2]See Golfrock v. Lee County, 247 So. 3d 37, 38 (Fla. 2d DCA 2018) ("To state a claim for declaratory relief, the party seeking the declaration must show that he is in doubt as to the existence or nonexistence of some right, status, immunity, power, or privilege and that he is entitled to have such doubt removed." (citing May v. Holley, 59 So. 2d 636, 638–39 (Fla. 1952))).

from beginning to end, as if there were a legally recognized, standalone cause of action to have a disinterested appraiser appointed in an insurance coverage dispute. But there isn't.

Nevertheless, despite our concerns with the filing that precipitated the circuit court's order, we will treat it as a "final order." For that is what the order appears to be. It is an order that concluded a civil case (such as it was) that had been filed with the circuit court. See S.L.T. Warehouse Co. v. Webb, 304 So. 2d 97, 99 (Fla. 1974) ("Generally, the test employed by the appellate court to determine finality of an order, judgment or decree is whether the order in question constitutes an end to the judicial labor in the cause, and nothing further remains to be done by the court to effectuate a termination of the cause as between the parties directly affected."). And because it is a final order, State Farm has a constitutional right to our review. See art. V, § 4(b)(1), Fla. Const.; In the Interest of J.B., 101 So. 3d 407, 410 (Fla. 2d DCA 2012).

B.

State Farm contends that Mr. Keys could not be a "disinterested appraiser" as that term is used in the policy. Because the facts that were put before the circuit court are not in dispute, the only issue we must decide is what this policy term means. That is an issue we review de novo. Am. S. Home Ins. Co. v. Lentini, 286 So. 3d 157, 158 n.2 (Fla. 2019); Ganzemuller v. Omega Ins. Co., 244 So. 3d 1189, 1190 (Fla. 2d DCA 2018).

The policy does not define "disinterested." We must, therefore, ascertain the plain meaning of the policy's term. See Allstate Ins. Co. v. Orthopedic Specialists, 212 So. 3d 973, 975-76 (Fla. 2017) ("Where the language in an insurance contract is

plain and unambiguous, a court must interpret the policy in accordance with the plain meaning so as to give effect to the policy as written." (quoting Wash. Nat'l Ins. Corp. v. Ruderman, 117 So. 3d 943, 948 (Fla. 2013))); Fla. Ins. Guar. Ass'n v. Branco, 148 So. 3d 488, 491 (Fla. 5th DCA 2014) ("Appraisals are creatures of contract and the subject or scope of appraisal depends on the contract provisions. Absent ambiguity, the plain meaning of an insurance policy controls." (citation omitted)); see also Lenzi v. Regency Tower Ass'n, 250 So. 3d 103, 105 (Fla. 4th DCA 2018) ("[U]nless they are defined, 'terms should be given their plain and unambiguous meaning as understood by the "man-on-the-street." ' " (quoting Harrington v. Citizens Prop. Ins. Corp., 54 So. 3d 999, 1001 (Fla. 4th DCA 2010))). Here, the term "interested" is an adjective describing an appraiser who holds an interest—that is, a stake of some sort, whether pecuniary, proprietary, or personal—in the outcome of the appraisal process. The prefix "dis" connotes its negative—so "disinterested" means an appraiser who does *not* hold an interest in the outcome of the policy's appraisal process.

As is clear from the policy provision, the conclusion of the appraisal process results in a recommended monetary award of some amount. Indeed, that is the point of the endeavor. And a contingency stake in a potential monetary award—such as this one—constitutes a pecuniary "interest." Cf. Landmark Am. Ins. Co. v. H. Anton Richardt, DDS, PA, No. 2:18-cv-600-FtM-29UAM, 2019 WL 2462865, at *2, *3 (M.D. Fla. June 13, 2019) (disqualifying insured's selected appraiser who had "a direct financial interest in the outcome of the appraisal" because "[a] pecuniary interest in the outcome is by definition a personal interest that favors one side over the other"); Shores at Coco Plum Condo. Ass'n v. Westchester Surplus Lines Ins. Co., No. 18-23910-Civ-

COOKE/GOODMAN, 2019 WL 2223172, at *2 (S.D. Fla. Apr. 29, 2019) (holding that insured's selected appraiser, who was to "be compensated on a contingency fee basis" could not serve as an impartial appraiser). An interest in the appraisal award, then, is part and parcel of an interest in the process' outcome.

Mr. Keys, as the president of Mr. Parrish's public adjusting firm, "has a vested interest in obtaining the highest possible recovery because [his] compensation will be a percentage of it." See Verneus v. Axis Surplus Ins. Co., No. 16-21863-CIV-MARTINEZ/GOODMAN, 2018 WL 3417905, at *6 (S.D. Fla. July 13, 2018). KCC's ten percent interest in the amount awarded in the appraisal process necessarily makes its president interested in the outcome of the process. For that reason alone, he is not a "disinterested appraiser." We are not the first court to reach that conclusion. See State Farm Fla. Ins. Co. v. Crispin, 290 So. 3d 150, 153 (Fla. 5th DCA 2020) ("[A]ny ordinary meaning of the term 'disinterested' precludes a financial stake in the outcome."); Landmark Am. Ins. Co., 2019 WL 2462865, at *3; Shores at Coco Plum Condo. Ass'n, 2019 WL 2223172, at *2; Verneus, 2018 WL 3417905, at *6-7; see also State Farm Fla. Ins. Co. v. Sanders, 45 Fla. L. Weekly D870, D873 (Fla. 3d DCA Apr. 15, 2020) (Fernandez, J., concurring) ("[T]he plain and ordinary meaning of disinterested includes free of self-interest or pecuniary interest. When an appraiser has a direct financial interest in the outcome of the appraisal, the appraiser is not disinterested." (quoting State Farm Fla. Ins. Co. v. Valenti, 285 So. 3d 958, 960-61 (Fla. 4th DCA 2019) (Kuntz, J., concurring))).

It is true, as Mr. Parrish points out, that the appraisal provision requires the insured and the insurer to pay their designated appraisers for their work. Mr.

Parrish will have to pay his appraiser in some fashion. It is also true that the policy does not expressly proscribe a particular method of payment (the policy simply states each party is "responsible for the compensation" of their respective appraisers). All that means, though, is that the policy's requirement of a "disinterested appraiser" does not foreclose financial remuneration for the appraiser's services and that the parties and their appraisers are free to negotiate a mutually agreed upon payment, so long as the form of payment does not give rise to an interest in the outcome of the appraisal process. Cf. City of Homestead v. Johnson, 760 So. 2d 80, 84 (Fla. 2000) (holding that courts should "read provisions of a contract harmoniously in order to give effect to all portions thereof" (citing Sugar Cane Growers Coop. of Fla., Inc., v. Pinnock, 735 So. 2d 530, 535 (Fla. 4th DCA 1999); Paddock v. Bay Concrete Indus., Inc., 154 So. 2d 313, 315 (Fla. 2d DCA 1963))).

A contingency form of payment is uniquely problematic under this provision because the amount of the appraiser's remuneration is inextricably tied to the amount of the award the appraiser will ultimately recommend. The bigger the award, the bigger the payment. It is that link between payment and award that makes the contingency-paid appraiser prohibitively interested in the outcome of the appraisal process, which is a condition the policy expressly prohibits.

Besides the interest KCC and Mr. Keys hold through KCC's ten percent stake in the appraisal award, there is also the separate, broader, and glaringly apparent interest they have in the appraisal process by virtue of the fact that *KCC is representing Mr. Parrish in the underlying dispute*. Even if KCC is not, as Mr. Parrish stresses, his "fiduciary" or his "agent" (which we need not decide), KCC is contractually bound to

negotiate with State Farm on Mr. Parrish's behalf. And as Mr. Parrish's public adjuster, KCC's adjusters are professionally bound to handle Mr. Parrish's claim "with dispatch and due diligence" and not "approach investigations, adjustments, and settlements in a manner prejudicial to the insured." See Fla. Admin. Code 69B-220-201; see also § 626.878, Fla. Stat. (2018) (requiring adjusters to subscribe to the Department of Insurance's code of ethics).

Other than nominating Mr. Parrish himself (or a member of his family), it would be difficult to imagine a more self-evidently interested person in an appraisal process than the person or firm that represents Mr. Parrish in that very process, especially since the policy's "disinterested appraiser" is essentially acting as an independent adjudicator of a dispute.[3] Cf. Branco, 148 So. 3d at 496 ("The policy provision, which requires a 'disinterested appraiser,' expresses the parties' clear intention to restrict appraisers to people who are, in fact, disinterested. Given the duty of loyalty owed by an attorney to a client, we conclude that attorneys may not serve as their clients' arbitrators or appraisers when 'disinterested' arbitrators or appraisers are bargained for.").[4] Mr. Keys cannot serve as a disinterested appraiser (in any meaningful sense of that term) in an appraisal process of his client's dispute.

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[3]The ancient natural justice maxim of *nemo judex in causa sua* holds a powerful compulsion even in proceedings outside of courtrooms. Cf. State v. Aldridge, 103 So. 835, 836 (Ala. 1925) (disqualifying certified public accountants from sitting on a review board in a license revocation proceeding they had funded and supported and observing that "the decided weight of authority" would extend the rule of judicial disqualification "to every tribunal exercising judicial or quasi-judicial functions").

[4]The conclusion Branco reached concerning an insured's attorney applies perforce to an insured's public adjuster. Although the means and methods of their work may differ, an insured hires a public adjuster or a lawyer for much the same purpose in these disputes: to maximize the insured's financial recovery on the policy.

III.

We hold that a public adjuster that has a contingency interest in an insured's appraisal award or represents an insured in an appraisal process is not a "disinterested appraiser" under this insurance policy's appraisal provision. The circuit court did not have the benefit of our decision today when it issued its ruling and instead relied upon the Third District's holding in Brickell Harbour Condominium Ass'n v. Hamilton Specialty Insurance Co., 256 So. 3d 245, 249 (Fla. 3d DCA 2018) ("[A]n appraiser's 'direct or indirect financial interest in the outcome of the arbitration,' including an arrangement for a contingent fee, requires disclosure rather than disqualification in the case of an appraiser."); accord Sanders, 45 Fla. L. Weekly at D871 (denying certiorari relief but certifying question of great public importance about whether a public adjuster "who is in a contractual agent-principal relationship with the insureds and who receives a contingency fee from the appraisal award" can be a disinterested appraiser as a matter of law). For all the reasons set forth in this opinion, we do not find Brickell's analysis persuasive. We certify conflict with Brickell to the extent it holds that a public adjuster who has a contingency interest in an insured's appraisal award or represents an insured in an appraisal process can serve as a "disinterested appraiser" under a policy's appraisal provision.

Reversed and remanded; conflict certified.

CASANUEVA and KELLY, JJ., Concur.

RECEIVED, 02/05/2021 09:55:28 AM, Clerk, Second District Court of Appeal

IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

STATE FARM FLORIDA
INSURANCE COMPANY,

Appellant,

vs.

2ND DCA CASE NO.: 2D19-130
LOWER CASE NO.: 2018-CA-01198

JON PARRISH,

Appellee.
_____/

NOTICE TO INVOKE DISCRETIONARY JURISDICTION

NOTICE IS GIVEN that, JON D. PARRISH, by and through his undersigned counsel, pursuant to Fla. R. App. P. 9.120, invokes the discretionary jurisdiction of the Supreme Court to review the review the decision of this Court rendered on January 6, 2021, which is attached as **Exhibit A**.

Pursuant to Fla. R. App. P. 9.030(a)(2), the decision is within the Supreme Court's jurisdiction to review in that it expressly and directly conflicts with the decision of another district court of appeal on the same question of law.

Respectfully submitted,

By: */s/ Mark A. Boyle*
Mark A. Boyle, Esq.
Florida Bar No.: 0005886
Gregory L. Evans, Esq.
Florida Bar No.: 0767824
Counsel for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail to the below for service list and all parties listed on the Florida's E-Filing Portal on February 5, 2021.

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EXHIBIT A

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

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Opinion filed January 6, 2021.

Appeal from Collier County; Frederick Hart, Judge.

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Mark A. Boyle, Gregory L. Evans, and Alicia M. Lopez of Boyle Leonard & Anderson, P.A., Fort Myers, for Appellee.

LUCAS, Judge.

State Farm Florida Insurance Company (State Farm) and its insured, Jon Parrish, find themselves in a dispute over who can appraise the value of Mr. Parrish's covered loss. Although we question the manner in which the dispute was presented

below, because the judgment the circuit court entered was indeed a final judgment, we exercise our jurisdiction under Florida Rule of Appellate Procedure 9.030(b)(1)(A). With the benefit of the parties' briefs, oral argument, and supplemental briefs, we conclude that State Farm's argument on appeal is well taken. Mr. Parrish will need to select someone other than his public adjuster to serve as a "disinterested appraiser" of his claim.

I.

In 2017, Mr. Parrish submitted a claim to State Farm under his homeowners insurance policy, asserting that his house had sustained damage from Hurricane Irma. He retained a public adjusting company, Keys Claims Consultants, Inc. (KCC), to represent his interests regarding his claim. Pursuant to his contract with KCC, KCC agreed to "prepare a detailed accounting of the damages and present them" to State Farm. KCC would "negotiate the damages with the insurance company representative(s)" and was authorized to invoke "the Appraisal provision" under Mr. Parrish's insurance policy. In return, Mr. Parrish assigned to KCC ten percent "of all insurance funds, contractual and extra contractual, received" by Mr. Parrish. Mr. Parrish also gave KCC "a right to be paid as a joint payee" of State Farm under his contract with KCC.

On January 8, 2018, Bobby Sims, a KCC public adjuster, forwarded Mr. Parrish's executed sworn statement in proof of loss to State Farm which valued Mr. Parrish's loss at $495,079.25. Along with the sworn statement, Mr. Sims requested that any dispute over the amount of loss be submitted to appraisal pursuant to the policy.

The specific policy provision Mr. Sims was invoking on behalf of his client reads, in pertinent part, as follows:

> Appraisal. If you and we fail to agree on the amount of loss, either party can demand that the amount of the loss be set by appraisal. A demand for appraisal must be in writing. . . .
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> Each party will select a qualified, disinterested appraiser and notify the other of the appraiser's identity within 20 days of receipt of the written demand. Each party shall be responsible for the compensation of their selected appraiser. The two appraisers shall then select a qualified disinterested umpire. . . . Reasonable expenses of the appraisal and the reasonable compensation of the umpire shall be paid equally by you and us.
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> The appraisers shall then set the amount of the loss.

In his correspondence to State Farm, Mr. Sims designated George Keys, the president and namesake of KCC, as Mr. Parrish's "disinterested appraiser." Not surprisingly, State Farm objected to his selection; it also disagreed with the amount Mr. Parrish claimed as his loss.[1] State Farm issued its own demand for appraisal and appointed Bob Davis of Davis Claim Management as its appraiser. It also asked Mr. Parrish to choose a different appraiser. When Mr. Parrish did not respond, State Farm initiated an action—of some sort—in the circuit court.

On May 5, 2018, State Farm filed a "Petition to Compel Appraisal with Disinterested Appraiser." This "petition" set forth in enumerated paragraphs a sequence of factual allegations (not unlike a civil cause of action), a separate section of legal argument explaining why, in State Farm's view, Mr. Keys should not be allowed to serve as a disinterested appraiser under the policy, and a request that the court "enter

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an order compelling [Mr. Parrish] to participate in appraisal with a disinterested appraiser not affiliated with Keys Claims Consulting, Inc." Mr. Parrish responded to the petition as if it were a civil action, admitting and denying the factual allegations and setting out his own "Legal Argument in Response to Petitioner's Argument." He addressed the legal issue of whether the appraiser he had named was "disinterested." Additionally, he argued that the petition should be dismissed because it was premature and because State Farm had waived its ability to object to his designation. None of his arguments, however, challenged State Farm's choice of filing what purports to be a petition to judicially compel him to appoint a different appraiser in this dispute.

The circuit court proceeded to set a hearing on State Farm's petition—though whether that was a "trial" or, as State Farm puts it, a procedure that "functioned much like a final summary judgment hearing," it is not entirely clear. Regardless, on December 18, 2018, the circuit court entered the order now before us in which the court determined that Mr. Keys could serve as a disinterested appraiser despite his company's contractual relationship with Mr. Parrish and the ten percent contingency fee KCC would earn from any payment Mr. Parrish received from his claim. The order both denied the petition and then stated that it was "hereby dismissed in its entirety." The court ordered the parties to proceed to appraisal and retained jurisdiction to award Mr. Parrish his attorney's fees and costs in connection with the petition.

State Farm now appeals that order.

II.

A.

At the outset, we confess we have some confusion, as well as reservations, about what it is we have been asked to review. Florida Statutes describe many different civil petitions that litigants may avail themselves of, but a petition to compel appraisal with a disinterested appraiser is not (yet) one of them. Nor is there a recognized common law cause of action for this kind of discrete claim. That would seem to be problematic. Cf. State Farm Fla. Ins. Co. v. Gonzalez, 76 So. 3d 34, 37, 38 (Fla. 3d DCA 2011) (reversing judgment on a "petition to confirm appraisal award" and remanding to allow petitioners to refile the action as a civil complaint because "[t]here is no rule or statute allowing for the filing of a petition to confirm an appraisal award" (emphasis omitted)).

It was because of this concern that, following oral argument, we requested supplemental briefing from the parties as to whether we should convert this appeal to a petition for a writ of certiorari. Mr. Parrish readily agreed that we should (and then, as such, deny State Farm certiorari relief). State Farm maintained that its petition to compel disinterested appraiser could be likened to a declaratory judgment action. The difficulty with that, of course, is that State Farm's petition did not actually seek a declaratory judgment or include any allegation that State Farm was in doubt of a right, status, immunity, or privilege and was entitled to have that doubt removed[2] or invoke chapter 86 of the Florida Statutes in any way—and we cannot believe that was unintentional. To the contrary, State Farm's filing was styled, framed, and constructed,

[2]See Golfrock v. Lee County, 247 So. 3d 37, 38 (Fla. 2d DCA 2018) ("To state a claim for declaratory relief, the party seeking the declaration must show that he is in doubt as to the existence or nonexistence of some right, status, immunity, power, or privilege and that he is entitled to have such doubt removed." (citing May v. Holley, 59 So. 2d 636, 638–39 (Fla. 1952))).

from beginning to end, as if there were a legally recognized, standalone cause of action to have a disinterested appraiser appointed in an insurance coverage dispute. But there isn't.

Nevertheless, despite our concerns with the filing that precipitated the circuit court's order, we will treat it as a "final order." For that is what the order appears to be. It is an order that concluded a civil case (such as it was) that had been filed with the circuit court. See S.L.T. Warehouse Co. v. Webb, 304 So. 2d 97, 99 (Fla. 1974) ("Generally, the test employed by the appellate court to determine finality of an order, judgment or decree is whether the order in question constitutes an end to the judicial labor in the cause, and nothing further remains to be done by the court to effectuate a termination of the cause as between the parties directly affected."). And because it is a final order, State Farm has a constitutional right to our review. See art. V, § 4(b)(1), Fla. Const.; In the Interest of J.B., 101 So. 3d 407, 410 (Fla. 2d DCA 2012).

B.

State Farm contends that Mr. Keys could not be a "disinterested appraiser" as that term is used in the policy. Because the facts that were put before the circuit court are not in dispute, the only issue we must decide is what this policy term means. That is an issue we review de novo. Am. S. Home Ins. Co. v. Lentini, 286 So. 3d 157, 158 n.2 (Fla. 2019); Ganzemuller v. Omega Ins. Co., 244 So. 3d 1189, 1190 (Fla. 2d DCA 2018).

The policy does not define "disinterested." We must, therefore, ascertain the plain meaning of the policy's term. See Allstate Ins. Co. v. Orthopedic Specialists, 212 So. 3d 973, 975-76 (Fla. 2017) ("Where the language in an insurance contract is

plain and unambiguous, a court must interpret the policy in accordance with the plain meaning so as to give effect to the policy as written." (quoting Wash. Nat'l Ins. Corp. v. Ruderman, 117 So. 3d 943, 948 (Fla. 2013))); Fla. Ins. Guar. Ass'n v. Branco, 148 So. 3d 488, 491 (Fla. 5th DCA 2014) ("Appraisals are creatures of contract and the subject or scope of appraisal depends on the contract provisions. Absent ambiguity, the plain meaning of an insurance policy controls." (citation omitted)); see also Lenzi v. Regency Tower Ass'n, 250 So. 3d 103, 105 (Fla. 4th DCA 2018) ("[U]nless they are defined, 'terms should be given their plain and unambiguous meaning as understood by the "man-on-the-street." ' " (quoting Harrington v. Citizens Prop. Ins. Corp., 54 So. 3d 999, 1001 (Fla. 4th DCA 2010))). Here, the term "interested" is an adjective describing an appraiser who holds an interest—that is, a stake of some sort, whether pecuniary, proprietary, or personal—in the outcome of the appraisal process. The prefix "dis" connotes its negative—so "disinterested" means an appraiser who does *not* hold an interest in the outcome of the policy's appraisal process.

As is clear from the policy provision, the conclusion of the appraisal process results in a recommended monetary award of some amount. Indeed, that is the point of the endeavor. And a contingency stake in a potential monetary award—such as this one—constitutes a pecuniary "interest." Cf. Landmark Am. Ins. Co. v. H. Anton Richardt, DDS, PA, No. 2:18-cv-600-FtM-29UAM, 2019 WL 2462865, at *2, *3 (M.D. Fla. June 13, 2019) (disqualifying insured's selected appraiser who had "a direct financial interest in the outcome of the appraisal" because "[a] pecuniary interest in the outcome is by definition a personal interest that favors one side over the other"); Shores at Coco Plum Condo. Ass'n v. Westchester Surplus Lines Ins. Co., No. 18-23910-Civ-

COOKE/GOODMAN, 2019 WL 2223172, at *2 (S.D. Fla. Apr. 29, 2019) (holding that insured's selected appraiser, who was to "be compensated on a contingency fee basis" could not serve as an impartial appraiser). An interest in the appraisal award, then, is part and parcel of an interest in the process' outcome.

Mr. Keys, as the president of Mr. Parrish's public adjusting firm, "has a vested interest in obtaining the highest possible recovery because [his] compensation will be a percentage of it." See Verneus v. Axis Surplus Ins. Co., No. 16-21863-CIV-MARTINEZ/GOODMAN, 2018 WL 3417905, at *6 (S.D. Fla. July 13, 2018). KCC's ten percent interest in the amount awarded in the appraisal process necessarily makes its president interested in the outcome of the process. For that reason alone, he is not a "disinterested appraiser." We are not the first court to reach that conclusion. See State Farm Fla. Ins. Co. v. Crispin, 290 So. 3d 150, 153 (Fla. 5th DCA 2020) ("[A]ny ordinary meaning of the term 'disinterested' precludes a financial stake in the outcome."); Landmark Am. Ins. Co., 2019 WL 2462865, at *3; Shores at Coco Plum Condo. Ass'n, 2019 WL 2223172, at *2; Verneus, 2018 WL 3417905, at *6-7; see also State Farm Fla. Ins. Co. v. Sanders, 45 Fla. L. Weekly D870, D873 (Fla. 3d DCA Apr. 15, 2020) (Fernandez, J., concurring) ("[T]he plain and ordinary meaning of disinterested includes free of self-interest or pecuniary interest. When an appraiser has a direct financial interest in the outcome of the appraisal, the appraiser is not disinterested." (quoting State Farm Fla. Ins. Co. v. Valenti, 285 So. 3d 958, 960-61 (Fla. 4th DCA 2019) (Kuntz, J., concurring))).

It is true, as Mr. Parrish points out, that the appraisal provision requires the insured and the insurer to pay their designated appraisers for their work. Mr.

Parrish will have to pay his appraiser in some fashion. It is also true that the policy does not expressly proscribe a particular method of payment (the policy simply states each party is "responsible for the compensation" of their respective appraisers). All that means, though, is that the policy's requirement of a "disinterested appraiser" does not foreclose financial remuneration for the appraiser's services and that the parties and their appraisers are free to negotiate a mutually agreed upon payment, so long as the form of payment does not give rise to an interest in the outcome of the appraisal process. Cf. City of Homestead v. Johnson, 760 So. 2d 80, 84 (Fla. 2000) (holding that courts should "read provisions of a contract harmoniously in order to give effect to all portions thereof" (citing Sugar Cane Growers Coop. of Fla., Inc., v. Pinnock, 735 So. 2d 530, 535 (Fla. 4th DCA 1999); Paddock v. Bay Concrete Indus., Inc., 154 So. 2d 313, 315 (Fla. 2d DCA 1963))).

A contingency form of payment is uniquely problematic under this provision because the amount of the appraiser's remuneration is inextricably tied to the amount of the award the appraiser will ultimately recommend. The bigger the award, the bigger the payment. It is that link between payment and award that makes the contingency-paid appraiser prohibitively interested in the outcome of the appraisal process, which is a condition the policy expressly prohibits.

Besides the interest KCC and Mr. Keys hold through KCC's ten percent stake in the appraisal award, there is also the separate, broader, and glaringly apparent interest they have in the appraisal process by virtue of the fact that *KCC is representing Mr. Parrish in the underlying dispute*. Even if KCC is not, as Mr. Parrish stresses, his "fiduciary" or his "agent" (which we need not decide), KCC is contractually bound to

negotiate with State Farm on Mr. Parrish's behalf. And as Mr. Parrish's public adjuster, KCC's adjusters are professionally bound to handle Mr. Parrish's claim "with dispatch and due diligence" and not "approach investigations, adjustments, and settlements in a manner prejudicial to the insured." See Fla. Admin. Code 69B-220-201; see also § 626.878, Fla. Stat. (2018) (requiring adjusters to subscribe to the Department of Insurance's code of ethics).

Other than nominating Mr. Parrish himself (or a member of his family), it would be difficult to imagine a more self-evidently interested person in an appraisal process than the person or firm that represents Mr. Parrish in that very process, especially since the policy's "disinterested appraiser" is essentially acting as an independent adjudicator of a dispute.[3] Cf. Branco, 148 So. 3d at 496 ("The policy provision, which requires a 'disinterested appraiser,' expresses the parties' clear intention to restrict appraisers to people who are, in fact, disinterested. Given the duty of loyalty owed by an attorney to a client, we conclude that attorneys may not serve as their clients' arbitrators or appraisers when 'disinterested' arbitrators or appraisers are bargained for.").[4] Mr. Keys cannot serve as a disinterested appraiser (in any meaningful sense of that term) in an appraisal process of his client's dispute.

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II.

A.

At the outset, we confess we have some confusion, as well as reservations, about what it is we have been asked to review. Florida Statutes describe many different civil petitions that litigants may avail themselves of, but a petition to compel appraisal with a disinterested appraiser is not (yet) one of them. Nor is there a recognized common law cause of action for this kind of discrete claim. That would seem to be problematic. Cf. State Farm Fla. Ins. Co. v. Gonzalez, 76 So. 3d 34, 37, 38 (Fla. 3d DCA 2011) (reversing judgment on a "petition to confirm appraisal award" and remanding to allow petitioners to refile the action as a civil complaint because "[t]here is no rule or statute allowing for the filing of a petition to confirm an appraisal award" (emphasis omitted)).

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from beginning to end, as if there were a legally recognized, standalone cause of action to have a disinterested appraiser appointed in an insurance coverage dispute. But there isn't.

Nevertheless, despite our concerns with the filing that precipitated the circuit court's order, we will treat it as a "final order." For that is what the order appears to be. It is an order that concluded a civil case (such as it was) that had been filed with the circuit court. See S.L.T. Warehouse Co. v. Webb, 304 So. 2d 97, 99 (Fla. 1974) ("Generally, the test employed by the appellate court to determine finality of an order, judgment or decree is whether the order in question constitutes an end to the judicial labor in the cause, and nothing further remains to be done by the court to effectuate a termination of the cause as between the parties directly affected."). And because it is a final order, State Farm has a constitutional right to our review. See art. V, § 4(b)(1), Fla. Const.; In the Interest of J.B., 101 So. 3d 407, 410 (Fla. 2d DCA 2012).

B.

State Farm contends that Mr. Keys could not be a "disinterested appraiser" as that term is used in the policy. Because the facts that were put before the circuit court are not in dispute, the only issue we must decide is what this policy term means. That is an issue we review de novo. Am. S. Home Ins. Co. v. Lentini, 286 So. 3d 157, 158 n.2 (Fla. 2019); Ganzemuller v. Omega Ins. Co., 244 So. 3d 1189, 1190 (Fla. 2d DCA 2018).

The policy does not define "disinterested." We must, therefore, ascertain the plain meaning of the policy's term. See Allstate Ins. Co. v. Orthopedic Specialists, 212 So. 3d 973, 975-76 (Fla. 2017) ("Where the language in an insurance contract is

plain and unambiguous, a court must interpret the policy in accordance with the plain meaning so as to give effect to the policy as written." (quoting Wash. Nat'l Ins. Corp. v. Ruderman, 117 So. 3d 943, 948 (Fla. 2013))); Fla. Ins. Guar. Ass'n v. Branco, 148 So. 3d 488, 491 (Fla. 5th DCA 2014) ("Appraisals are creatures of contract and the subject or scope of appraisal depends on the contract provisions. Absent ambiguity, the plain meaning of an insurance policy controls." (citation omitted)); see also Lenzi v. Regency Tower Ass'n, 250 So. 3d 103, 105 (Fla. 4th DCA 2018) ("[U]nless they are defined, 'terms should be given their plain and unambiguous meaning as understood by the "man-on-the-street." ' " (quoting Harrington v. Citizens Prop. Ins. Corp., 54 So. 3d 999, 1001 (Fla. 4th DCA 2010))). Here, the term "interested" is an adjective describing an appraiser who holds an interest—that is, a stake of some sort, whether pecuniary, proprietary, or personal—in the outcome of the appraisal process. The prefix "dis" connotes its negative—so "disinterested" means an appraiser who does *not* hold an interest in the outcome of the policy's appraisal process.

As is clear from the policy provision, the conclusion of the appraisal process results in a recommended monetary award of some amount. Indeed, that is the point of the endeavor. And a contingency stake in a potential monetary award—such as this one—constitutes a pecuniary "interest." Cf. Landmark Am. Ins. Co. v. H. Anton Richardt, DDS, PA, No. 2:18-cv-600-FtM-29UAM, 2019 WL 2462865, at *2, *3 (M.D. Fla. June 13, 2019) (disqualifying insured's selected appraiser who had "a direct financial interest in the outcome of the appraisal" because "[a] pecuniary interest in the outcome is by definition a personal interest that favors one side over the other"); Shores at Coco Plum Condo. Ass'n v. Westchester Surplus Lines Ins. Co., No. 18-23910-Civ-

COOKE/GOODMAN, 2019 WL 2223172, at *2 (S.D. Fla. Apr. 29, 2019) (holding that insured's selected appraiser, who was to "be compensated on a contingency fee basis" could not serve as an impartial appraiser). An interest in the appraisal award, then, is part and parcel of an interest in the process' outcome.

Mr. Keys, as the president of Mr. Parrish's public adjusting firm, "has a vested interest in obtaining the highest possible recovery because [his] compensation will be a percentage of it." See Verneus v. Axis Surplus Ins. Co., No. 16-21863-CIV-MARTINEZ/GOODMAN, 2018 WL 3417905, at *6 (S.D. Fla. July 13, 2018). KCC's ten percent interest in the amount awarded in the appraisal process necessarily makes its president interested in the outcome of the process. For that reason alone, he is not a "disinterested appraiser." We are not the first court to reach that conclusion. See State Farm Fla. Ins. Co. v. Crispin, 290 So. 3d 150, 153 (Fla. 5th DCA 2020) ("[A]ny ordinary meaning of the term 'disinterested' precludes a financial stake in the outcome."); Landmark Am. Ins. Co., 2019 WL 2462865, at *3; Shores at Coco Plum Condo. Ass'n, 2019 WL 2223172, at *2; Verneus, 2018 WL 3417905, at *6-7; see also State Farm Fla. Ins. Co. v. Sanders, 45 Fla. L. Weekly D870, D873 (Fla. 3d DCA Apr. 15, 2020) (Fernandez, J., concurring) ("[T]he plain and ordinary meaning of disinterested includes free of self-interest or pecuniary interest. When an appraiser has a direct financial interest in the outcome of the appraisal, the appraiser is not disinterested." (quoting State Farm Fla. Ins. Co. v. Valenti, 285 So. 3d 958, 960-61 (Fla. 4th DCA 2019) (Kuntz, J., concurring))).

It is true, as Mr. Parrish points out, that the appraisal provision requires the insured and the insurer to pay their designated appraisers for their work. Mr.

Parrish will have to pay his appraiser in some fashion. It is also true that the policy does not expressly proscribe a particular method of payment (the policy simply states each party is "responsible for the compensation" of their respective appraisers). All that means, though, is that the policy's requirement of a "disinterested appraiser" does not foreclose financial remuneration for the appraiser's services and that the parties and their appraisers are free to negotiate a mutually agreed upon payment, so long as the form of payment does not give rise to an interest in the outcome of the appraisal process. Cf. City of Homestead v. Johnson, 760 So. 2d 80, 84 (Fla. 2000) (holding that courts should "read provisions of a contract harmoniously in order to give effect to all portions thereof" (citing Sugar Cane Growers Coop. of Fla., Inc., v. Pinnock, 735 So. 2d 530, 535 (Fla. 4th DCA 1999); Paddock v. Bay Concrete Indus., Inc., 154 So. 2d 313, 315 (Fla. 2d DCA 1963))).

A contingency form of payment is uniquely problematic under this provision because the amount of the appraiser's remuneration is inextricably tied to the amount of the award the appraiser will ultimately recommend. The bigger the award, the bigger the payment. It is that link between payment and award that makes the contingency-paid appraiser prohibitively interested in the outcome of the appraisal process, which is a condition the policy expressly prohibits.

Besides the interest KCC and Mr. Keys hold through KCC's ten percent stake in the appraisal award, there is also the separate, broader, and glaringly apparent interest they have in the appraisal process by virtue of the fact that *KCC is representing Mr. Parrish in the underlying dispute*. Even if KCC is not, as Mr. Parrish stresses, his "fiduciary" or his "agent" (which we need not decide), KCC is contractually bound to

negotiate with State Farm on Mr. Parrish's behalf. And as Mr. Parrish's public adjuster, KCC's adjusters are professionally bound to handle Mr. Parrish's claim "with dispatch and due diligence" and not "approach investigations, adjustments, and settlements in a manner prejudicial to the insured." See Fla. Admin. Code 69B-220-201; see also § 626.878, Fla. Stat. (2018) (requiring adjusters to subscribe to the Department of Insurance's code of ethics).

Other than nominating Mr. Parrish himself (or a member of his family), it would be difficult to imagine a more self-evidently interested person in an appraisal process than the person or firm that represents Mr. Parrish in that very process, especially since the policy's "disinterested appraiser" is essentially acting as an independent adjudicator of a dispute.[3] Cf. Branco, 148 So. 3d at 496 ("The policy provision, which requires a 'disinterested appraiser,' expresses the parties' clear intention to restrict appraisers to people who are, in fact, disinterested. Given the duty of loyalty owed by an attorney to a client, we conclude that attorneys may not serve as their clients' arbitrators or appraisers when 'disinterested' arbitrators or appraisers are bargained for.").[4] Mr. Keys cannot serve as a disinterested appraiser (in any meaningful sense of that term) in an appraisal process of his client's dispute.

---

[3]The ancient natural justice maxim of *nemo judex in causa sua* holds a powerful compulsion even in proceedings outside of courtrooms. Cf. State v. Aldridge, 103 So. 835, 836 (Ala. 1925) (disqualifying certified public accountants from sitting on a review board in a license revocation proceeding they had funded and supported and observing that "the decided weight of authority" would extend the rule of judicial disqualification "to every tribunal exercising judicial or quasi-judicial functions").

[4]The conclusion Branco reached concerning an insured's attorney applies perforce to an insured's public adjuster. Although the means and methods of their work may differ, an insured hires a public adjuster or a lawyer for much the same purpose in these disputes: to maximize the insured's financial recovery on the policy.

III.

We hold that a public adjuster that has a contingency interest in an insured's appraisal award or represents an insured in an appraisal process is not a "disinterested appraiser" under this insurance policy's appraisal provision. The circuit court did not have the benefit of our decision today when it issued its ruling and instead relied upon the Third District's holding in Brickell Harbour Condominium Ass'n v. Hamilton Specialty Insurance Co., 256 So. 3d 245, 249 (Fla. 3d DCA 2018) ("[A]n appraiser's 'direct or indirect financial interest in the outcome of the arbitration,' including an arrangement for a contingent fee, requires disclosure rather than disqualification in the case of an appraiser."); accord Sanders, 45 Fla. L. Weekly at D871 (denying certiorari relief but certifying question of great public importance about whether a public adjuster "who is in a contractual agent-principal relationship with the insureds and who receives a contingency fee from the appraisal award" can be a disinterested appraiser as a matter of law). For all the reasons set forth in this opinion, we do not find Brickell's analysis persuasive. We certify conflict with Brickell to the extent it holds that a public adjuster who has a contingency interest in an insured's appraisal award or represents an insured in an appraisal process can serve as a "disinterested appraiser" under a policy's appraisal provision.

Reversed and remanded; conflict certified.

CASANUEVA and KELLY, JJ., Concur.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT, POST OFFICE BOX 327, LAKELAND, FL 33802-0327

January 27, 2021

CASE NO.: 2D19-0130
L.T. No.: 2018-CA-1198

STATE FARM FLORIDA INSURANCE COMPANY	v.	JON PARRISH
Appellant / Petitioner(s),		Appellee / Respondent(s).

BY ORDER OF THE COURT:

Appellant's motion for rehearing of this court's order granting the appellee appellate attorney's fees is granted. The order granting appellate attorney's fees entered January 6, 2021, is vacated. Appellee's motion for appellate attorney's fees, filed September 11, 2019, is denied.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

ALICIA MARIA LOPEZ, ESQ.
GREGORY L. EVANS, ESQ.
LYNN S. ALFANO, ESQ.
MARY C. LAMOUREUX, ESQ.
THEODORE A. CORLESS, ESQ.
DANIEL M. SCHWARZ, ESQ.
KARA ROCKENBACH - LINK, ESQ.
MARK A. BOYLE, ESQ.
ROBERT A. KINGSFORD, ESQ.
CRYSTAL K. KINZEL, CLERK

ec

Mary Elizabeth Kuenzel
Mary Elizabeth Kuenzel
Clerk

SECOND DISTRICT COURT OF APPEAL OF FLORIDA
P.O. BOX 327
LAKELAND, FLORIDA 33802-0327
(863) 499-2290

February 5, 2021

Re:
State Farm Insurance Company
v.
Jon Parrish
Appeal No.: 2D19-130
Trial Court No.: 2018-CA-1198
Trial Court Judge:

Florida Supreme Court
Attn: Clerk's Office

Attached is a certified copy of the notice invoking the discretionary jurisdiction of the Supreme Court, pursuant to Rule 9.120, Florida Rules of Appellate Procedure. Attached also is this Court's opinion or decision relevant to this case.

___The filing fee prescribed by Section 25.241(2)(a), Florida Statutes, was paid through the portal.

___ The filing fee prescribed by Section 25.241(2)(a), Florida Statutes, was received by this court and is attached.

__X__The filing fee prescribed by Section 25.241(2)(a), Florida Statutes, was not received by this court.

____ Petitioner/Appellant has been previously determined insolvent by the circuit court or our court in the underlying case.

____ Petitioner/Appellant has already filed, and this court has granted, petitioner/appellant's motion to proceed without payment of costs in this case.

No filing fee is required because:
___ Summary Appeal, pursuant to rule 9.141
___ From the Unemployment Appeals Commission
___ A Habeas Corpus proceeding
___ A Juvenile case
___ Other

In criminal cases, the notice of appeal was filed in the lower tribunal on _____.

If there are any questions regarding this matter, please do not hesitate to contact this office.

Sincerely,

Mary Elizabeth Kuenzel
Clerk

By: Joshua Dannelley

MK: jd

cc (without attachments):
Kara Rockenbach - Link, Esq. Lynn S. Alfano, Esq. Theodore A. Corless, Esq. Gregory L. Evans, Esq.
Daniel M. Schwarz, Esq. Robert A. Kingsford, Esq. Mary C. Lamoureux, Esq. Alicia Maria Lopez, Esq.
Mark A. Boyle, Esq.

Filing # 120934404 E-Filed 02/05/2021 04:35:05 PM

FILED 02/05/2021 5:01 pm Second District Court Of Appeal

Supreme Court of Florida

Office of the Clerk
500 South Duval Street
Tallahassee, Florida 32399-1927

JOHN A. TOMASINO
CLERK
MARK CLAYTON
CHIEF DEPUTY CLERK
JULIA BREEDING
STAFF ATTORNEY

PHONE NUMBER: (850) 488-0125
www.floridasupremecourt.org

ACKNOWLEDGMENT OF NEW CASE

February 5, 2021

RE: JON DOUGLAS PARRISH vs. STATE FARM FLORIDA INSURANCE COMPANY

CASE NUMBER: SC21-172
Lower Tribunal Case Number(s): 2D19-130; 112018CA0011980001XX
Lower Tribunal Filing Date: 2/5/2021

The Florida Supreme Court's case number must be utilized on all pleadings and correspondence filed in this cause. The Court has received the following documents reflecting a filing date of 2/5/2021.

Notice to Invoke Discretionary Jurisdiction seeking review of opinion dated January 6, 2021.

Filers can now pay the $300 filing fee through the portal. To pay this fee, go to the "Document" page after entering the case number. On the "Documents" page, after clicking the "Add" button, navigate to the "Pay Fee" category. Select the "PAY CASE FILING FEE - $300", then go to the bottom of the page and upload a one-page Filing Fee Paid letter, stating that you are paying the fee through the portal. The fee amount and the fields to enter the payment information will be on the "Review and Submit" page. Your fee must be paid within ten days.

tr
cc:
LYNN S. ALFANO
MARK A. BOYLE
GREGORY L. EVANS

THEODORE A. CORLESS
KARA ROCKENBACH LINK
DANIEL M. SCHWARZ
MARY C. LAMOUREUX
HON. MARY BETH KUENZEL, CLERK
ROBERT A. KINGSFORD

Filing # 121160622 E-Filed 02/10/2021 01:44:00 PM

FILED 02/10/2021 1:58 pm Second District Court Of Appeal

Supreme Court of Florida

WEDNESDAY, FEBRUARY 10, 2021

CASE NO.: SC21-172
Lower Tribunal No(s).:
2D19-130;
112018CA0011980001XX

JON DOUGLAS PARRISH	vs.	STATE FARM FLORIDA INSURANCE COMPANY
Petitioner(s)		Respondent(s)

The proceedings in this Court in the above case are hereby stayed pending disposition of *State Farm Florida Insurance Company v. Sanders*, Case No. SC20-596, which is pending in this Court.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

ks
Served:

LYNN S. ALFANO
ROBERT A. KINGSFORD
MARK A. BOYLE
GREGORY L. EVANS
THEODORE A. CORLESS
KARA ROCKENBACH LINK
MARY C. LAMOUREUX
DANIEL M. SCHWARZ
HON. MARY BETH KUENZEL, CLERK
HON. FREDERICK ROBERT HARDT, JUDGE
HON. CRYSTAL K. KINZEL, CLERK

M A N D A T E

from

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

SECOND DISTRICT

THIS CAUSE HAVING BEEN BROUGHT TO THIS COURT BY APPEAL, AND AFTER DUE CONSIDERATION THE COURT HAVING ISSUED ITS OPINION;

YOU ARE HEREBY COMMANDED THAT SUCH FURTHER PROCEEDINGS BE HAD IN SAID CAUSE, IF REQUIRED, IN ACCORDANCE WITH THE OPINION OF THIS COURT ATTACHED HERETO AND INCORPORATED AS PART OF THIS ORDER, AND WITH THE RULES OF PROCEDURE AND LAWS OF THE STATE OF FLORIDA.

WITNESS THE HONORABLE NELLY N. KHOUZAM CHIEF JUDGE OF THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, SECOND DISTRICT, AND THE SEAL OF THE SAID COURT AT LAKELAND, FLORIDA ON THIS DAY.

DATE: March 10, 2021

SECOND DCA CASE NO. 19-0130

COUNTY OF ORIGIN: Collier

LOWER TRIBUNAL CASE NO. 2018-CA-1198

CASE STYLE: STATE FARM FLORIDA INSURANCE COMPANY v. JON PARRISH

Mary Elizabeth Kuenzel

Mary Elizabeth Kuenzel
Clerk

cc: (without attached opinion)
ALICIA MARIA LOPEZ, ESQ.
GREGORY L. EVANS, ESQ.
LYNN S. ALFANO, ESQ.
MARY C. LAMOUREUX, ESQ.
THEODORE A. CORLESS, ESQ.
DANIEL M. SCHWARZ, ESQ.
KARA ROCKENBACH - LINK, ESQ.
MARK A. BOYLE, ESQ.
ROBERT A. KINGSFORD, ESQ.

mep

Filing # 136872225 E-Filed 10/19/2021 05:17:08 PM

FILED 10/19/2021 5:17 PM Second District Court Of Appeal

Supreme Court of Florida

TUESDAY, OCTOBER 19, 2021

CASE NO.: SC21-172
Lower Tribunal No(s).:
2D19-130;
112018CA0011980001XX

JON DOUGLAS PARRISH	vs.	STATE FARM FLORIDA INSURANCE COMPANY
Petitioner(s)		Respondent(s)

Petitioner shall show cause on or before November 3, 2021, why in light of this Court's decision to discharge jurisdiction in *State Farm Florida Insurance Company v. Sanders*, No. SC20-596, this Court should not decline to exercise jurisdiction in this case. Respondent may file a reply on or before November 15, 2021.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

ks
Served:

LYNN S. ALFANO
ROBERT A. KINGSFORD
GREGORY L. EVANS
THEODORE A. CORLESS
KARA ROCKENBACH LINK
MARY C. LAMOUREUX
DANIEL M. SCHWARZ
MARK A. BOYLE
HON. MARY BETH KUENZEL, CLERK
HON. FREDERICK ROBERT HARDT, JUDGE
HON. CRYSTAL K. KINZEL, CLERK

Filing # 140732357 E-Filed 12/21/2021 09:21:22 AM

FILED 12/21/2021 9:24 am Second District Court Of Appeal

Supreme Court of Florida

TUESDAY, DECEMBER 21, 2021

CASE NO.: SC21-172
Lower Tribunal No(s).:
2D19-130;
112018CA0011980001XX

JON DOUGLAS PARRISH	vs.	STATE FARM FLORIDA INSURANCE COMPANY
Petitioner(s)		Respondent(s)

The Court accepts jurisdiction.

Petitioner's brief on the merits shall be served on or before January 25, 2022; respondent's answer brief on the merits shall be served thirty days after service of petitioner's brief on the merits; petitioner's reply brief on the merits shall be served thirty days after service of respondent's brief on the merits; and respondent's cross-reply brief on the merits, if authorized, must be served thirty days after service of petitioner's reply brief on the merits.

The Clerk of the Second District Court of Appeal shall file the record which shall be properly indexed and paginated on or before January 18, 2022. The Clerk may provide the record in the format as currently maintained at the district court, either paper or electronic.

CANADY, C.J., and POLSTON, LABARGA, COURIEL, and GROSSHANS, JJ., concur.

The Court dispenses with oral argument pursuant to Florida Rule of Appellate Procedure 9.320.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

kj
Served:

LYNN S. ALFANO
ROBERT A. KINGSFORD
GREGORY L. EVANS
THEODORE A. CORLESS
KARA ROCKENBACH LINK
MARY C. LAMOUREUX
DANIEL M. SCHWARZ
MARK A. BOYLE
HON. MARY BETH KUENZEL, CLERK

2DCA Docket Report

2D19-130 **STATE FARM FLORIDA INSURANCE COMPANY vs JON PARRISH**

Type	Date	Description	Attached Order Information
Notice	01/10/2019	Notice of Appeal Filed	
Notes:	ATTACHED ORDER APPEALED		
Filed by:	AA KARA ROCKENBACH - LINK, ESQ. 44903		
Event	01/10/2019	LOWER TRIBUNAL TRANSMITTAL COVER SHEET	
Notes:			
Filed by:	CC CRYSTAL K. KINZEL, CLERK		
Letter	01/10/2019	Acknowledgment Letter 1	
Notes:			
Filed by:	Not Entered		
Order	01/10/2019	fee - civil; atty	
Notes:	This appeal has been filed without a filing fee required by section 35.22(2)(a), Florida Statutes, Florida Statutes. If the attorney for appellant has not already done so, they shall forward the required $300.00 filing fee or, if applicable, an order of the circuit court finding appellant insolvent pursuant to section 57.081, Florida Statutes, within twenty days from the date of this order. If this court does not receive either of the above within the prescribed time, this appeal may be subject to dismissal without further notice.		
Ordered by:	Clerk/Standard		
Receipt	01/14/2019	Filing Fee $300	
Notes:			
Receipt #:	2019 - 1019112 Amount: $300		
Brief	02/05/2019	Received Records	
Notes:	REDACTED - KRIER, 187 PGS.		
Filed by:	CC CRYSTAL K. KINZEL, CLERK		
Notice	03/18/2019	Stipulation for Extension of Time	
Notes:	30 - IB due 04/17/19		
Filed by:	AA KARA ROCKENBACH - LINK, ESQ. 44903		
Notice	03/22/2019	Notice of Appearance	
Notes:			
Filed by:	AE GREGORY L. EVANS, ESQ. 0767824		
Notice	04/17/2019	Stipulation for Extension of Time	
Notes:	05 - IB due 04/22/19		
Filed by:	AA KARA ROCKENBACH - LINK, ESQ. 44903		
Brief	04/22/2019	Initial Appellant Brief on Merits	

2D19-130 **STATE FARM FLORIDA INSURANCE COMPANY vs JON PARRISH**

Type	Date	Description	Attached Order Information
Notes:			
Filed by:	AA KARA ROCKENBACH - LINK, ESQ. 44903		
Event	04/22/2019	Request for Oral Argument	
Notes:			
Filed by:	AA KARA ROCKENBACH - LINK, ESQ. 44903		
Notice	05/16/2019	Stipulation for Extension of Time	
Notes:	30- AB DUE 06/21/19		
Filed by:	AE ALICIA MARIA LOPEZ, ESQ. 161160		
Notice	06/11/2019	Notice of Supplemental Authority	
Notes:			
Filed by:	AA KARA ROCKENBACH - LINK, ESQ. 44903		
Notice	06/17/2019	Stipulation for Extension of Time	
Notes:	20 - AB due 07/11/19		
Filed by:	AE GREGORY L. EVANS, ESQ. 0767824		
Notice	06/20/2019	Notice of Supplemental Authority	
Notes:			
Filed by:	AA KARA ROCKENBACH - LINK, ESQ. 44903		
Notice	07/08/2019	Stipulation for Extension of Time	
Notes:	30 - AB due 08/12/19		
Filed by:	AE ALICIA MARIA LOPEZ, ESQ. 161160		
Notice	07/30/2019	Notice of Supplemental Authority	
Notes:			
Filed by:	AA KARA ROCKENBACH - LINK, ESQ. 44903		
Notice	08/12/2019	Stipulation for Extension of Time	
Notes:	20 - AB due 09/03/19		
Filed by:	AE ALICIA MARIA LOPEZ, ESQ. 161160		
Brief	09/03/2019	Appellee Answer Brief	
Notes:			
Filed by:	AE MARK A. BOYLE, ESQ. 5886		
Brief	09/03/2019	Case Perfected	
Notes:			
Filed by:			
Motion	09/11/2019	Motion For Attorney's Fees	Attorneys Fees/Deny/Appellee Date: 01/27/2021
Notes:			

2D19-130 **STATE FARM FLORIDA INSURANCE COMPANY vs JON PARRISH**

Type	Date	Description	Attached Order Information
Filed by:	AE GREGORY L. EVANS, ESQ. 0767824		
Brief	10/01/2019	Appellant Reply Brief	
Notes:			
Filed by:	AA KARA ROCKENBACH - LINK, ESQ. 44903		
Event	12/03/2019	Assigned Date	
Notes:			
Filed by:			
Order	12/04/2019	Oral Argument Notice	
Notes:	This case is provisionally set for oral argument on TUESDAY, FEBRUARY 04, 2020, at 11:00 A.M., before: Judge Darryl C. Casanueva, Judge Patricia J. Kelly, Judge Matthew C. Lucas. Oral argument will occur at the Second District Court of Appeal, Tampa Branch Headquarters, in the courtroom of the Stetson University College Of Law, Tampa Campus, First Floor, 1700 North Tampa Street, Tampa, Florida. The court calendars can be viewed on this court's website at www.2dca.org. Counsel or parties are requested to make their presence known to the receptionist by fifteen minutes prior to the time listed above. The panel is subject to change without notice. Should the assigned panel of judges decide that the court will not benefit from oral argument in this proceeding, the attorneys or parties will be notified by order no less than two weeks before the scheduled date. Please review the notice regarding oral argument in the Second District Court of Appeal. A copy has been furnished with this order and may also be found on this court's website.	
Ordered by:	Clerk/Standard		
Notice	12/12/2019	Notice of Supplemental Authority	
Notes:			
Filed by:	AE MARK A. BOYLE, ESQ. 5886		
Notice	12/12/2019	Notice of Supplemental Authority	
Notes:			
Filed by:	AA KARA ROCKENBACH - LINK, ESQ. 44903		
Notice	12/31/2019	Notice	
Notes:	NOTICE OF CHANGE OF NAME		
Filed by:	AA KARA ROCKENBACH - LINK, ESQ. 44903		
Notice	01/27/2020	Notice of Supplemental Authority	
Notes:			
Filed by:	AE MARK A. BOYLE, ESQ. 5886		
Event	02/04/2020	Oral Argument Date Set	
Notes:	Tampa		
Filed by:			

2D19-130 **STATE FARM FLORIDA INSURANCE COMPANY vs JON PARRISH**

Type	Date	Description	Attached Order Information
Order	02/05/2020	ORD-SUA SPONTE	
Notes:	The parties shall file supplemental briefs addressing whether this court can convert this appeal to a petition for certiorari and addressing all three prongs of certiorari review. Appellant's supplemental brief shall be filed within twenty days of this order. Appellee's supplemental brief shall be filed within twenty days thereafter.		
Ordered by:	Judge/Special		
Notice	02/11/2020	Notice of Supplemental Authority	
Notes:			
Filed by:	AE MARK A. BOYLE, ESQ. 5886		
Notice	02/11/2020	Notice of Supplemental Authority	
Notes:			
Filed by:	AA DANIEL M. SCHWARZ, ESQ. 92537		
Brief	02/25/2020	Supplemental Appellant Initial Brief	
Notes:			
Filed by:	AA KARA ROCKENBACH - LINK, ESQ. 44903		
Brief	03/16/2020	Supplemental Appellee Answer Brief	
Notes:			
Filed by:	AE MARK A. BOYLE, ESQ. 5886		
Notice	04/15/2020	Notice of Supplemental Authority	
Notes:	APPELLEE'S NOTICE OF FILING SUPPLEMENTAL AUTHORITY		
Filed by:	AE MARK A. BOYLE, ESQ. 5886		
Notice	08/21/2020	Notice of Supplemental Authority	
Notes:	APPELLEE'S NOTICE OF FILING SUPPLEMENTAL AUTHORITY		
Filed by:	AE MARK A. BOYLE, ESQ. 5886		
Notice	08/25/2020	Notice	
Notes:	TO THE COURT REGARDING PREVIOUSLY FILED SUPPLEMENTAL AUTHORITY		
Filed by:	AA KARA ROCKENBACH - LINK, ESQ. 44903		
Notice	10/08/2020	Notice	
Notes:	NOTICE TO THE COURT REGARDING ACCEPTANCE OF JURISDICTION IN PREVIOUSLY FILED SUPPLEMENTAL AUTHORITY		
Filed by:	AA DANIEL M. SCHWARZ, ESQ. 92537		
Disposition	01/06/2021	Reversed	
Notes:	and remanded; conflict certified.		
Manner:	Authored Opinion		
Order	01/06/2021	Miscellaneous Order	

2D19-130 **STATE FARM FLORIDA INSURANCE COMPANY vs JON PARRISH**

Type	Date	Description	Attached Order Information
Notes:	**VACATED**(SEE 01/27/21 ord)Parrish's motion for appellate attorney's fees, filed pursuant to section 627.428, Florida Statutes, is granted. The trial court shall determine the appropriate amount of the award. See Fla. R. App. P. 9.400(b).		
Ordered by:	Judge/Standard		
Motion	01/11/2021	Motion For Rehearing on an Order	
Notes:	**NOTED** (See 01/12/21 amended motion)		
Filed by:	AA DANIEL M. SCHWARZ, ESQ. 92537		
Motion	01/22/2021	Motion For Rehearing on an Order	ORD-GRANT. REHEAR. ON AN ORDER Date: 01/27/2021 Due: 01/27/2021
Notes:	AMENDED, UNOPPOSED MOTION FOR REHEARING OF ORDER GRANTING APPELLEE'S MOTION FOR APPELLATE ATTORNEYS' FEES		
Filed by:	AA DANIEL M. SCHWARZ, ESQ. 92537		
Order	01/27/2021	ORD-GRANT. REHEAR. ON AN ORDER	
Notes:	Appellant's motion for rehearing of this court's order granting the appellee appellate attorney's fees is granted. The order granting appellate attorney's fees entered January 6, 2021, is vacated. Appellee's motion for appellate attorney's fees, filed September 11, 2019, is denied.		
Ordered by:	Judge/Standard		
Order	01/27/2021	ORDER VACATED	
Notes:	The order granting appellate attorney's fees entered January 6, 2021, is vacated.		
Ordered by:	Judge/Standard		
Order	01/27/2021	Attorneys Fees/Deny/Appellee	
Notes:	Appellee's motion for appellate attorney's fees, filed September 11, 2019, is denied.		
Ordered by:	Judge/Standard		
Notice	02/05/2021	Notice of Discretional Jurisdiction to Supreme Court	
Notes:			
Filed by:	AE MARK A. BOYLE, ESQ. 5886		
US Sup Ct	02/05/2021	NOTICE OF DISCRETN. JURISDICTN	
Notes:			
SC Case:	SC21-172		
US Sup Ct	02/05/2021	Review Sent to Supreme Court	
Notes:			
SC Case:	SC21-172		
US Sup Ct	02/05/2021	Acknowledged Receipt from Supreme Court	
Notes:			
SC Case:	SC21-172		

2D19-130 **STATE FARM FLORIDA INSURANCE COMPANY vs JON PARRISH**

Type	Date	Description	Attached Order Information
US Sup Ct	02/10/2021	Acknowledged Receipt from Supreme Court	
Notes:	The proceedings in this Court in the above case are hereby stayed pending disposition of State Farm Florida Insurance Company v. Sanders, Case No. SC20-596, which is pending in this Court.		
SC Case:	SC21-172		
Mandate	03/10/2021	Mandate	
Notes:			
Event	03/16/2021	West Publishing	
Notes:			
Filed by:			
US Sup Ct	10/20/2021	Acknowledged Receipt from Supreme Court	
Notes:	Petitioner shall show cause on or before November 3, 2021, why in light of this Court's decision to discharge jurisdiction in State Farm Florida Insurance Company v. Sanders, No. SC20-596, this Court should not decline to exercise jurisdiction in this case. Respondent may file a reply on or before November 15, 2021.		
SC Case:	SC21-172		
US Sup Ct	12/21/2021	Acknowledged Receipt from Supreme Court	
Notes:			
SC Case:	SC21-172		

CERTIFICATE OF CLERK

STATE OF FLORIDA }
}
COUNTY OF POLK }

I, MARY ELIZABETH KUENZEL, Clerk of the District Court of Appeal of the State of Florida in and for the Second District, do hereby certify that the foregoing 1 record, as certified to this court by the clerk of the trial court, and 1 constructed record constitute the record in the case of State Farm Florida Insurance Company v. Jon Parrish, 2D19-130, as the same appears among the records and files of my said office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said District Court of Appeal of Florida at Lakeland, the headquarters of the court, on this the 3rd day of January, 2022.

/s/ Mary Elizabeth Kuenzel
Mary Elizabeth Kuenzel, Clerk
District Court of Appeal
Second District