IN THE SUPREME COURT OF FLORIDA

STATE FARM FLORIDA INSURANCE COMPANY,

Respondent,

Case No.: SC21-172
L.T. Case No.: 2D19-0130

vs.

JON PARRISH,

Petitioner.
_____/

PETITION FOR DISCRETIONARY REVIEW OF A DECISION OF THE SECOND DISTRICT COURT OF APPEAL

PETITIONER'S REPLY BRIEF

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A. THE PLAIN MEANING OF THE TERM "DISINTERESTED" PERMITS PARRISH TO COMPENSATE HIS PARTY APPOINTED APPRAISER WITH A CONTINGENCY FEE.

State Farm attempts to pass off its interpretation as the natural textualist outcome. "[N]o one should be fooled." *Bostock v. Clayton Cnty., GA*, 590 U.S. ---, 140 S. Ct. 1731, 1755 (2020) (Alito, J., dissenting). State Farm's interpretation "is like a pirate ship. It sails under a textualist flag, but what it actually represents is a theory…that Justice Scalia excoriated—" the interpretation of individual words without any regard for the context in which they appear. *Id.* In this way, State Farm's analysis is indistinguishable from that of the *Bostock* majority. State Farm plucks the term "disinterested" from its surrounding words and phrases, applies a dictionary definition of the term without regard for what that term meant to the parties at the time the contract was executed[1], and calls it "giving meaning to the terms of the contract." *See e.g.*, (Resp. Br.

[1] It is notable that *amici* for the Respondent would like the Court to be "narrow" in its holding, so as to avoid any application of the term "disinterested" to the insurer's appraisers who are compensated with hourly or flat fee arrangements. *See* (Amicus Br. of Fla. Defense Lawyers Ass'n at p. 12). In other words, dictionary definition for thee, but not for me.

at p. 1). This Court should heed Justice Alito's poignant warning and find that "disinterested" does not restrict the compensation which may be paid to a party appointed appraiser.

"The words of a governing text are of paramount concern, and what they convey, **in their context,** is what that text means." Antonin Scalia & Bryan A. Garner, READING LAW: INTERPRETATION OF LEGAL TEXTS 56 (2012) (emphasis added). "Of course, words are given meaning by their context, and context includes the purpose of the text." *Id.* The portion of the appraisal clause in question states as follows:

> 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.

(R. 40) (italicized and underlined emphasis added).

The question to be answered then, is what is the purpose of, and meant by, "[e]ach party will select a qualified, disinterested

appraiser" when the following clause states that each party shall be responsible for its appraiser's compensation? The *Rios* Court correctly interpreted the clauses regarding the *selection* of the appraiser, and the *compensation* of the appraiser, separately. *Rios v. Tri-State Ins. Co.*, 714 So. 2d 547, 549 (Fla. 3d DCA 1998). The *Rios* Court's reasoning is in line with that laid out by the late Justice Scalia in his book READING LAW, discussed *supra*: "the appraisal clause 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.* Thus, the *Rios* Court refused to divorce the term "independent" from the context of the specific aspect of the appraisal clause in which it appears, then apply it generally to the entire clause. *Id.* The *Galvis* Court would shortly thereafter follow the same reasoning except with the term "disinterested." *Galvis v. Allstate Ins. Co.*, 721 So. 2d 421, 421 (Fla. 3d DCA 1998). This reasoning is as valid today as it was in 1998.

State Farm would instead like the Court to focus on what the dictionary says the term "disinterested" means, without any regard for the context in which it appears, just like the *Bostock* majority. And like the *Bostock* majority which disregarded what the term "sex"

meant to ordinary people in 1964, State Farm *does not* want the Court to examine evidence of what the term "disinterested" meant **to the parties at the time of the execution of the contract.** Reason being, "disinterested" meant what *Rios* and *Galvis* said it means. In 2017, there was no doubt under Florida law. A public adjuster compensated with a contingency arrangement was disinterested as a matter of law and was qualified to be a party appointed appraiser so long as his or her contingency arrangement was disclosed. *See Rios*, 714 So. 2d at 549; *Galvis*, 721 So. 2d at 421.

At the very least, the facts of this case present an ambiguity, which must be resolved in Parrish's favor. *See Security Ins. Co. of Hartford v. Investors Diversified Ltd., Inc.*, 407 So. 2d 314, 316 (Fla. 4th DCA 1981) (finding a policy provision ambiguous and citing as proof the fact that courts arrived at opposite conclusions from a study of essentially the same language). Indeed, **"[a]n ambiguity can exist when, even though the words themselves appear clear, the specific facts of the case create more than one reasonable interpretation of the contractual provisions."** *Register v. White*, 358 N.C. 691, 695 (2004) (citations omitted) (emphasis added).

Rios and *Galvis* lead to such an ambiguity. *Penzer v. Transp. Ins. Co.*, 29 So. 3d 1000, 1009 (Fla. 2010) (Pariente, J., joined by Canady, J., concurring) (quoting *Terra Nova Ins. Co. v. Fray-Witzer*, 449 Mass. 406, 869 N.E.2d 565, 573 (2007)) ("[I]n evaluating the ambiguity of the phrase, we cannot ignore the body of national case law addressing the same or similar policy language falling on both sides of the interpretive ledger. It is fair to say that even the most sophisticated and informed insurance consumer would be confused as to the boundaries of advertising injury coverage in light of the deep difference of opinion symbolized in these cases."). Parrish reasonably relied upon the *Rios* and *Galvis* holdings when he contracted with State Farm. State Farm cannot now claim that the term "disinterested" clearly prohibited the use of a party appointed appraiser with a contingency arrangement in light of the existence of those opinions (and the lack of any holding to the contrary) at the time the contract was executed. Thus, even if this Court overturns *Rios* and *Galvis*, and holds that the term "disinterested" should be interpreted to prohibit contingency compensation for party appointed appraisers going forward, the Court should still find that *Parrish's*

arrangement is permitted based upon the law that was in place at the time of contract execution.

"The bottom line is that if [State Farm], as the drafter of the language, intended to" prohibit Parrish from paying his party appointed appraiser with a contingency fee, "then [State Farm] could have easily done so by simply adding a phrase" that says as much. *Penzer*, 29 So. 3d at 1009 (Pariente, J., joined by Canady, J., concurring). State Farm did not, and the Court should not reform the policy in State Farm's favor *post facto*.

B. "NONPARTISAN," "UNBIASED," AND "NEUTRAL" PARTY APPOINTED APPRAISERS DO NOT EXIST.

State Farm claims that Mr. Keys is disqualified because he is a partisan, biased, and non-neutral advocate because he is paid with a contingency fee. *See* (Resp. Br. at pp. 35-37). The implication is that party appointed appraisers who are compensated with flat fees or hourly fees *are* nonpartisan, unbiased, and neutral. But as Parrish demonstrated in his initial brief, this is simply not the case.[2]

[2] State Farm failed to respond to this argument, simply stating that nothing about State Farm's appraiser has any relevance. (Resp. Br. at p. 11, n. 2). We are left guessing as to why when Parrish has demonstrated that adopting State Farm's interpretation would wholly

Regardless of the form of compensation, party appointed appraisers possess biases towards the party that appointed them. Thus, State Farm does not want this Court to interpret "disinterested" in a way which would eliminate all bias, just the forms of bias State Farm disfavors.

The bias of party appointed arbitrators has been the subject of multiple peer reviewed empirical studies. *See* Albert van den Berg, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, *in* LOOKING TO THE FUTURE: ESSAYS ON INT'L LAW IN HONOR OF W. MICHAEL REISMAN 824 (2010); Sergio Puig and Anton Strezhnev, *Affiliation Bias in Arbitration: An Experimental Approach*, 46 J. LEGAL STUD. 371 (June 2017) [hereinafter, "*Affiliation Bias*"]; *see also* Alan Redfern, *Dissenting Opinions in Int'l Commercial Arbitration: the Good, the Bad and the Ugly*, 2003 Freshfields Lecture, 20 ARB. INT'L 223 (2004); Seth H. Lieberman, *Something's Rotten in the State of Party-Appointed Arbitration: Healing ADR's Black Eye that is "Nonneutral Neutrals"*, 5 CARDOZO J. CONFLICT RESOL. 215 (Spring 2004). All of

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frustrate the very purpose of the appraisal clause by disqualifying all appraisers.

these studies found that an arbitrator is inherently biased in favor of the party which appointed it.

The *Affiliation Bias* study is particularly enlightening. The authors conducted an experiment where participating arbitrators were given a brief vignette describing a hypothetical arbitration between an investor and a state. *Affiliation Bias*, at 376. The participants were told that they had been appointed by the respondent, the claimant, or by the tribunal. *Id.* The only incentive provided to participants was the promise of an advance copy of any articles summarizing the research. *Id.* at 379. After reviewing the vignette, the participants were then asked, "how they thought the parties' expenses in the dispute, including the cost of legal representation, should be apportioned in such a case." *Id.* at 377. The experiment was then repeated, except the second experiment asked the participants to determine the value of damages. *Id.* at 383.

The results were telling. Among the findings: "[o]n average, arbitrators were about 18 percentage points more likely to award all costs to the winning party when they were appointed by the winner rather than the loser." *Id.* at 381. After analyzing the data the authors found that, "[w]hen given strong discretion, as is the case for cost

awards [in arbitration], party appointees tend to give the party that appointed them a more favorable outcome. Winning-party appointees demand more from the loser, while losing-party appointees try to mitigate their appointer's losses." *Id.* at 387. In other words, "being appointed by one of the parties in a dispute **directly changes the behavior of the arbitrators. Hence, the appointment itself is the cause of some of the bias toward the arbitrator's appointing party.**" *Id.* at 393-94 (emphasis added).

The biases exhibited by the participants in the *Affiliation Bias* study are present in each and every tripartite appraisal. However, appraisals, such as the one at issue in the instant case present additional sources of bias including the prospect of future business, *see Coon v. Nat'l Fire Ins. Co. of Hartford*, 126 Misc. 75, 78 (N.Y. Sup. Ct. Sept. 29, 1925 (Devendorf, J.), *aff'd*, 246 N.Y. 594 (1925) (citation omitted), loyalty, *see id.*, and active participation in the months long proceeding, *see Affiliation Bias*, at 382. Indeed, the authors of the *Affiliation Bias* study stated that their results "are likely a **very conservative** test of affiliation effects." *Affiliation Bias*, at 382.

It is evident that any party appointed appraiser possesses bias in favor of the party that appointed it. State Farm is asking this Court

to filter out only appraisers who posses a type of bias that State Farm disfavors, rather than disqualify all biased appraisers. If State Farm wishes to achieve such a result, it must explicitly state which appraisers are and are not qualified in its policy forms. Since State Farm did not do so, Mr. Parrish must prevail.

C. *BRANCO* IS NOT APPLICABLE BECAUSE MR. KEYS OWES MR. PARRISH NEITHER A "FIDUCIARY DUTY OF LOYALTY" NOR A "CONFIDENTIAL RELATIONSHIP."

State Farm appears to have abandoned its argument that a public adjuster has a fiduciary duty to its insured. *Compare* (SC R. 48-49); *with* (Resp. Br. at pp. 48-53).[3] State Farm now claims that *Fla. Ins. Guar. Ass'n v. Branco*, 148 So. 3d 791 (Fla. 5th DCA 2014)'s reasoning applies because the rules that public adjusters are bound to follow create a "duty of loyalty" that a public adjuster owes to its insured. (Resp. Br. at p. 40). Further, State Farm claims—without a scintilla of evidence—that public adjusters will be unwilling to move

[3] At the district court oral argument, the undersigned pointed out that a holding finding public adjusters have a fiduciary duty to the insured would, for various reasons, expose insurers to enormous bad faith liability. Having now recognized this fact, State Farm shifts gears. Thus, State Farm's abandonment of its district court position is best understood as just another example of State Farm seeking application of one set of rules for its insureds, without having to comply with the same set of rules.

off of their initial estimates, rendering them biased. (Resp. Br. at p. 37).

As a threshold matter, State Farm's newly found "duty of loyalty" argument has not been preserved, and as such, should not be considered by this Court. *Aills v. Boemi*, 29 So. 3d 1105, 1108 (Fla. 2010) ("to be preserved for appeal, 'the specific legal ground upon which a claim is based must be raised at trial and a claim different than that will not be heard on appeal.'"); *Pagan v. State*, 29 So. 3d 938, 957 (Fla. 2009); *Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990); *City of Miami v. Steckloff*, 111 So. 2d 446, 447 (Fla. 1959); *Sebo v. Am. Home Assurance Co., Inc.*, 208 So. 3d 694, 699 n. 2 (Fla. 2016). After arguing in the trial and district courts that a *fiduciary* duty existed between Parrish and his public adjuster, State Farm cannot now switch horses midstream to argue that they possessed some other type of special relationship.

Regardless, as Parrish stated in the initial brief, none of the statutes cited by State Farm requires his public adjuster to do anything other than fairly and honestly evaluate the claim. (Init. Br. at p. 25). Specifically, State Farm cites two regulations. 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.") (emphasis added); Fla. Admin. Code R. 69B-220.201(3)(c) ("An adjuster shall not approach investigations, adjustments, and settlements in a manner *prejudicial* to the insured.") (emphasis added).

After citing these regulations, State Farm declares in conclusory fashion, and without offering anything by way of explanation as to how an insured is prejudiced by a fair and honest evaluation of their claim, that Parrish is "simply wrong." (Resp. Br. at p. 40, n. 5). But nothing in the Florida Admin. Code prohibits a public adjuster from rendering a fair and honest opinion regarding the value of a loss, regardless of the effect said opinion has on the claimant. As such, no "duty" (fiduciary or otherwise) is created by the Florida Admin. Code. State Farm's declarations to the contrary do not make it so.

Finally, State Farm argues that *Branco* applies and Mr. Keys is not "disinterested" because he is a "partisan advocate" who has an "undeniable agency relationship" with Mr. Parrish. (Resp. Br. at p. 42). In essence, State Farm argues that because Mr. Keys is authorized to bind Mr. Parrish as to the value of the loss by way of

the public adjuster contract, Mr. Keys is not "disinterested" as a matter of law. But this same logic would bar *any* party appointed appraiser from being disinterested *regardless of the form of compensation*.

This is because regardless of the form of their compensation, party appointed appraisers have the authority to bind the party which appoints them as to the amount of the loss:

> The appraisers shall then set the amount of the loss…. 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…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) (emphasis added). As such, all party appointed appraisers possess the same "agency" relationship alleged by State Farm to be disqualifying.

At bottom, *Branco* held that "[i]f 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'" and thus such an appraiser is not "disinterested" as a matter of law. *Branco*, 148 So. 3d at 495 (quoting *Donegal Ins. Co. v. Longo*, 415 Pa.Super. 628, 610 A.2d 466, 468-69 (1992) (add'l citation omitted)). As State Farm now apparently admits, Mr. Keys owes Mr. Parrish neither a fiduciary duty of loyalty, nor a confidential relationship. As such, *Branco* is inapplicable.

CONCLUSION

The Second District erred by reversing the trial court's order permitting Mr. Keys to serve as Mr. Parrish's party-appointed appraiser. Accordingly, Mr. Parrish requests this Court reverse and remand with instructions.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with font requirements; it is typed in Bookman Old Style 14-point font and type, has been typed using the Bookman Old Style 14-point font, is proportionately spaced, and contains 2,883 words, as required by the Florida Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 23, 2022, a true and correct copy of the foregoing was electronically filed with the Florida Supreme Court through Florida E-Filing Portal, which will send a copy to the following:

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