IN THE SUPREME COURT OF FLORIDA

CASE NO. 85,920

THE STATE OF FLORIDA,

Petitioner,

vs.

MARK MARKS, P.A., et al.,

Respondents.

REPLY BRIEF OF PETITIONER (AS TO RESPONDENT MARK MARKS, P.A.)

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STATEMENT OF THE CASE AND FACTS

The State rejects the Respondent's Statement of the Case and Facts. The Respndent is attempting to interject alleged "factual" details of many of the counts charged in the information. However, those "facts" have never been adjudicated by either the trial court or the Fourth District Court of Appeal. This case has not proceeded to trial; there has not been any evidentiary hearing on the "facts" of the individual counts; and the case is not before this Court pursuant to any ruling on a sworn motion to dismiss. Furthermore, the Fourth District Court of Appeal, in its opinion below, did not consider or address any of the "facts" that the Respondent is asserting herein. The case is now before this Court pursuant to a limited certified question which does not, in any way, hinge on the "facts" which are improperly king asserted by the Respondent.

ARGUMENT

I

THE LOWER COURT ERRED IN CONCLUDING THAT SECTION 817.234(1), FLORIDA STATUTES, IS UNCONSTITUTIONALLY VAGUE AS APPLIED TO ATTORNEYS.

The Respondent, in presenting reasons why section 817.234(1), Florida Statutes, should be deemed unconstitutionally vague as applied to attorneys, persistently presents arguments which purport to be based upon the "facts" of the counts of the charging document. Such fact-specific arguments are not properly before this Court for several reasons. There has been no

adjudication of the pertinent facts, either through a trial, an evidentiary hearing, or a ruling on a sworn motion to dismiss. Similarly, the Fourth District Court of Appeal, in rendering its decision in this case, did not rely upon, or develop, any facts regarding the individual counts. Thus, all arguments which purport to be predicated upon facts which neither the lower court nor the trial court have fully developed cannot be the basis for any arguments in this Court. This *Court* has been presented with a single, limited certified question, regarding the constitutionality of section 817.234(1), as applied to attorneys who withhold material information from insurers, with the intent to defraud.

The Respondent persists in arguing that the statute does not delineate which materials must be produced to the insurer and that the statute is therefore **vague,** Once again, the State must reiterate that the Respondent's effort to portray the statute as one proscribing nondisclosure is erroneous. The statute criminalizes nondisclosure of material information only when such nondisclosure is coupled with an intent to defraud. Thus, it is not a question of mandating disclosure as to *any* particular matters. Attorneys who submit claims in good faith, when those claims are not known to be frivolous and have a factual basis, will not be acting with an intent to defraud, and *any* nondisclosures without the intent to defraud will not be subject to prosecution under **the** statute.

The statute's reference to "incomplete" claims is tied in to the concept of "materiality," a concept with which attorneys deal with on a daily basis in trial courts throughout this State when they make evidentiary determinations regarding relevancy and materiality. See, section 90.401, Florida Statutes. Thus, the lower court acknowledged that "[u]ndoubtedly,

attorneys know what facts are material when negotiating damages with an insurance company . . . ." See, Pet. App., p. 12.

In a related argument, the Respondent asserts that the statute is vague because it fails to give attorneys notice of when their exercise of the work-product privilege will result in the commission of a crime. The answer to this is simple. Whenever the attorney withholds material information with the requisite intent to defraud, the attorney's conduct will be fraudulent. An attorney is not permitted to engage in criminally fraudulent conduct and rest upon an alleged privilege. *See*, Rules 4-1.6(c), 4-1.6(b), 4-4.1, Rules Regulating the Florida Bar; pp. 31-32, Initial Brief of Petitioner. If the attorney wishes to protect the allegedly privileged materials, the attorney can lawfully do so by refraining from the submission of a claim to the insurer, when the claim is submitted with an intent to defraud.

The Respondent rests the analysis for this portion of the argument on Hermanson v. State, 604 So. 2d 775 (Fla. 1992). Hermanson, however, involved two statutes which created a clear conflict as to when and if deprivation of medical treatment for a child due to religious beliefs could constitute a criminal act. As the instant case presents no conflict between the insurance fraud statute and any other statute, rule of procedure or ethical canon - since no other statutes, rules or canons permit attorneys to act with an intent to defraud - Hermanson has no applicability to the instant case.

The foregoing "vagueness" attacks proffered by the Respondent fail for additional reasons as well. A showing that a statute is facially and unconstitutionally vague requires the complainant to "prove that the

enactment is vague 'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in *the* sense that no standard of conduct is specified at all.'" Village of Hoffman Estates v. The Flipside, 455 U.S. 489, 495, n. **7, 102** S.Ct. **1186,** 71 L.Ed. **2d** 362 (1982). The statute must be shown to be impermissibly **vague** in all of its applications. Id. The Respondent has not accomplished that.

Rather, the Respondent takes the approach that there may be certain situations in which the statute cannot apply. As the facts of this case have not yet been adjudicated through either a trial or sworn motion to dismiss, there is no way for this Court, or for the lower courts, to make the determination of whether those situations apply to the Respondent. "The traditional rule is that a person to whom a statute **may** constitutionally be applied **my** not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the *Court."* New York v. ~~Ferber,~~ ~~458~~ U.S. 747, 767, 102 S.Ct. **3348, 73** L.Ed. **2d 1113** (1982). See also, State v. Saiez, **489** So, 2d 1125 (Fla. 1986). While an exception exists in **the** context of overbreadth claims, no such exception exists as to vagueness claims. Thus, fact-specific claims, for which there has been no factual adjudication in the trial court, cannot possibly be assessed in the context of a **vagueness** attack on the facial validity of the statute.

As to the related argument that CLE lecturers state that withholding unfavorable materials is permissible, the State has addressed that contention at length in its prior brief. See, Initial Brief of Petitioner, pp. 32-35. The State would, however, further note that even when clients assert, as defenses to criminal prosecutions, that they acted in

reliance upon advice of counsel, such defenses are rarely accepted, as a matter of law, even where privity exists between attorney and client.[1] The situation where attorneys attending CLE lectures, or reading CLE materials, from lecturers with whom no attorney-client relationship exists, and where no privity of parties exists, is obviously even more tenuous than the case of the client who relies upon the advice of retained counsel. Lastly, as noted in the Initial Brief of Petitioner, any argument which vests CLE lecturers with a veto power over the legislature clearly asserts a position which is truly repugnant to the system of constitutional checks and balances which is delineated in Florida's Constitution.

As to the Respondent's assertion that the statute criminalizes "innocent conduct," the simple answer is that none of the activities described by the Respondent are "innocent conduct" when they are coupled with the intent to defraud an insurance company, as no attorney has the right to defraud an insurer or to assist a client in defrauding an insurer.

Much of the Respondent's argument focuses on the significance of the specific intent, a matter which is fully addressed in the State's Initial Brief of Petitioner. The Respondent hypothesizes that the State cauld get a case to a jury solely on the basis of circumstantial evidence of intent,

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[1] Few cases exist which discuss reliance on counsel as a defense to criminal prosecutions. United States v. Polytarides, 584 F. 2d 1350, 1352-54 (4th Cir. 1978), held that "[a] crucial element in the defense of acting upon the advice of counsel is that the defendant secured the advice on the lawfulness of his possible future conduct." *Any* such defense would further require that the defendant make a full and fair disclosure to his counsel. United States v. Conner, 752 F. 2d 566, 574 (11th Cir. 1985). Thus, a defendant would have to advise his attorney that he intended to defraud an insurance company; or that the withholding of material information was being done with the knowledge that the case was frivolous or that the withheld materials clearly refuted any good faith basis for the submitted claim.

inferred from the conduct. This does not raise any specter of horrors or significant policy concerns. As with all cases predicated solely on circumstantial evidence, the State could not get past a motion for judgment of acquittal unless it established that the circumstantial evidence of intent was inconsistent with *any* proffered reasonable hypothesis of innocence. State v. Law, 559 So. 2d 187 (Fla. 1990).

The State would reiterate that many cases, as cited in the Initial Brief of Petitioner, have found that specific intents have sufficed to save many statutes from vagueness attacks. Those cases where specific intents have failed to save the statutes, such as State v. Rou, *366 So.* 2d 385 (Fla. 1979), State v. DeLeo, 356 So. 2d 306 (Fla. 1978), and State v. Llopis, 257 So. 2d 17 (Fla. 1971), have failed to do so because it was the specific intent language which was vague. By contrast, there is nothing vague about the statutory element of the intent to defraud; it is an intent which is found in dozens of statutes; it is an intent which has historical roots in centuries of common law history.

Thus, contrary to the assertions of the Respondent, there is no need for any "rewriting" of the statute by the judiciary, as the statute, as written, does not have any constitutional defects, Similarly, the "rule of lenity" upon which the Respondent relies is equally inapplicable. That rule, as codified in section 775.021(1), Florida Statutes, provides that when statutory "language is susceptible of differing constructions, it shall be construed most favorably to the accused." In essence, it prohibits the application of a vague statute to a defendant in a criminal prosecution, Carawan v. State, 515 So. 2d 161, 165-66 (Fla. 1987). In the absence of any unconstitutional vagueness, in the absence of any conflicts with any other

statutes, rules of privilege or procedure, ethical canons, etc., the rule of lenity simply does not apply.

II

THE LOWER COURT'S CONCLUSIONS ARE NOT RIGHT FOR THE WRONG REASONS.

The Respondent urges this Court to find that the lower court's decision is "right for the wrong reason." The reasons advanced by the Respondent are reasons which should not be considered by this Court for several reasons. As previously noted, this case is before this Court pursuant to a limited certified question. The "reasons" advanced by the Respondent involve numerous issues which were not addressed by the lower court. Furthermore, they involve factual determinations as to factual matters for which there has been no adjudication in the trial court. Thus, these assorted claims should not be considered by this Court. See, e.g., Salgat v. State, 652 So. 2d 815 (Fla. 1995) (Court lacked jurisdiction to consider a certified question which had not first been passed upon by the district court). The State will nevertheless address these issues in the event that this Court does choose to consider them.

A. Whether "Demand" Letters are "Statements"

Initially, the Respondent asserts that an attorney's demand letter, which forms the basis for some of the counts at issue in this proceeding, does not constitute a "statement," as that term is defined in section 817.234(6), Florida Statutes, and that such a letter cannot form the

basis for a prosecution for insurance fraud. As previously noted, this is a fact-specific argument, for which there has been no factual determination made in the trial court, in the absence of either a trial or a ruling on a sworn motion to dismiss.

The term "statement" is defined very broadly in the statute:

> For the purposes of this section, "statement" includes, but is not limited to, any notice, statement, proof of loss, bill of lading, invoice, account, estimate of property damages, bill for services, diagnosis, prescription, hospital or doctor records, X ray, test result, or other evidence of loss, injury, or expense.

Thus, the definition includes virtually any form of documentation relating to a claim for a loss, in which there are factual misrepresentations or omissions.

While an attorney's demand letter may be more than just a "statement," as it my include things such as the attorney's legal opinions, there is no inherent reason why such a document cannot also constitute a "statement," as, in the process of demanding settlement, the letter can also include either misrepresentations or missions of material facts. Furthermore, insofar as section 817.234(3), Florida Statutes, prohibits attorneys from assisting, conspiring with, or urging claimants to commit insurance fraud, the statute clearly contemplates that submissions by attorneys could trigger the applicability of the insurance fraud statute.

The Respondent further argues that prosecutions predicated upon an attorney's settlement letters would be inconsistent with section 90.408, Florida Statutes. That contention is clearly frivolous as the statute in question is an evidentiary rule regarding the admissibility of settlement Letters for the purpose of proving "liability or absence of liability for the

claim or its value." That statute would have no effect on a criminal prosecution for insurance fraud, as the demand letter would not be offered to prove liability or the absence of liability for the claim or its value; the letter would be offered for the purpose of demonstrating that the author either misrepresented or omitted material facts and that the author intended to defraud the insurer.

B. Equal Protection Claim

In another argument which was not addressed by the lower court, the Respondent argues that the insurance fraud statute violates the equal protection clauses of the state and federal constitutions because it treats claimants and insurance companies differently. Since this does not involve "suspect" classifications, the equal protection requires only a "minimum scrutiny" of whether the classification bears same relationship to a legitimate state puropse. Loxahatchee River Environmental Control District v. School Board of Palm Beach County, 496 So. 2d 930, 937-38 (Fla. 4th DCA 1986).

The Respondent has not carried the burden of demonstrating the absence of such a rational relationship between the alleged classification and a legitimate state purpose. The purpose of this legislation was to reduce insurance premiums paid by the public. The Senate Staff Analysis states that, "Testimony before the Senate Commerce Committee indicated that the tort limitations contained in this bill would reduce verdict amounts with a corresponding reduction in insurance premiums." (2R. 1961). Since insurers pass the costs of fraud on to consumers by way of premium increases, tough insurance fraud provisions against fraudulent claims are a rational mans to protect consumers from inflated premiums. Since fraudulent claims are

initiated and made by claimants, attorneys and physicians, it is rational that the statute punish those who commit the fraud.

This Court rejected a similar claim in LeBlanc v. State, 382 So. 2d 299 (Fla. 1980), where a statute criminalized battery on a spouse but did not similarly criminalize domestic violence occurring between other family members and between unrelated persons sharing a home. The Court rejected the "contention that the statute must apply to all parties who might be involved with or affected by domestic violence. It is not a requirement of equal protection that every statutory classification be all-inclusive. . . . Rather, the statute must merely apply equally to the members of the statutory class and bear a reasonable relation to some legitimate state interest." 382 So. 2d at 300.

Furthermore, claimants and insurance companies occupy substantially different legal positions. Insurance companies are heavily regulated by the State. Unfair trade practices and unfair settlement practices are prohibited. Fraudulent acts by insurers could result in the loss of licenses to conduct business in the State. If insurers fail to settle a legitimate claim, they can be held liable for excess verdicts for bad faith. Claimants and their attorneys are not subject to these regulations.

Thus, the equal protection clause would not invalidate the statute even if it totally failed to address insurers. In fact, the statute does apply to insurers. Under subsection (7), the "provisions of this section apply to any insurer . . . who, with intent, injure[s], defraud[s] or deceive[s] any claimant with regard to any claim." The prior "provisions of this section" provide for criminal penalties, and a civil cause of action

upon a criminal adjudication of guilt. Under subsection (7), these same penalties apply to insurers. Contrary to the Respondent's assertions, this statute goes beyond the requirements of equal protection.

C. Absence of Conflict with PIP Statute

The essence of the Respondent's argument is that the insurance fraud statute and the PIP statue, section 627.736, Florida Statutes, are in conflict as to the disclosure of medical reports to an insurer. This claim was not addressed by the lower court. Moreover, this claim is also one which would require factual development, through either a trial or sworn motion to dismiss, in the trial court,

The Respondent contends that the PIP statute requires disclosure -to an insurer of a claimant's medical reports only under limited conditions, and that those conditions requiring disclosure are inconsistent with the insurance fraud statute's requirement of automatic disclosure. Because of this alleged conflict, the Respondent argues that it can not be prosecuted for fraudulent omissions in uninsured motorist claims, where a PIP claim has also been submitted.

As the insurance fraud statute does not require automatic, full and complete disclosure of all medical records, the Respondent's argument clearly fails. The insurance fraud statute, as previously detailed in both this brief and the State's prior brief, prohibits only the knowing submission of statements containing incomplete information, with fraudulent intent. Even though disclosure under the PIP statute is required only under certain specified conditions, that statute does not state that fraudulent nondisclosure is permissible even when the specified conditions do not otherwise mandate disclosure. Once again, when an attorney acts without an

intent to defraud, the two statutes are fully consistent. It is perfectly consistent to require disclosure for PIP purposes in limited circumstances, while criminalizing acts accompanied by an intent to defraud which nevertheless occur prior to the occurrence of those limited circumstances.

Not only are the two statutes consistent, but section 626.989(1), Florida Statutes, which vests the Division of Insurance Fraud with the power to investigate insurance fraud, defines "fraudulent insurance acts " to include acts committed knowingly, with an intent to defraud, presented in support of a claim for payment or other benefit pursuant to any insurance policy, if the party "conceals, for the purpose of misleading mother, information concerning any fact material thereto." This section does not exempt uninusured motorist/PIP claims.

D. Right to Privacy

The Respondent also argues, in passing, see Brief of Respondent, p. 11, that the insurance fraud statute violates the constitutional right to privacy by requiring disclosure of privileged medical information. As with most of the Respondent's arguments, as this issue was not addressed by the lower Court, this Court should not consider it. In any event, the simple response, as repeatedly asserted by the State, is that the statute does not mandate disclosure of any materials, privileged or otherwise. The attorney can protect allegedly privileged materials by refraining from the submission of a fraudulent claim, Furthermore, compelling state interests can override any alleged constitutional privacy interests. Winfield v.Division of Pari-Mutuel Wagering, 477 So. 2d 544, 548 (Fla. 1985). Many cases have concluded that patients' medical records could be obtained during the course of a government investigation of insurance fraud, as the governmental interest in

proscribing fraudulent conduct prevailed over the alleged privacy interest. See, e.g., In re Search Warrant, 810 F. 2d 67 (3d Cir. 1987); United States v. Burzynzki Cancer Research Institute, 819 F. 2d 1301 (5th Cir. 1987); United States v. Westinghouse Elec. Corp., 638 F. 2d 570, 577 (3d Cir. 1980).

E. Theft Counts

Lastly, the Respondent argues that the counts charging theft, under section 812.014, Florida Statutes, should have been dismissed because they are predicated on the same fraudulent omission involved in section 517.234, In the absence of a trial or a sworn motion to dismiss, theft charges cannot properly be dismissed, as the charging document, alleging theft, does not specify the acts constituting the basis for the theft. (R. 51).

Even viewing the theft charges as corresponding to the insurance fraud counts, dismissal of theft charges would still be improper. Just as the federal mail fraud statute has been applied in the context of insurance fraud through a failure to disclose, United States v. Richman, 944 F. 2d 323, 332 (7th Cir. 1991), so too, Florida's theft statute can apply to theft by a fraudulent failure to disclose material information. Thus, to the extent that the Fourth District's decision implies that theft charges based solely on fraud by mission must fail, for the same reason that the lower Court has improperly construed the insurance fraud statute itself, the Fourth District's analysis of the theft charges fails.[2]

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[2] The lower Court's analysis merged the question of theft charges with the analysis of insurance fraud by omission and concluded that all counts dismissed by the trial court should be reinstated "except those which are totally and exclusively dependent upon alleged incomplete statements tendered by the attorneys in representation of their clients." Pet. App. p. 6.

CONCLUSION

Based on the foregoing, the lower Court's analysis of fraud in the context of incomplete claims, whether charged under the insurance fraud statute or the theft statute, is in error, and that portion of the decision should be quashed and the certified question should be answered in the negative.

Respectfully s&Knitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Petitioner has been mailed this 11th day of October, 1995, to H. DOHN WILLIAMS, JR., Esq., 110 S.E. 6th Street, Suite 1710, P.O. Box 1722, New River Station, Fort Lauderdale, FL 33302; J. DAVID BOGENSCHUTZ, Esq., 600 South Andrews Avenue, Suite 500, Fort Lauderdale, FL 33301; RONALD GURALNIK, Esq., 3225 Aviation Avenue, Suite 600, Miami, FL 33131; EDWARD R. CARHART, Esq., 2151 S. Lejeune Road, Suite 202, Coral Gables, FL 33134; ARCHIBALD

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