STATE OF MICHIGAN

COURT OF APPEALS

STEVEN M. WHITE and GAIL A. WHITE, Plaintiffs-Appellees,	FOR PUBLICATION July 28, 2011 9:10 a.m.
v	No. 298083 Oakland Circuit Court
STATE FARM FIRE & CASUALTY COMPANY, Defendant-Appellant.	LC No. 2009-099766-CK

Before: BORRELLO, P.J., and METER and SHAPIRO, JJ.

METER, J.

In this dispute involving a fire-insurance policy, defendant, plaintiffs' insurance company, appeals as of right from a partial grant of summary disposition to plaintiffs.[1] Defendant argues that the trial court erred by ruling that plaintiffs' appraiser, Jeffery Moss, is "independent" under the meaning of MCL 500.2833(1)(m) and that he may proceed with the appraisal process. In the alternative, defendant submits that MCL 500.2833(1)(m) is unconstitutional as a violation of defendant's due-process rights if it permits appraisers with pertinent contingency-fee contracts in effect to serve as appraisers in coverage disputes. We affirm.

In June 2008, plaintiffs' residence in Farmington Hills was severely damaged by a fire. Plaintiffs hired the public adjusting firm Associated Adjusters, Inc. (Associated), to assist them in presenting their claim to defendant. Jeffery Moss, a licensed public adjuster, was assigned to assist plaintiffs. Moss and plaintiffs signed a contract assigning to Associated 10 percent of the total payment on plaintiffs' claim.

A dispute developed during negotiations between Associated and defendant, and when the differences could not be settled, Moss sent a letter to defendant demanding appraisal pursuant to MCL 500.2833(1)(m). He stated that he would represent plaintiffs as their appraiser in the

[1] The court ruled in defendant's favor concerning other matters not pertinent to this appeal.

dispute. For the appraisal, he is to be paid on a time-and-expense basis.[2] Defendant responded that it would not accept Moss as plaintiffs' appraiser because he is not "disinterested" under defendant's policy or "independent" under MCL 500.2833(1)(m). Plaintiffs then filed this action, seeking a declaratory judgment that Moss is "independent" under the statute and qualified to serve as an appraiser despite his contingency-fee adjusting agreement that remains in effect.

The parties filed cross-motions for summary disposition under MCR 2.116(C)(10). The trial court ruled that Moss is "competent" and "independent" under MCL 500.2833(1)(m) and thus qualified to serve as an appraiser despite having a contingency-free contract with plaintiff for the adjusting. The trial court also ruled that the statute is constitutional and not a violation of defendant's due-process rights.

This Court reviews de novo both declaratory rulings and summary-disposition rulings. *Toll Northville LTD v Twp of Northville*, 480 Mich 6, 10; 743 NW2d 902 (2008); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In evaluating a motion for summary disposition under MCR 2.116(C)(10), a court considers all pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties. MCR 2.116(G)(5). Evidence is considered in the light most favorable to the non-moving party, and the moving party is entitled to judgment as a matter of law if there is no genuine issue of material fact. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

Defendant concedes in its appellate brief that this case involves interpreting the statutory term "independent" and does not analyze whether it may add the term "disinterested" to its policy as a separate, additional condition that appraisers must satisfy. Consequently, we resolve this appeal solely based on the language of MCL 500.2833(1)(m). This statute indicates that a fire-insurance policy in Michigan must provide

> [t]hat if the insured and insurer fail to agree on the actual cash value or amount of the loss, either party may make a written demand that the amount of the loss or the actual cash value be set by appraisal. If either makes a written demand for appraisal, each party shall select a competent, independent appraiser and notify the other of the appraiser's identity within 20 days after receipt of the written demand. The 2 appraisers shall then select a competent, impartial umpire. If the 2 appraisers are unable to agree upon an umpire within 15 days, the insured or insurer may ask a judge of the circuit court for the county in which the loss occurred or in which the property is located to select an umpire. The appraisers shall then set the amount of the loss and actual cash value as to each item. If the appraisers submit a written report of an agreement to the insurer, the amount

[2] Moss is to receive an hourly rate of $250, with total compensation not exceeding $5,000. Evidence indicated that his total payment, under both the adjusting contract and the appraisal agreement, would not exceed 10 percent of the final amount obtained from defendant. Presumably, the time-and-expense payment for the appraisal would be adjusted downward, if need be, to ensure that the 10-percent limit would not be exceeded.

> agreed upon shall be the amount of the loss. If the appraisers fail to agree within a reasonable time, they shall submit their differences to the umpire. Written agreement signed by any 2 of these 3 shall set the amount of the loss. Each appraiser shall be paid by the party selecting that appraiser. Other expenses of the appraisal and the compensation of the umpire shall be paid equally by the insured and the insurer. [*Id*.]

Defendant argues that because Moss signed an agreement with plaintiffs assigning to Associated 10 percent of the overall amount paid by defendants, and this agreement was still in effect when plaintiffs nominated Moss as their appraiser and in fact remains in effect, Moss has a pecuniary interest in the appraisal's outcome and is not "independent" under the statute.

This Court's decision in *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394; 605 NW2d 685 (1999), interpreted the requirement that an appraiser be "independent" in MCL 500.2833(1)(m) for the only time in a published opinion since the former statute's repeal in 1992. Before the repeal of MCL 500.2832 and the subsequent enactment of the statute at issue here, the analogous statute had read, in pertinent part, that "each [party] shall select a competent and *disinterested* appraiser," and should the two appraisers not come to an agreement, they should select a "competent and *disinterested* umpire" to resolve the dispute (emphases added). See former MCL 500.2832 (repealed 1992, replaced by MCL 500.2833). As the decision in *Auto-Owners* explained, MCL 500.2833 "indicates that the standards for appraisers and umpires are no longer the same." *Auto-Owners*, 238 Mich App at 400. The current version of the statute requires that appraisers be "competent [and] *independent*," while umpires must be "competent [and] *impartial*." MCL 500.2833(1)(m) (emphases added).

Because the statute does not define the words "independent" or "impartial," it is proper to consider the dictionary definitions of these terms. See *Auto-Owners*, 238 Mich App at 398. The *Auto-Owners* Court indicated that "[t]he definition of 'independent' is '[n]ot dependent; not subject to control, restriction, modification, or limitation from a given outside source.'" *Id*. at 400, quoting Black's Law Dictionary (6th Ed). On the contrary, "the definition of 'impartial' is '[f]avoring neither; disinterested; treating all alike; unbiased; equitable, fair, and just.'" *Auto-Owners*, 238 Mich App at 400-401, quoting Black's Law Dictionary (6th Ed). *Id.* Based on this difference, the Court in *Auto-Owners* found that an "independent appraiser may be biased toward the party who hires and pays him, as long as he retains the ability to base his recommendation on his own judgment." *Auto-Owners*, 238 Mich App at 401. The Court held that appraisers "are not disqualified from their appointments on the basis of having previously served as adjusters." *Id*. The *Auto-Owners* Court did not decide any issue pertaining to a contingency-fee agreement such as the one at issue in this case.

This Court in *Linford Lounge, Inc v Michigan Basic Prop Ins Assoc*, 77 Mich App 710, 713; 259 NW2d 201 (1977), interpreting the since-repealed statute that included the "disinterested" requirement, held that an appraiser may still be "disinterested" if he or she had previously served as an adjuster on a claim. That case, like the one at bar, involved a contingency-fee agreement paid to a public adjuster. Unlike in this case, the contract with the public adjuster in *Linford Lounge* was canceled before or at the time the adjuster was appointed as the insured's appraiser in the dispute. *Id*. at 712. However, contrary to defendant's contention, *Linford Lounge* does not *require* that the insured cancel its previously agreed-upon

contract in order to appoint its prior adjuster as its appraiser in the event of a dispute. The *Linford Lounge* Court held only that an appraiser is not disqualified under the "disinterested" standard simply because he had represented the insured previously as an adjuster. It did not decide whether the appraiser would have been "disinterested" if the contract had not been canceled. Neither *Auto-Owners* nor *Linford Lounge* holds, as defendant implies, that an appraiser currently working under a contingency-fee agreement as an adjuster cannot be "independent."

Because no published opinion in Michigan is directly on point with regard to the present appeal, we look to decisions from other jurisdictions. In *Rios v Tri-State Ins Co*, 714 So2d 547 (Fla App 1998), the court interpreted a contractual provision similar to MCL 500.2833(1)(m). The appraisal provision in the contract required each party to "select 'a competent, *independent* appraiser' (emphasis added), and the two party-designated appraisers will then select a 'competent, impartial umpire.'" *Id*. at 548. Given that the contract in *Rios*, like MCL 500.2833(1)(m), contained no definition of "independent," the court quoted the same definition discussed above[3] and "decline[d] to interpret the term 'independent' . . . to limit the type of compensation which can be paid." *Id*. at 549. While the court cautioned that the other party must be made aware of a contingency-fee agreement, it held that an appraiser may be independent while working under a contingency-fee agreement. *Id*. at 549-550. Another Florida panel held that a policy that required an appraiser to be "disinterested" did not prevent him from receiving a contingency fee for the appraisal. See *Galvis v Allstate Ins Co*, 721 So2d 421 (Fla App 1998).

The court in *Hozlock v Donegal Companies*, 745 A2d 1261 (Pa Super Ct 2000), stated that "mere partiality does not necessarily render an arbitrator incapable of fair judgment." *Id*. at 1264. While the policy at issue in *Hozlock* required only that the appraiser be "competent," the court went on to state that

> an appraiser who is paid with a contingency fee will not necessarily be any more biased towards his appointor than one paid with a flat fee. Caselaw should reflect that reality. Therefore, a holding that the mere existence of a contingency agreement warrants disqualification, in the absence of specific contractual language requiring impartiality, would be inappropriate. [*Id*. at 1265.]

While this case is not directly on point because it did not analyze the term "independent," it is instructive.[4] The court specifically declined to state whether the addition of "disinterested" into

[3] "'[N]ot subject to control, restriction, modification, or limitation from a given outside source[.]'" *Rios*, 714 So2d at 549, quoting Black's Law Dictionary (6th Ed).

[4] As discussed above, the *Hozlock* court opined that "a holding that the mere existence of a contingency agreement warrants disqualification, in the absence of *specific contractual language requiring impartiality*, would be inappropriate." *Hozlock*, 745 A2d at 1265 (emphasis added). We interpret that language to endorse the position that a contingency-fee agreement does not

the policy would have changed the result, *id*. at 1266, but, clearly, adding the word "independent" as defined above would not.

Other state cases have criticized contingency-fee agreements in certain contexts. The Iowa Supreme Court invalidated an appraisal award in *Central Life Ins Co v Aetna Cas & Sur Co*, 466 NW2d 257, 261-262 (Iowa 1991), on the grounds that appraisal is a quasi-judicial function and thus an appraiser must be disinterested. That court expressed the opinion that a contingency-fee agreement gives the appraiser "a direct financial interest in the dispute" and thus renders him "interested." *Id*. at 261. The Rhode Island Supreme Court in *Aetna Cas & Sur Co v Grabbert*, 590 A2d 88, 94 (RI 1991), an arbitration case, stated that "Grabbert's party-appointed arbitrator has violated Canon I of the Code of Ethics because his contingent fee gave him a direct financial interest in the award that would tend to destroy public confidence in the integrity of the arbitration process." The court nevertheless refused to vacate the arbitration award because of other considerations. *Id*. at 96-97. The court in *Rios* explicitly declined to follow both of these cases. *Rios*, 714 So2d at 549.

We follow *Rios* and hold that a contingency-fee agreement does not prohibit an appraiser from being "independent" under MCL 500.2833.[5] Moss is clearly "'not subject to control, restriction, modification, or limitation'" by anyone. See *Auto-Owners*, 238 Mich App at 400, quoting Black's Law Dictionary (6th Ed). He is not an employee of plaintiffs or under any other legal duty to them with the exception of the public-adjusting contract. As such, he is capable of exercising his own judgment regarding the value of the loss in this proceeding and should not be disqualified to serve as plaintiffs' appraiser in this dispute under the "competent [and] independent" standard set forth in MCL 500.2833(1)(m). Moss testified that he makes his own determinations regarding the loss and does not listen to his clients regarding a recommended settlement amount, and defendant's appraiser agreed. Moss is "independent," and we affirm the trial court's decision.[6]

Defendant next argues that MCL 500.2833(1)(m), if it allows Moss to serve as an appraiser under the present facts, violates defendant's due-process rights. We disagree. We review matters of constitutional interpretation de novo. *Toll Northville*, 480 Mich at 10-11.

Contrary to defendant's implication, appraisers in Michigan are not considered to be quasi-judges. They are not held to the same standard of fairness as an "impartial" umpire. See MCL 500.2833(1)(m) (requiring the parties to select a "competent [and] impartial" umpire in

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disqualify an appraiser under the "independent" standard because the word "independent," as we have defined it, does not require impartiality.

[5] As in *Rios*, we find that the opposing party must be made aware that a contingency-fee agreement exists.

[6] We note that reading the word "independent" to require a time-and-expense compensation agreement would make it more difficult for policyholders to hire public adjusters. The situation is analogous to the hiring of attorneys on a contingency-fee basis; that system exists partly because many people would be unable to hire lawyers if time-and-expense were the only allowable compensation method.

appraisal disputes). Public adjusters and appraisers are hired to assist in presenting a claim to an insurance company and to assist in any dispute that might arise, respectively. They are more similar to attorneys than to judges and umpires. Attorneys and appraisers are hired by one party to assist in presenting that party's position, while judges and umpires must take the proposals of both parties and decide which one is to prevail.[7]

Auto-Owners, 238 Mich App at 401, allows for the likelihood of a party-appointed appraiser being biased towards the party that retained him. This does not deprive defendant of any constitutional right. The cases cited by defendant in favor of its position assume that an appraiser is directly analogous to a judge. They are not binding in this situation because Moss is not required to be quasi-judicial or impartial. See *Tumey v Ohio*, 273 US 510; 47 S Ct 437; 71 L Ed 749 (1927) (violation of due process where mayor of city sat as judge and received a salary increase for convicting a defendant), and *Caperton v AT Massey Coal Co*, 556 US ___; 129 S Ct 2252; 173 L Ed 2d 1208 (2009) (West Virginia justice refused to recuse himself in a situation in which he had a conflict of interest). Moss is not a quasi-judge and there has been no denial of defendant's due-process rights. The trial court did not err in its ruling.

Affirmed.

/s/ Patrick M. Meter
/s/ Stephen L. Borrello

[7] This Court adopted language from a California decision for the proposition that "'[c]ourts have repeatedly upheld agreements for arbitration conducted by party-chosen, nonneutral arbitrators, particularly when a neutral arbitrator is also involved. These cases implicitly recognize it is not necessarily unfair or unconscionable to create an effectively neutral tribunal by building in presumably offsetting biases.'" *Whitaker v Citizens Ins Co of America*, 190 Mich App 436, 440; 476 NW2d 161 (1991), quoting *Tate v Saratoga Savings & Loan Ass'n*, 216 Cal App 3d 843, 852; 265 Cal Rptr 440 (1989), abrogated on other grounds by *Advanced Micro Devices, Inc v Intel Corp*, 9 Cal 4th 362; 885 P2d 994; 36 Cal Rptr 581 (1994). While *Whitaker* and *Tate* refer to arbitration proceedings and not appraisals, they are instructive because arbitration and appraisal have pertinent similarities. But see *Mahnke v Superior Court*, 180 Cal App 4th 565, 574-75; 103 Cal Rptr 3d 197 (2009) (noting that under California law appraisers are held to a "disinterested" standard much like the repealed MCL 500.2832, but arbitrators are held to a less stringent standard not requiring disinterest).

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Before: BORRELLO, P.J., and METER and SHAPIRO, JJ.

SHAPIRO, J. (*concurring*).

I concur with Judge Meter's opinion in all respects. I write separately to emphasize the practical dislocations that would arise from adoption of defendant's argument. Defendant essentially asks that we require the party-appointed appraisers to possess the same level of neutrality as the umpire. Indeed, virtually all the cases cited by defendant address the requirements for judges and magistrates, which is, of course, an absolute standard of impartiality. I agree with the majority that this position is inconsistent with the Legislature's decision to use statutory language that clearly distinguishes between the role of the party-selected appraisers and the umpire. The umpire, upon whom the decision ultimately rests, must be "impartial" while the appraisers need not be. Instead, they must be "independent," i.e. not under the actual control of the parties.

Appraisal is a practical mechanism to resolve disputes without the necessity for lawsuits and the appraiser acts as an expert for the party that hires them. While an appraiser brings specialized knowledge to the process, all parties also expect that each appraiser will articulate and generally support his client's position concerning the claim. In an appraisal, the two party-selected appraisers, through argument and compromise, attempt to reach a resolution of the claim that they both believe is reasonable. If that cannot be accomplished, then the umpire either induces them to bridge their differences or makes the decision himself with one of the two-party appraisers providing the second vote. Despite defendant's assertion of a due process claim, at no point does defendant assert that this methodology yields unfair results or that it is impracticable.

Defendant suggests that payment of an appraiser by contingent fee is corrupting, but that payment by hourly fee is not. This is a distinction without a difference. The appraiser appointed by defendant in this case makes his living acting on behalf of insurance companies and it is

either naive or disingenuous to suggest that he will continue to be hired by them if they do not feel that the results he obtains are in their interest. Defendant's appraiser testified that over the past three years alone, defendant has appointed him as its appraiser on approximately 40 claims and has paid him $114,512.03 in appraiser fees. In the 14 recent claims where this appraiser and a public adjustor, presumably working under a 10 percent contingency, served as party appraisers, his hourly fees exceeded the policyholders' appraisers' fees by 42 percent. To maintain that he does not have a pecuniary interest in seeking a favorable outcome for defendant and the other insurance companies that retain him is absurd. This is not an attack on this gentleman's probity, as he is, in fact, paid to act as an advocate with specialized knowledge, as is plaintiff's appraiser. The role that the appraiser plays, the fact that he is paid by one side to the dispute, and the fact that he exclusively (or nearly exclusively) works for either insurers or insureds, is the source of the lack of impartiality, not whether he is compensated at an hourly rate or by a contingent fee. The appraiser's livelihood depends on maintaining a reputation among insureds or insurers that their respective positions will be well-articulated and supported and that the appraiser will obtain an acceptable, if not pleasing, outcome for the side that retained them. If we were to adopt defendant's extra-statutory requirements, virtually all party-appointed appraisers would have to be disqualified and the entire appraisal mechanism, which has fairly served all sides for decades, would come to a screeching halt. The result would be more unnecessary litigation.

Lastly, the majority opinion does not address plaintiff's argument that defendant's policy, by requiring "disinterested" rather than "independent" appraisers, is inconsistent with state law as it has existed since 1990 and constitutes fraud. Given our conclusion in this case, I agree that it was not necessary to do so and I make no judgment as to defendant's intent in its continued use of the outdated terminology. However, it must be noted that defendant's response to this argument is wholly devoid of merit. Defendant suggests that if its policy is out of compliance with the statute, indeed, even if it is purposefully so, it is of no consequence because its policy also states:

> **10. Conformity to State Law.**
>
> When a policy provision is in conflict with the applicable law of the state in which this policy is issued, the law of the State will apply.

This statement, which is itself required to be included by state law, is a sword provided to the insured should they discover that the policy issued to them does not comply with state law. Contrary to defendant's suggestion, it is not intended as a shield for insurers that issue policies inconsistent with state law. Insurers have a duty to comply with state law. The provision just-cited is intended to require that compliance; not to facilitate non-compliance.

/s/ Douglas B. Shapiro