IN THE SUPREME COURT OF FLORIDA

CASE NO. 85,920

THE STATE OF FLORIDA,

Petitioner/Cross-Appellee,

-vs-

MARK MARKS, et al.,

Respondent/Cross-Appellant.

REPLY BRIEF OF PETITIONER/ANSWER BRIEF OF CROSS-APPELLEE (AS TO RESPONDENT MARK MARKS)

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STATEMENT OF THE CASE AND FACTS

The State rejects the Respondent's Statement of the Case and Facts. The Respondent has presented detailed "factual" allegations regarding many of the offenses charged in the information. These "factual" matters have never been adjudicated in the trial court. The charges have not been resolved by any factual determinations which would accompany either a trial or any form of a pretrial evidentiary hearing. Moreover, the counts which had been dismissed by the trial court and which are the subject of these appellate proceedings were not even resolved pursuant to a sworn motion to dismiss under Rule 3.190(c)(4), Florida Rules of Criminal Procedure. As there has never been any factual adjudication of such matters in the lower courts, the State maintains that such factual presentations are entirely inappropriate and beyond the scope of either the State's appeal/discretionary review proceeding or any cross-appeal arising from that proceeding. Furthermore, as many of the "factual" matters asserted by the Respondent are matters which the State would dispute if they ever reached a proper evidentiary forum in the trial court, the inability of this Court to resolve any such factual questions which have never been addressed by a trier of fact in a trial court is readily apparent.[1] For obvious

[1] For such obvious reasons, the Fourth District Court of Appeal did not address or resolve any of the multitude of "factual" allegations presented by the Respondents in that Court. The Fourth District's decision was based only upon the questions of

reasons, in the absence of either a trial or an evidentiary hearing, the State has never had any reason to even present all of the pertinent evidence on the various counts at issue herein.

The Respondent's "factual" presentation appears to be based on State v. Globe Communications Corp., 622 So. 2d 1066 (Fla. 4th DCA 1993), affirmed, 648 So. 2d 110 (Fla. 1994). The State, in Globe, had conceded in the appellate court that record support existed for the lower court's conclusion that the statute in question there was unconstitutional as applied to Globe under the facts of the case. 622 So. 2d at 1067. The sale issue on appeal was the facial constitutionality of the statute in question. Id. The appellate courts did not decide any issues regarding the facts of that case, or the application of the statute to the facts. Furthermore, factual matters in Globe, to whatever extent they may have been significant, were presented and addressed in the trial court in two distinct contexts: (1) a sworn motion to dismies; and (2) through a pretrial evidentiary hearing on relevant factual matters which were then adjudicated by the trial court in its capacity as the finder of fact. No factual matters in the instant case have been adjudicated in either of those contexts. What the Respondent presents as "facts" to this Court routinely consists of quotes from either

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whether the counts involved attorneys and whether the claims were first-party or third-party claims. Those matters were admitted by all parties in the trial court and those are the only matters which were deemed appropriate or relevant in the ensuing Fourth District Court of Appeal proceedings.

documents or depositions appended to motions which have never been ruled upon.

While the State therefore rejects the Respondent's Statement of the Case and Facts virtually in its entirety, the State will herein focus on several of the egregious "factual" allegations of the Respondent, and show how they have been disputed by the State in the trial court, and demonstrate why such unadjudicated allegations cannot have any bearing on the proceedings pending in this Court.

A. Neomia Williams. In response to a sworn motion to dismiss, which has not been ruled upon by the trial court and is not subject to this appeal, the State filed a traverse, specifically denying the allegation that Dr. Kagan, whose report was suppressed by the defendants, "was not Williams' examining or treating doctor." (SR. 73-77). The State also denied that Dr. Kagan had been retained as an expert in anticipation of litigation. The Respondent asserts that Dr. Kagan's suppressed report, in which Dr. Kagan stated that an MRI showed no evidence of disc herniation, is irrelevant to the claim involved. Brief of Respondent, pp. 7-8. The defendant's demand letter to the insurer, which was appended to the same sworn motion to dismiss which the trial court never ruled upon, reflects that the scope of the demand was greater than the Respondent would have this Court believe. The demand letter referred to earlier thermographs as positive proof of lumbar radiculopathy, which would relate to the type of neurological injury which Dr. Kagan explicitly did not find. (2R. 445-448).

B. Annette Hardimon. The Respondent implies that the medical report of Dr. Thorne, which was omitted from the attorney's demand package to the insurer, involved a prior "separate and distinct worker's compensation claim which occurred either months earlier," and was therefore irrelevant to the slip and fall claim which was the subject of the demand. What the Respondent omits, however, is that the same demand package included all of Dr. Thorne's reports for visits **before** the liability **accident.** The omitted report was for a visit after the liability accident in which Dr. Thorne found nothing seriously wrong with the patient, and suspected malingering. (2R. 1812-13; **1945-46; 346-47).**

C. Williamena Nelams. The counts regarding Ms. Nelams involved a slip and fall **case** in which the State has alleged that the Marks law firm concealed three medical reports which stated that an MRI showed no disc herniation. (2R. 1813-14). **The** Respondent, in this Court, is urging a distinction as to whether the reports meant that these was no disc herniation or no disc herniation into the lumbar spinal canal. Brief of Respondent, p. 12. One of the omitted reports from Dr. Centrone did not contain any such qualification **and** specifically stated that the MRI "didn't show any definite disc herniation." (R. 690).

D. Phillip Gammage. With respect to count 23, which charged that the defendant, Mark Marks, urged Gammage to make a false claim by undergoing unnecessary surgery, the State, in the trial court, filed a traverse, to a sworn motion to dismiss

regarding the Gammage count. (SR. 40-43). That sworn motion has never been ruled upon by the trial court. In that traverse, the State denied the defendant's statement that "Marks did not suggest that he fake or exaggerate any injury.'' (SR. 40). The State further denied the defendant's statement that Gammage "did not fake or exaggerate any pain.'' (SR. 40).

E. Sharon Mills. Count 22, regarding Ms. Mills, is not the subject of any trial court rulings. The count charges that the defendant urged Ms. Mills to exaggerate her pain and suffering during medical examinations. (2R. 93). The Respondent simply refers to Ms. Mills's deposition where she denied exaggerating any such pain and suffering. As the charge relates to the Respondent's alleged act of urging Ms. Mills to act improperly, whether or not Ms. Mills exaggerated pain and suffering is irrelevant to the defendant's alleged prior act of urging.

F. Montgomery. Counts 29-33, regarding Mr. Montgomery, involve the alleged submission, by the defendant's law firm, of a letter purporting to be from a doctor, on a doctor's stationery, which report, however, was prepared by the law firm, and not by the doctor.

G. Drinks. The Respondent's account of the Drinks' count allegations demonstrates the impropriety of considering such factual allegations in this proceeding, as the Respondent refers to what the Respondent denotes as the lack of credibility of Mr. and Mrs. Drinks. Brief of Respondent, p. 15. Such matters

are obviously to be decided by a trial court, after an appropriate trial or evidentiary hearing.

In view of the foregoing, the State reiterates that any and all such factual matters are irrelevant to the issues properly before this Court. Those factual matters have never been resolved by any finder of fact in the trial court and clearly can not form the basis for any appellate court's decision absent prior litigation and adjudication in a proper trial court forum.

ARGUMENT

I

SECTION 817.234(1), FLORIDA STATUTES, IS NOT UNCONSTITUTIONALLY VAGUE WHEN APPLIED TO FRAUDULENT OMISSIONS BY ATTORNEYS IN THE REPRESENTATION OF THEIR CLIENTS.

The Respondent's argument regarding the alleged unconstitutional vagueness of section 817.234(1), Florida Statutes, as applied to attorneys, who, with the intent to defraud, submit incomplete claims to insurers while omitting material information, is predicated upon various arguments related to attorney-client privileges, physician-patient confidentiality, attorneys' ethical standards, and attorneys' higher degrees of education. These matters are largely addressed in the State's initial brief herein, as well as in the Reply Brief to the co-Respondent, Mark Marks, P.A.. The instant brief will therefore attempt to focus on the distinctive arguments raised by this particular Respondent/Cross-Appellant.

As the State has previously argued at great length, the intent to defraud gives the statute its scope and definition. As fraudulent conduct is involved, attorneys have no vested right in protecting criminally fraudulent conduct on their part. Similarly, as previously argued, fraudulent conduct will not provide an excuse for an attorney to assert any form of work-product or attorney-client or medical privilege. Those privileges, to whatever extent they exist, can be protected by

refraining from the submission of the fraudulent claim. That way, the insurer is not defrauded; the attorney's and client's privileged matters remain confidential; and the interests of all parties are kept in a proper balance.

While the State has previously endeavored to furnish case law defining the intent to defraud, the State would further note, that in State v. Thompson, 607 So. 2d 422 (Fla. 1992), this Court approved the decision of the Fifth District Court of Appeal in Thompson v. State, 585 So. 2d 492 (Fla. 5th DCA 1991), in which the Fifth District, in a general discussion of the fraudulent practices defined in Chapter 817, stated "that the specific statutory offenses of theft, such as those contained in Chapter 817, are different degrees (or more specific descriptions) of the general offense of theft defined in Chapter 812." 585 So. 2d at 494. Thus, the intent to defraud is indicative of an intent to commit theft. Such an intent clearly denotes that the insurance fraud statute's proscription of fraud by omission refers to illegal conduct in which no person, whether an attorney or otherwise, has any legitimate interest.

The Respondent attempts to minimize the significance of this intent to defraud through a detailed discussion of three cases - Smiles v. Young, 271 So. 2d 798 (Fla. 3d DCA), cert. den., 279 so. 2d 305 (Fla. 1973); Wilkinson v. Golden, 630 So. 2d 1238 (Fla. 2d DCA 1994); and USM Corp. v. SPS Technologies, Inc., 694 F. 2d 505 (7th Cir. 1982), cert. den., 462 U.S. 1107 (1983). None of those cases supports the Respondent's argument

about the insignificance of the intent element of the statute. None of those cases even construes a penal statute, let alone s. 817.234.

Smiles involved the efforts of personal injury plaintiffs to vacate a judgment entered pursuant to negotiations and stipulation. The plaintiffs asserted that subsequent to the negotiated settlement, they discovered that one of the plaintiff's injuries were more serious than originally believed. They further alleged that the defendants, as a result of their knowledge of a report prepared by a court-appointed physician, were aware of the greater severity of the injuries, but failed to disclose that report to the plaintiffs. The appellate court ruled in favor of the defendants, finding that the defendants were not obligated to disclose this report and concluding that grounds did not exist, under Rule 1.540, Florida Rules of Civil Procedure, for vacating the judgment. This conclusion was based, in large part, on the provisions of Rule 1.360(b), Florida Rules of Civil Procedure, which required disclosure of the report only if the report was requested by the examined party. It was also obvious that all parties were aware of the examination and the report. More significantly, the case did not arise in the context of an explicit statute which criminalizes certain acts, occurring during the submission of claims, when those acts are committed with a fraudulent intent.

Wilkinson involved the question of whether a dental malpractice action should be dismissed as a result of a

Plaintiff's failure to comply with statutory requirements relating to presuit investigations and efforts to resolve such claims. The statutory scheme required presuit notice of intent to litigate, a 90-day period for evaluation of the claim, and cooperation, during that 90-day period, in "informal" discovery. Counsel for the defendant, during that 90-day period, had requested, inter alia, all of the claimant's health care providers for the preceding ten years. The claimant furnished information for just the preceding five years, withholding information from the earlier time period which included references to another dentist whom the claimant had sued for malpractice. Wilkinson did not involve any question of fraud or intent to defraud. There was no determination, or allegation, that disclosure of the earlier medical history would have negated the current claim. The earlier medical history may have had no bearing at all on the current claim. In short, Wilkinson does not sanction the withholding of any information when such concealment is coupled with an intent to defraud. Nor does Wilkinson prohibit prosecutions under a statute which explicitly covers such situations.

USM Corp., supra, involved an analysis of the relation between a consent judgment in a patent infringement suit, and subsequent allegations that the patent, which the judgment had deemed valid, had been procured by fraud. After SPS's patent had been decreed valid, and USM commenced paying royalties to SPS pursuant to the judgment, USM initiated a second suit,

contending that SPS's patent had been procured by fraud, and that SPS, during discovery in the first case, had failed to disclose that the inventor of the patented device at issue had submitted a patent application to the Patent Office several years earlier, but had subsequently withdrawn that information. The nondisclosure of that earlier patent application did not reflect any intent to defraud. During the inventor's pretrial deposition, that earlier application was discussed. 694 F. 2d at 508. When USM's counsel sought it, SPS's counsel did not deny its existence, but contested its relevancy, and USM did not pursue the matter any further, although they were aware of it. Id. Not only was there an apparent lack of fraudulent intent, coupled with substantial disclosure to the other party from which the other party could make its own relevancy determination, but, as in the prior cases, no action was predicated on a statute which explicitly proscribed the conduct in question.

To a large extent, the foregoing cases simply reflect the reluctance of a judiciary to proscribe that which a legislature has failed to proscribe. They do not divest the legislature of the power to proscribe fraudulent conduct. Nor do the foregoing cases grant attorneys the right to engage in efforts to defraud insurers by omitting material information from claims submitted to the insurers.

The Respondent places great weight on the notion that personal injury claims are often imprecise or speculative as to

the ultimate dollar value of the claim. Thus, the Respondent seems to imply that it is difficult to determine when an attorney's omission from a claim is related to an effort to obtain more than the attorney's client is legally entitled to. The State would note that mere opinions as to dollar values for a claim, whether they are right or wrong, are not in and of themselves fraud by omission. Not only are the opinions as to dollar values not "omissions," and not only are they opinions as to the attorney's legal conclusions, but, to whatever extent fraud by omission exists, it will exist by the fraudulent concealment of underlying materials related to the claim. The fact that it may be difficult, in any given case, to determine when a party is acting with a fraudulent intent, does not render a statute either unconstitutional or facially invalid as applied to attorneys. Many statutes routinely present difficult questions as to whether sufficient proof of state of mind exists, for the purpose of proving the intent element of a penal statute. That, however, does not preclude judges and juries from routinely making the necessary determinations. Indeed, in many cases, the determinations will be relatively simple. When the attorney is pursuing a claim which is known to be frivolous, and the attorney conceals the underlying materials which demonstrate the frivolous nature of the claim, the determinations will not be speculative. This Court, through the ethical canons which it has adopted for attorneys, has routinely proscribed the pursuit of frivolous claims. Such ethical

constraints are based on the implicit notion that the frivolous claim pursued by the attorney is one which is tantamount to an effort to defraud an opposing party.

In view of the foregoing, for the reasons stated in the State's initial brief, in the reply brief to the co-Respondent, Mark Marks, P.A., and in this reply brief to Mark Marks, this Court should conclude that the lower Court erred in concluding that section 817.234(1) is unconstitutional as applied to attorneys in the context of "incomplete" claims.

II

SECTION 817.234, FLORIDA STATUTES, DOES NOT UNCONSTITUTIONALLY ENCROACH ON THE POWERS OF THE JUDICIARY.

The Respondent next asserts that the insurance fraud statute invades the exclusive jurisdiction of this Court to regulate the professional or ethical conduct of attorneys. This claim is frivolous. While Article V, Section 15, of the Florida Constitution, gives this Court "exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted," a criminal prosecution is not an exercise in the discipline of a member of the bar. The Respondent's claim has been expressly repudiated in Pace v. State, 368 So. 2d 340, 345 (Fla. 1979), which involved a penal anti-solicitation statute:

> The appellant argues that the legislature may not criminalize conduct by a lawyer committed in the course of his practice of law, unless the conduct is criminal per se. To adopt this view would be to say that the legislature may not punish conduct deemed harmful to the public welfare if the conduct also falls within the purview of this Court's authority to discipline lawyers for violating the Code of Professional Responsibility in the course of their practice of law. Simply because certain conduct is subject to professional discipline is no reason why the legislature may not proscribe the conduct. Under the police power the legislature may enact penal legislation that affects the legal profession just

as it can with regard to other occupations and professions.

(emphasis added).

Contrary to the Respondent's contention, that attorney does not face a Hobson's choice of whether to protect privileged or confidential information ok whether to pursue a personal injury claim. The attorney need only refrain from submitting fraudulent claims to the insurer. That way, the attorney does not engage in criminal conduct; the insurer is not defrauded; and the client's privileged communications or attorney's work-product remain confidential. As noted in the State's initial brief herein, several sections of the Rules Regulating the Florida Bar effectively prevent an attorney from relying on asserted privileges to either engage in, or assist a client in engaging in, fraudulent conduct. See, Rules 4-1.6(c); 4-1.6(b); 4-4.1; Kneale v. Williams, 158 Fla. 811, 30 So. 2d 284 (1947); Pearlman v. Pearlman, 425 So. 2d 666 (Fla. 3d DCA 1983); Anderson v. State, 297 So. 2d 871 (Fla. 2d DCA 1974). Neither this Court, nor the Florida Bar, permit fraudulent conduct to exist under the guise of "privileges."

III

ARGUMENTS ON CROSS APPEAL

A. THE LOWER COURT DID NOT ERR IN HOLDING THAT SECTION 817.234, FLORIDA STATUTES, APPLIES TO THIRD-PARTY CLAIMS.

One of the holdings of the Fourth District Court of Appeal was that section 817.234(1), Florida Statutes, applies, not only to first-party claims, in which a person seeks payments under that party's own insurance policy, but to third-party claims as well, in which the claimant seeks payments from another party's insurance policy. That conclusion is supported by the clear language of the statute, the purpose of the statute, the legislative history, common sense, and pertinent case law. [2]

Section 817.234(1) essentially prohibits "any person" from committing insurance fraud. In interpreting the statute, certain well-established rules of statutory construction are helpful. The intent of the legislature is the paramount consideration. Lloyd Citrus Trucking, Inc. v. State Dept. of Agriculture, 572 So, 2d 977 (Fla. 4th DCA 1990). The words used are the best evidence of this legislative intent where they are plain and unambiguous. City of Delray Beach v. Barfield, 579 So. 2d 315 (Fla. 4th DCA 1991). When reading a statute, a court

[2] As the instant case is before this Court pursuant to a limited certified question, the issue of whether the insurance fraud statute applies to third-party claims is one which this Court need not reach.

should give the language its plain and ordinary meaning. Lloyd Citrus Trucking, supra. While the legislative intent is determined primarily from the language of the statute itself, a literal interpretation need not be given when to do so would lead to unreasonable conclusions or would defeat clear legislative intent. Winemiller v. Feddish, 568 So.2 d 483 (Fla. 4th DCA 1990).

1. The statutory phrase "any person" means any person

Subsection (l)(a) of the insurance fraud statute, according to its own language, applies to "any person" who prepares or makes a fraudulent submission to an insurer. The plain and ordinary meaning of this language would include fraudulent submissions by allegedly injured third parties, Since there is nothing inherently unreasonable about the legislature prohibiting such fraud, the issue is whether this plain meaning of the language should not be followed because it would defeat the clear intent of the legislature.

The Respondent argues that the phrase "any person," as used in section 817.234(1), does not include third-party claimants, in part because of terminology used in subsections (2), (3) and (4) of the statute. Section 817.234(2), Florida Statutes, provides, in part, that "[a]ny physician . . . who knowingly and willfully assists, conspires with, or urges any

insured party to violate any of the provisions of this section . . . is guilty of a felony of the third degree. . . .." (emphasis added). Subsection (3), pertaining to attorneys, provides that "[a]ny attorney who knowingly and willfully assists, conspires with, or urges any claimant to violate any of the provisions of this section . . . is guilty of a felony of the third degree . . . ." Subsection (4), pertaining to hospital personnel, uses the phrase "insured party." Contrary to the Respondent's argument, the legislature's use of different terms in different portions of the same statute is strong evidence that it intended different meanings. Ocasio v. Bureau of Crimes Compensation, 408 so. 2d 751 (Fla. 3d DCA 1982); Department of Professional Regulation v. Durrani, 455 So. 2d 515 (Fla. 1st DCA 1984). The fact that the legislature knowingly and intentionally used a broader phrase in subsection (1) clearly indicates the intent that that subsection have broader applicability.

2. Claimants and Claim Forms

The Respondents have further argued in this Court and in the lower courts, that section 817.234(1)(b) refers to "claims forms," thus indicating a statutory intent to limit the scope of section 817.234(1) to "claimants," and that "claimants" would include only first-parties, not third-parties, since claims forms are used only for first party insurance claims. see, Answer Brief of Mark Marks, p. 37. Courts from other

jurisdictions, construing similar statutory provisions, have routinely rejected the highly contrived and artificial construction which the Respondent would have this Court adopt, as such a construction would defeat the clear purpose of the statute and would defy both common sense and an ordinary understanding of the term "claim."

For example, in People v. Benson, 23 Cal. Rptr. 908, 916-17 (Cal. App. 1962), California's insurance fraud statute referred to claims for payment of a loss "under a contract of insurance." The California court applied the statute to third-party claims:

> It was pointed out earlier that the gravamen of the substantive offense is the defendant's intent to defraud. The Legislature realistically provided in the concluding paragraph of section 556 that "Every person who violates any provision of this section is punishable by imprisonment. . . " (Emphasis added.) In turn, we' propose to be realistic in our interpretation of its coverage, particularly in light of the circumstances at bar. It is a matter of common knowledge that insurance companies negotiate settlements directly with injured parties or their attorneys because of the liability of the insured.

23 Cal. Rptr. at 916. (emphasis added). Benson was an attorney, pursuing "claims" on behalf of his client, who was injured in an automobile accident. Other California courts have reached the

same conclusion. See, e.g., People v. Petsas, 262 Cal. Rptr. 467 (Cal. App. 1989); People v. Grossman, 82 P. 2d 76 (Cal. App. 1938); People v. Reed, 190 Cal. App. 2d 344, 11 Cal. Rptr. 780 (Cal. App. 1961).

Similarly, in Kiddie v. State, 575 P. 2d 1042 (Okla. App. 1977), the court concluded that an insurance fraud prosecution did not have to be predicated upon privity of contract between the defendant and the insurer. Oklahoma's statute referred to fraudulent claims upon a contract of insurance. In rejecting the defendant's argument that the statute applied only to first-party claims, the court emphasized the absurdity of such a contention:

> Such an interpretation would be clearly ludicrous as it would not concur with reason and the spirit of the statute, i.e., to arrest the shameful conduct of those who attempt to collect funds from insurance companies on fraudulent manufactured claims. Additionally, a reading of the statute reveals that it sanctions every person who presents or causes to be presented a false claim on any contract of insurance. It does not state that the claim must be filed on a contract of insurance between the accused and the insurance company.

574 P. 2d at 1047. See also, Day v. State, 784 P. 2d 79 (Okla. App. 1989); United States v. Maker, 751 F. 2d 614 (3d Cir. 1984) (applying federal mail fraud statute to fraud during the course of third-party claims against insurer); United States v. Neely, 980 F. 2d 1074, 1091 (7th Cir. 1992) (same).

Further support for the foregoing conclusion comes from this Court's recent decision in Auto-Owners Insurance Company v. Conquest, 20 Fla. L. Weekly S312 (Fla. July 6, 1995). That decision construed section 624.155, Florida Statutes, which defines the circumstances under which a person may sue an insurer who violates provisions of the insurance code. This Court, approving a decision of the Second District Court of Appeal, and disapproving a contrary decision of the Third District Court of Appeal, Cardenas v. Miami-Dade Yellow Cab Co., 538 So. 2d 491 (Fla. 3d DCA 1989), concluded that the use of the phrase "any person," in section 624.155, clearly applied to "any person," and did not make any distinctions between first and third-parties:

> Section 624.155 is the mechanism by which a person may bring a civil suit against an insurer who violates the Insurance Code and provides that "[a]ny person may bring a civil action against an insurer when such person is damaged." We find the section's use of the words "any person" is dispositive. The words are precise and their meaning unequivocal. By choosing this wording the legislature has evidenced its desire that all persons be allowed to bring civil suit when they have been damaged by enumerated acts of the insurer. This court has a long history of giving deference to a statute's clear and unambiguous wording. . . .

20 Fla. L. Weekly at S313. It is highly significant that the Respondents, in the lower courts, had relied extensively on the Cardenas decision which this Court expressly overruled.

The few cases upon which the Respondent relies, in which "any person" was not construed to mean "any person," did so in the context of unique aspects of the statutes involved, as well as for the purpose of avoiding absurd results. See e.g., Lee v. Gaddy, 183 So. 4 (Fla. 1938) (Court perceived literal application of phrase "any person" to constitute absurd and unintended result as it would have required ball-players, teachers, journalists, ministers, etc., to obtain occupational licenses); Lambert v. Mullan, 83 So. 2d 601, 604 (Fla. 1955) (Court emphasized that it was acting as it did to avoid an otherwise "'unreasonable or ridiculous conclusion. . . .'"). By contrast, there is nothing absurd about a legislative attempt to proscribe fraudulent acts against insurers responding to third-party claims. Those claims, as they deal with liability insurance, involve what is probably the largest area of insurance practice, and vast opportunities for the perpetration of fraudulent actions through efforts to collect on fabricated or exaggerated claims clearly exist. The only absurdity would arise if the area of third-party practice were exempted from the insurance fraud statute, as it would imply that the legislature intended to proscribe insurance fraud in all areas of insurance except the predominant area of practice.

As to the Respondent's factual assertion that third-party practice does not use "claims forms," and that third parties are therefore not "claimants," not only is there no factual record for that assertion, but, even if it were true,

there is no apparent reason why insurers could not require third-party claimants to submit their claims on "claims forms." Furthermore, as the Third District Court of Appeal has concluded in State v. Book, 523 So. 2d 636 (Fla. 3d DCA 1988), claims can be commenced by informal means, other than through the use of statutory claims forms. Thus, in Book, a "claim" was deemed to have been initiated through a telephonic communication.

The Respondent's argument is negated by numerous other provisions of the insurance code and related statutes, in which "third parties" are routinely referred to as "claimants" - that animal which the Respondent would have the Court believe not to exist. For example, section 627.743, Florida Statutes, is specifically entitled "payment of Third Party Claims." Similarly, section 627.7275, specifies that "coverage of property damage liability shall meet the applicable requirements of s. 324.151. . . . ." Section 324.151(1)(a), in turn, asserts that "the insurer shall pay to the third-party claimant the amount of any property damage liability settlement or judgment . . . ." Section 627.727(6)(a), Florida Statutes, at all pertinent times since the adoption of Florida's insurance fraud statute, has similarly included language which refers to third party claimants, as it deals with "injured persons" who settle claims with insurers. In short, over and over again, the insurance code recognizes the relationship which exists between third party claimants who seek to settle liability claims with other parties' insurers. Such statutory relationships are

utterly inconsistent with the Respondent's vision, under which third party claimants either do not exist or have an inherent right to perpetrate frauds on insurers for the simple reason that those defrauded insurers are other parties' insurers. Thus, the Respondent's message: defraud an insurer as long as it is not your own insurer. Thus, the Respondent's interpretation of legislative purpose: prohibit insurance fraud in all areas except the predominant area of insurance practice.

3. Legislative History

The history of the insurance fraud statute also fails to support the Respondent's limiting construction of the law's plain language. The initial insurance fraud statute was enacted by Chapter 76-266, s. 7, Laws of Florida, which provided the following:

> (1) Any insured party or insurance adjuster who, with intent, knowingly and willfully conspires to fraudulently violate any of the provisions of this part or who, due to fraud on such person's part, does knowingly and willfully violate any of the provisions of this part is guilty of a felony of the third degree. . . .

Section 627.7257, Florida Statutes (1976 Supp.) (emphasis added).

This wording was changed by the Florida Insurance and Tort Reform Act of 1977, Chapter 77-468, s. 36, Laws of Florida. The provision concerning the insurer and insurance adjuster was moved and presently appears, with some modification, in s. 817.234(7). Subsection (l)(a) waa rewritten to prohibit "any person" from presenting, causing to be presented, preparing or making any statement as part of, or in support of an insurance claim, knowing it contains false, incomplete or misleading material information, with intent to injure, defraud or deceive the insurer. In rewriting this section, the legislature could have retained the wording, "Any insured party;" it did not. This wording was changed to "any person." It is a recognized principle of statutory construction that when a legislature amends a statute by omitting or including words, it is to be presumed that the legislature intended the statute to have a different meaning than that accorded it before the amendment. Capella v. City of Gainesville, 377 So. 2d 658 (Fla. 1979).

The legislative intent to expand the scope of the insurance fraud statute is further shown by the 1977 Senate Staff Analysis and Economic Statement of June 7, 1977, which includes in its "Bill Summary" that the bill "[p]rovides for strong anti-fraud provisions." (2R.1 957). Its summary of Section 36, which rewrote the insurance fraud statute into its present form, includes the following:

> Section 36. This section rewrites s. 627.7375 in the following manner:
>
> (1) Fraudulent claims - expanded to all persons involved in the auto claims process.

(2R. 1960) (emphasis added).[3] Since the predecessor statute included parties, insurers and insurance adjusters, and had provisions concerning attorneys and physicians, the legislature obviously did not intend "any person" to mean only "any insured party," since that would have contracted, not expanded, the scope of the statute.

The legislative intent in enacting the Florida Insurance and Tort Reform Act of 1977 was "to deal comprehensively with tort claims and particularly with the problem of a substantial increase in automobile insurance problems." State v. Lee, 356 So. 2d 276, 282 (Fla. 1978). The Senate Staff Analysis specifically states, "Testimony before the Senate Commerce Committee indicates that the tort limitations contained in this bill would reduce verdict amounts with a corresponding reduction in insurance premiums." (2R. 1961). It would be most curious for this omnibus tort reform law to have a claims fraud section which did not cover liability claims. The Respondent effectively argues that this law prohibits fraudulent submissions under every type of insurance policy except

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[3] Section 627.7375, Florida Statutes, was renumbered, in 1979, to become section 817.234. Chapter 79-81, s. 1, Laws of Florida,

liability insurance. That would be an absurd consequence for a law whose purpose was tort reform. Statutes should be construed to avoid absurd consequences. City of St. Petersburg v. Siebold, 48 So. 2d 291 (Fla. 1950).[4]

4. Nonjoinder and the Insurance Fraud Statute

Key to the Respondent's analysis is the interplay between the insurance fraud and the nonjoinder statutes. The present nonjoinder statute provides that an injured third party has no interest in a liability insurance policy until verdict or judgment. The Respondent therefore reasons that since a third party has no substantive rights against the insurer prior to verdict or judgment, there is no insurance "claim" prior to that time. Thus, the Respondent reasons that the legislature could not have intended to include third parties within the law's ambit, as the fraudulent statement had to be prepared or submitted as part of, or in support of a "claim."

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[4] The trial court, when rejecting the State's arguments regarding this issue, had concluded that "the legislature could have meant to expand the statute to include executors or administrators of estates which were not incorporated within the prior text." (2R. 1980). Such a bizarre construction of the legislative change from "any insured party" to "any person" has absolutely no basis in the statutory language, the legislative history, or the purpose of the statute.

Much of the Respondent's reasoning has been repudiated by this Court's recent decision in Auto-Owners Insurance Company v. Conquest, supra, in which this Court concluded that third-party claimants, who are not in privity with insurers, do have certain rights to sue others' liability insurers regardless of whether the third-party claimant has previously obtained a judgment against the insured. And, as previously noted, the courts of several other jurisdictions have rejected the requirement of privity between the claimant and the insurer as a prerequisite for application of a state's insurance fraud statute in the context of third-party claims. This, as noted by the lower court, was concluded in jurisdictions which have similar nonjoinder statutes to Florida's. See, Pet. App. 20; Benson, supra. Furthermore, one need not have a right to sue in court in order to submit an informal, nonjudicial claim to another's insurer. There is no reason why a legislature can not choose to prohibit fraudulent acts even in cases where the acts prohibited are those perpetrated by parties not permitted to sue the defrauded victim. The reductio ad absurdum of the Respondent's thesis can be seen more clearly in the context of penal statutes prohibiting fraudulent acts against governmental entities. Following the Respondent's argument, if the government did not waive sovereign immunity, it could not criminalize acts of fraud committed against the government. After all, the perpetrator could not sue the government, so why should the perpetrator be prohibited from defrauding the government?

The Respondent's argument fails for other reasons as well. Most significantly, in 1977, when the insurance fraud statute was enacted in substantially its present form, the present nonjoinder statute was not yet enacted. Prior to the enactment of Chapter 82-243, s. 542, Laws of Florida, the third-party claimant was a third-party beneficiary under the insurance policy. Shingleton v. Bussey, 223 So. 2d 715 (Fla. 1969). The injured third party had a legally enforceable claim against a liability insurer when the insurance fraud statute was drafted and enacted, and was a "person" making submissions in support of a "claim." The legislature is presumed to know the existing law at the time that it enacts the statute. Opperman v. Nationwide Mutual Fire Ins. Co., 515 So. 2d 263 (Fla. 5th DCA 1987). By using broad language - "any person" - and not expressly limiting the type of insurance claim involved, the legislature clearly intended the fraud section to apply to any type of insurance claim.

The inclusion of a nonjoinder statute in the Insurance and Tort Reform Act of 1977 (Chapter 77-468, s. 39, Laws of Florida), enacted as s. 768.045, Florida Statutes (1977), does not affect this conclusion. This nonjoinder statute did not affect the substantive rights of a third-party claimant, and was virtually identical to a prior nonjoinder statute, enacted in 1976, s. 627.7262, Florida Statutes (1976 Supp.), pursuant to Chapter 76-266, ss. 12 and 16, Laws of Florida. The 1976 statute applied to motor vehicle liability insurers, The 1977

statute applied to all liability insurers. The 1976 statute was held unconstitutional in Markert v. Johnson, 367 So. 2d 1003 (Fla. 1979), as encroaching upon the rule-making power of the Supreme Court over procedural matters. Compare, ss. 768.045, Florida Statutes (1977), and 627.7262, Florida Statutes (1976 Supp.).

The Respondent attempts to use the 1977 nonjoinder statute as an explanation for limiting the scope of the 1977 statutory change in language from "an insured party" to "any person." Yet, since a virtually identical piece of legislation existed since 1976, the 1977 nonjoinder statute does not represent a significant legislative change and does not explain any changes in the language of the insurance fraud statute.

The 1982 enactment of the present nonjoinder statute does not affect the conclusion that the legislature intended the insurance fraud statute, through the use of the phrase "any person," to apply to any type of insurance claim. By that time, the insurance fraud statute had been moved from the insurance code (where it was section 627.7375) to the chapter on fraudulent practices (where it is presently section 817.234). Chapter 79-81, s. 487, Laws of Florida, To accept the Respondent's reasoning, one must make the leap of faith that by passing the nonjoinder statute, the legislature intended to amend and limit sub silentio a criminal fraud statute in a different chapter of the Florida Statutes. No such intent to legalize fraud in the third-party setting has been demonstrated.

The nonjoinder statute simply transformed the third party's vested, enforceable claim into a contingent claim. Previously, under Shingleton, supra, the Court had said, "It seems reasonable to view the cause of action against an insurer in favor of an injured third party as vesting or accruing to the injured party at the same time he becomes entitled to sue the insured." Id. at 716 (emphasis added). Afterwards, "The present statute requires, as a condition precedent to having a third party interest in an insurance policy, the vesting of that interest by judgment; the prior statute did not." VanBibber v. Hartford Accident & Indemnity Insurance Co., 439 So. 2d 880, 882-83 (Fla. 1983) (emphasis added). Of course, the insured continues to have a vested, enforceable claim against his insurer.[5]

In view of the foregoing, it must be concluded that the Fourth District Court of Appeal correctly ruled that section 817.234, Florida Statutes applies in the context of both first-party and third-party claims against insurers.

B. SECTION 817.234, FLORIDA STATUTES, DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSES OF THE STATE OR FEDERAL CONSTITUTIONS.

[5] It should also be noted that under s. 631.192(3), Florida Statutes, a third-party claim against an insolvent insurer is not considered contingent under certain circumstances even if liability has not yet been established.

The equal protection argument which the Respondent/Cross-Appellant, Mark Marks, raises, see Brief of Respondent/Cross-Appellant (Mark Marks), pp. 48-49, is the same as the argument presented in the Brief of the co-Respondent, Mark Marks, P.A., and the State has fully addressed that argument in its Reply Brief to Mark Marks, P.A. Thus, the State adopts the argument set forth in that brief as if fully set forth herein.

Additionally, however, the State would respond to the distinct argument raised by Respondent Mark Marks, see Brief of Mark Marks, p. 48, at n. 28, wherein the Respondent argues that the State somehow conceded that section 817.234, Florida Statutes could not equally be applied to attorneys. The State would note that the same argument being presented herein by the State was fully asserted in the trial court. See, State's Response and Memorandum of Law (2R. 1952-54).

The Respondent also asserts, without any elaboration, that applying the statute to third-party liability cases would somehow discriminate between attorneys who are penalized for conspiring with third-parties and doctors and hospitals who are not. While the Respondent seems to be referring to the fact that subsections 817.234(2) and (4) refer to dealings between doctors, hospitals and insured parties (as opposed to "any person"), the Respondent fails to note that doctors and hospitals engaging in fraudulent conduct not covered by subsections (2) and (4) would be covered by the "any person"

language of subsection (1). Thus, the differential treatment perceived by the Respondent simply does not exist.

C. REINSTATEMENT OF THE THEFT COUNTS.

With respect to the theft counts which the trial court had dismissed, the Fourth District reinstated them, as follows:

> We, therefore, reverse all of the orders of dismissal and remand with direction to reinstate all of the counts and predicate acts except those which are totally and exclusively dependent upon alleged incomplete statements tendered by the attorneys in representation of their clients. Only to this extent to we affirm the trial court's actions, since we find that its application of "vagueness" beyond that to be erroneous.

(Pet. App. p. 6). As to the theft counts, the Fourth District therefore seems to be saying that (1) dismissal was premature; (2) the facts need to be fully developed through an appropriate trial court forum - either sworn motion or trial; and (3) future dismissal of those counts may be appropriate if they are based solely on "alleged incomplete statements tendered by the attorneys in he representation of their clients."

As there is nothing facially invalid about the theft statute or the charging documents alleging theft, the Fourth District was clearly correct in ordering reinstatement.

However, if this Court concludes that the insurance fraud statute can apply to attorneys who, with the intent to defraud, submit incomplete claims to insurers, such a conclusion by this Court would undermine the Fourth District's implicit conclusion that theft charges could ultimately be dismissed if they are predicated solely upon incomplete statements. The same reasons which would permit application of the insurance fraud statute to such conduct by attorneys would necessarily permit application of the general theft statute to such conduct by attorneys.

Lastly, the Respondent argues that the State somehow waived the right to argue the improper dismissal of the theft counts in the Fourth District by virtue of the State's failure to move to set aside the trial court's dismissal of those counts.

This argument fails for several reasons. First, the Respondent did not present this argument in the Fourth District and that Court did not address it. See, Salqat v. State, 652 So. 2d 815 (Fla. 1995) (Court lacked jurisdiction to consider a question which had not first been passed upon by the district court) ; Trushin v. State, 425 So. 2d 1126, 1130 (Fla. 1983) (Court would not consider issue which party had not raised in District Court of Appeal and which District Court of Appeal dis not address).

Second, and perhaps more significantly, this rather pernicious argument is predicated upon a profound misunderstanding of the rules of criminal procedure, and upon an

equally profound failure to advise this Court of the bizarre manner in which the trial court dismissed the theft counts. The trial court's dismissal of the theft counts was without any advance notice to the State of Florida. The trial court was not ruling on any motion to dismiss the theft counts. The motions upon which the trial court ruled dealt solely with various insurance fraud charges, not with general theft charges. (2R. 1523; R. 97-114). Furthermore, a review of the transcripts of the hearings in which these motions were considered, reveals that neither the defense attorneys nor the trial judge ever referred to any of the general theft counts; the arguments were addressed solely to the insurance fraud counts and the predicate acts for the racketeering counts which were based on insurance fraud charges under the insurance fraud statute. Thus, when the trial court's orders of dismissal stated that various theft counts were being dismissed in addition to the insurance fraud counts, those acts of dismissal were done without any advance notice to the State and without any opportunity for the State to ever address the propriety of dismissal of the theft charges.

The Respondent's assertion that the State should have sought a "reconsideration" of the dismissal of the theft charges ignores the State's limited options under the rules of criminal and appellate procedure. Once the trial court dismissed the counts, the State had 15 days in which to file its appeal. The filing of a motion for rehearing or reconsideration would not have tolled the time for the commencement of the State's appeal

under Rule 9.020(g), Florida Rules of Appellate Procedure, since such a tolling would be predicated solely upon the filing of an "authorized" motion for rehearing. The rules of criminal procedure do not authorize the filing of any motions for rehearing or reconsideration by the State, from orders of dismissal.[6] Thus, an such motion by the State would have been unauthorized and would not toll the time for an appeal by the State. The act of filing such a motion would have jeopardized the State's right to appeal any of the dismissal orders. Thus, the Respondent has presented a truly bizarre argument, where an outrageous dismissal arose out of the sua sponte action of the trial court, without the benefit of any motion or argument from the defense, and without providing the State with any timely opportunity for the presentation of arguments regarding the theft counts. Such outrageous action on the part of the trial court, without any notice or opportunity to be heard, can not form the basis for an argument which would thereafter estop the State from attacking the sua sponte ruling on direct appeal. The Respondent's argument on this matter is therefore utterly frivolous.

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[6] See, State v. Jones, 613 So. 2d 577, 578 (Fla. 1st DCA 1993) (filing of unauthorized motion for rehearing by State, after order dismissing charging document, did not toll time for appeal as motion for rehearing was not authorized by rules of procedure).

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. All claims presented under the cross-appeal should be rejected for either procedural reasons, due to the limited scope of the certified question, or, on the merits, if this Court chooses to reach the additional issues.

Respectfully submitted,

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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 12th 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 THOMAS, III, Esq.,** Suite 1640, Gulf Life Tower, 1301 Gulf Life Drive, Jacksonville, FL 32207; **MARK HICKS, Esq.,** Hicks, Anderson & **Blum,** P.A., Suite 2402, New World Tower, 100 N. Biscayne Blvd., Miami, FL 33132-2513; **NEAL SONNETT, Esq.,** One Biscayne Tower, Two South Biscayne Blvd., Suite 2600, Miami, FL 33131; **EDWARD SHOHAT, Esq.,** Suite 1730, Courthouse Center, Suite 1730, 175 N.W. 1st Avenue, **Miami,** FL 33128; **RONALD I. STRAUSS, Esq., 3225** Aviation Avenue, Suite 600, Coconut Grove, Florida 33133; **ROBERT S. GLAZER, Esq.,** The Gifford House, 2937 S.W. 27th Avenue, Miami, FL 33133.

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