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:
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> > [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).
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> 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)).
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> "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).
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> 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).
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> 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).
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> 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.
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> 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.
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> 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.