IN THE SUPREME COURT OF FLORIDA

CASE NO. 96,910

STATE OF FLORIDA,

Petitioner,

vs.

CHARLES BRADFORD,

Respondent.

****
ON DISCRETIONARY REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL
****

PETITIONER'S INITIAL BRIEF ON THE MERITS

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CASE NO. 96,910

STATE OF FLORIDA v. CHARLES BRADFORD

CERTIFICATE OF INTERESTED PERSONS

Counsel for the State of Florida, Petitioner herein, certifies that the following persons and entities have or may have an interest in the outcome of this case.

1. **The Honorable Joyce A. Julian**, Circuit Court Judge, Seventeenth Judicial Circuit in and for Broward County, Florida

2. **Robert R. Wheeler, Esq., Assistant Attorney General**
   Office of the Attorney General, State of Florida
   The Honorable Robert Butterworth, Attorney General
   (Appellate counsel for the State of Florida, Petitioner)

3. **Melanie Ann Hines, Statewide Prosecutor**
   Cynthia G. Imperato, Assistant Statewide Prosecutor
   (Prosecuting Attorney)

4. **Michael E. Dutko, Esq**.
   (Trial counsel for Respondent)
   (Appellate counsel for Respondent)

5. **Charles Bradford**
   (Respondent)

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel for the State of Florida, Petitioner herein, hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, was the prosecution in the trial court, Appellee before the Fourth District Court of Appeal, and will be referred to herein as "Petitioner" or the "State". Respondent was the defendant in the trial court, Appellant on appeal to the Fourth District Court of Appeal, and will be referred to herein as "Respondent" or "Defendant". Reference to the record on appeal will be by the symbol "R" followed by the appropriate page number. References to appellate documents will be by their title followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

On January 27, 1997, the State charged Respondent, by information, with two counts of unlawful insurance solicitation in violation of Florida Statute §817.234(8) (R 4-5). On March 25, 1998, Respondent filed a Sworn Motion to Dismiss setting forth sworn facts and alleging that the undisputed facts fail to set forth a prima facie case of guilt against Respondent for a violation of Florida Statute §817.234(8) (R 94-99). On March 27, 1998, Respondent filed a Motion to Dismiss asserting the unconstitutionality of Florida Statute §817.234(8) on five grounds (R 100-27).

On March 30, 1998, the State responded to Respondent's March 27, 1998 Motion to Dismiss on constitutional grounds (R 128-42). In this response, the State stipulated to the following facts:

> 1. A motor vehicle accident report, as public information, was purchased from a public agency, by a representative of Prebeck Consultants, Inc., a Florida Corporation [hereinafter "Prebeck"], that was in the business of, inter alia, scheduling appointments between persons involved in motor vehicle accidents and chiropractors.
>
> 2. The name and telephone number of a person involved in a traffic accident was obtained from an accident report, by a Prebeck representative.
>
> 3. That person was telephonically solicited, by Prebeck representatives, to schedule an appointment with CHARLES BRADFORD, D.C. to be examined and treated, if necessary, for injuries arising from the traffic accident.

> 4. The person telephonically solicited subsequently kept the scheduled appointment with CHARLES BRADFORD, D.C., was examined and was later treated.
>
> 5. CHARLES BRADFORD, D.C. later made a claim for personal injury protection (PIP) benefits, regarding chiropractic services performed on that patient, to an insurance company, that was subsequently paid.

(R 131). The trial court relied on these stipulated facts in its June 25, 1998 order denying Respondent's motion to dismiss (R 283-93). The court found Florida Statute §817.234(8) constitutional (R 293).

Respondent pled no contest to a lesser included offense, Conspiracy to Commit Unlawful Insurance Solicitation in violation of Florida Statute §817.234(8), but reserved his right to appeal "the trial court's ruling regarding his motion to dismiss based on the claim that s.817.234(8), Fla. Stat., is unconstitutional and the trial court's ruling regarding the Defendant's sworn motion to dismiss" (R 299-300).

Respondent timely appealed the trial court's order denying his motion to dismiss based on the claim that §817.234(8), Fla. Stat., is unconstitutional. On appeal, Respondent challenged the statute as unconstitutional on four grounds: overbroadness, void for vagueness, not sufficiently narrow to justify legitimate restriction of free speech, and violative of the equal protection clauses of the Florida and United States Constitution.

The Fourth District Court of Appeal issued its opinion in this

case on June 30, 1999: Bradford v. State, 740 So. 2d 569 (Fla. 4th DCA 1999). The court acknowledged that this same issue of the constitutionality of §817.234(8) had previously been addressed in Barr v. State, 731 So. 2d 126 (Fla. 4th DCA 1999) and is constitutional. Id. at 570. However, the court wrote only to clarify why the statute does not punish purely innocent activity. Id. In it's analysis, this Court stated that "it becomes obvious that the legislature in enacting subsection (8) intended to punish only solicitations made for the sole purpose of defrauding that patient's PIP insurer." Id. at 571 The court continued:

> In sum, we reiterate that "[t]he statute is not a blanket ban on all solicitation of business by a chiropractor, but rather, targets only those persons who solicit business for the sole purpose of making motor vehicle tort or PIP benefits claims. Although not the least restrictive means available to achieve the state's purpose, we hold the ban on such solicitation is reasonably tailored to the state's interest in preventing insurance fraud and raised premiums." Barr, slip op. at 2. In other words, a chiropractor may solicit any prospective patient even if that chiropractor happens to get paid for his services by the patient's PIP insurance, as long as he does not solicit with the intent to defraud the insurer.

Id.

Additionally, the appellate court analyzed the legislative history of §817.234(8) Fla. Stat. (1997) and stated:

> It is a general principle of statutory construction that statutes enacted during the same session of the legislature dealing with

> the same subject matter must be considered in pari materia in order to harmonize them and, at the same time, to give effect to the legislative intent. When reading subsection (8) in pari materia with subsection (1)(a), it becomes obvious that the legislature in enacting subsection (8) intended to punish only solicitations made for the sole purpose of defrauding that patient's PIP insurer.

Id.

Both the State and Respondent filed Motions for Rehearing and Motions for Rehearing En Banc which were denied by the court.

SUMMARY OF THE ARGUMENT

The appellate court erred by inserting fraud as an element of Florida's anti-solicitation §817.234(8) Fla. Stat. (1997). Fraud is not an element of this section based on the plain language of the statute, the statutory construction, and the legislative history.

Absent the fraud element, the statute is a constitutional restriction of commercial speech and does not violate First Amendment protections. It is narrowly drawn and not overbroad.

ARGUMENT

POINT 1

INTENT TO DEFRAUD IS NOT AN ELEMENT OF FLORIDA'S ANTI-SOLICITATION STATUTE, §817.234(8) FLA. STAT. (1997).

In the underlying opinion to this case, the Fourth District Court of Appeal inserted an additional element of fraud into the anti-solicitation crime created by the legislature in §817.234(8). In an attempt to clarify why subsection (8) does not punish purely innocent activity, the appellate court stated that the legislature "intended to punish only solicitations **made for the sole purpose of defrauding that patient's PIP insurer**." Bradford v. State, 740 So. 2d 569 (Fla. 4th DCA 1999)(emphasis added). Additionally, the court stated that a chiropractor can solicit patients and get paid by the patient's PIP insurance "**as long as he does not solicit with the intent to defraud the insurer**." Id. (emphasis added). The Fourth District Court of Appeal erred by adding an element of fraud that was never required by the statute itself or intended by the legislature.

The Fourth District Court of Appeal improperly construed §817.234(8) Fla. Stat. (1997) by inserting an element of fraud that is not required by the plain meaning of the statute. Even if the statute is ambiguous, any reasonable construction of the statute does not require a fraud element. Additionally, a review of the legislative history clearly indicates that the legislature did not

intend for the crimes created in this section to contain any element of fraud.

§ 817.234 Fla. Stat. (1997) provides:

817.234. False and fraudulent insurance claims

(1)(a) Any person who, with the intent to injure, defraud, or deceive any insurer:

1. Presents or causes to be presented any written or oral statement as part of, or in support of, a claim for payment or other benefit pursuant to an insurance policy, knowing that such statement contains any false, incomplete, or misleading information concerning any fact or thing material to such claim;

2. Prepares or makes any written or oral statement that is intended to be presented to any insurer in connection with, or in support of, any claim for payment or other benefit pursuant to an insurance policy, knowing that such statement contains any false, incomplete, or misleading information concerning any fact or thing material to such claim; or

3. Knowingly presents, causes to be presented, or prepares or makes with knowledge or belief that it will be presented to any insurer, purported insurer, servicing corporation, insurance broker, or insurance agent, or any employee or agent thereof, any false, incomplete, or misleading information or written or oral statement as part of, or in support of, an application for the issuance of, or the rating of, any insurance policy, or who conceals information concerning any fact material to such application commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(b) All claims and application forms shall contain a statement that is approved by the Department of Insurance that clearly states in substance the following: "Any person who knowingly and with intent to injure, defraud, or deceive any insurer files a statement of claim or an application containing any false, incomplete, or misleading information is guilty of a felony of the third degree." The changes in this paragraph relating to applications shall take effect on March 1, 1996.

(2) Any physician licensed under chapter 458, osteopathic physician licensed under chapter 459, chiropractic physician licensed under chapter 460, or other practitioner licensed under the laws of this state who knowingly and willfully assists, conspires with, or urges any insured party to fraudulently violate any of the provisions of this section or part XI of chapter 627, or any person who, due to such assistance, conspiracy, or urging by said physician, osteopathic physician, chiropractic physician, or practitioner, knowingly and willfully benefits from the proceeds derived from the use of such fraud, is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. In the event that a physician, osteopathic physician, chiropractic physician, or practitioner is adjudicated guilty of a violation of this section, the Board of Medicine as set forth in chapter 458, the Board of Osteopathic Medicine as set forth in chapter 459, the Board of Chiropractic Medicine as set forth in chapter 460, or other appropriate licensing authority shall hold an administrative hearing to consider the imposition of administrative sanctions as provided by law against said physician, osteopathic physician, chiropractic physician, or practitioner.

(3) Any attorney who knowingly and willfully assists, conspires with, or urges any claimant to fraudulently violate any of the provisions of this section or part XI of chapter 627, or any person who, due to such assistance, conspiracy, or urging on such attorney's part, knowingly and willfully benefits from the proceeds derived from the use of such fraud, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(4) No person or governmental unit licensed under chapter 395 to maintain or operate a hospital, and no administrator or employee of any such hospital, shall knowingly and willfully allow the use of the facilities of said hospital by an insured party in a scheme or conspiracy to fraudulently violate any of the provisions of this section or part XI of chapter 627. Any hospital administrator or employee who violates this subsection commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. Any adjudication of guilt for a violation of this subsection, or the use of business practices demonstrating a pattern indicating that the spirit of the law set forth in this

section or part XI of chapter 627 is not being followed, shall be grounds for suspension or revocation of the license to operate the hospital or the imposition of an administrative penalty of up to $5,000 by the licensing agency, as set forth in chapter 395.

(5) Any insurer damaged as a result of a violation of any provision of this section when there has been a criminal adjudication of guilt shall have a cause of action to recover compensatory damages, plus all reasonable investigation and litigation expenses, including attorneys' fees, at the trial and appellate courts.

(6) 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.

(7) The provisions of this section shall also apply as to any insurer or adjusting firm or its agents or representatives who, with intent, injure, defraud, or deceive any claimant with regard to any claim. The claimant shall have the right to recover the damages provided in this section.

(8) It is unlawful for any person, in his or her individual capacity or in his or her capacity as a public or private employee, or for any firm, corporation, partnership, or association, to solicit any business in or about city receiving hospitals, city and county receiving hospitals, county hospitals, justice courts, or municipal courts; in any public institution; in any public place; upon any public street or highway; in or about private hospitals, sanitariums, or any private institution; or upon private property of any character whatsoever for the purpose of making motor vehicle tort claims or claims for personal injury protection benefits required by s. 627.736. Any person who violates the provisions of this subsection commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(9) It is unlawful for any attorney to solicit any business relating to the representation of persons injured in a motor vehicle accident for the purpose of

> filing a motor vehicle tort claim or a claim for personal injury protection benefits required by s. 627.736. The solicitation by advertising of any business by an attorney relating to the representation of a person injured in a specific motor vehicle accident is prohibited by this section. Any attorney who violates the provisions of this subsection commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. Whenever any circuit or special grievance committee acting under the jurisdiction of the Supreme Court finds probable cause to believe that an attorney is guilty of a violation of this section, such committee shall forward to the appropriate state attorney a copy of the finding of probable cause and the report being filed in the matter. This section shall not be interpreted to prohibit advertising by attorneys which does not entail a solicitation as described in this subsection and which is permitted by the rules regulating The Florida Bar as promulgated by the Florida Supreme Court.
>
> (10) As used in this section, the term "insurer" means any insurer, self-insurer, self-insurance fund, or other similar entity or person regulated under chapter 440 or by the Department of Insurance under the Florida Insurance Code.

§ 817.234, Fla. Stat. (1997), False and fraudulent insurance claims.

Only a few decisions interpret this statute. See State v. Marks, P.A. 698 So.2d 533, 540 (Fla. 1997); Hershkowitz v. State, 24 Fla. Law Weekly D 2706d (Fla. 3rd DCA Dec. 8, 1999); Bradford v. State, 740 So.2d 569 (Fla. 4th DCA 1999); Barr v. State, 731 So.2d 126 (Fla. 4th DCA 1999); and State v. Falk, 724 So.2d 146 (Fla. 3rd DCA 1998). In each of these cases, the statute has been challenged on various grounds and held to be constitutional.[1]

[1] **In Marks one small portion of statute was declared vague but the statute as a whole was held constitutional.**

A. PLAIN MEANING

As a general proposition, the legislature has the prerogative to determine what is a crime and to define or redefine the elements of the crime. See Perkins v. State, 682 So. 2d 1083 (Fla. 1996); State v. Hamilton, 660 So. 2d 1038 (Fla. 1995); Chapman v. Lake, 112 Fla. 746, 151 So. 399 (1933). Statutes are to be construed to effectuate legislative intent. In order to ensure legislative intent will be followed, the rule is that when a court entertains a challenge to a statute, the polestar for the court's construction of the statute is the plain meaning of the statutory language. If a statute is clear on its face the courts must apply the plain meaning without resorting to other rules of construction. State v. Egan, 287 So.2d 1 (Fla. 1973)

"[T]he plain meaning of statutory language is the first consideration of statutory construction." Capers v. State, 678 So. 2d 330, 332 (Fla. 1996). There is no room for alternative construction if the meaning of a statute is plain on its face. State v. Harvey, 693 So. 2d 1009, 1010 (Fla. 4th DCA 1997). "When the language of a statute is clear and unambiguous, . . . the language should be given effect without resort to extrinsic guides to construction." State v. Marks, 698 SO. 2d at 540.

A clear and unambiguous statute precludes an examination of legislative history or intent. Streeter v. Sullivan, 509 So. 2d 268, 271 (Fla. 1987). "When the language of a statute is clear and

unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation to alter the plain meaning." Mancini v. Personalized Air Conditioning & Heating, Inc, 702 So. 2d 1376, 1378 (Fla. 4th DCA 1997) quoting Ross v. Gore, 48 So. 2d 412, 415 (Fla. 1950); State v. Cohen, 696 So. 2d 435, 438 (Fla. 4th DCA 1997). "Where the language of the statute is plain and unambiguous, there is no need for judicial interpretation." T.R. v. State, 677 So. 2d 270, 271 (Fla. 1996). See Pardo v. State, 596 So. 2d 665 (Fla. 1992)(fundamental principle of statutory construction: where language of statute is plain and unambiguous, no occasion for judicial interpretation). Because the Act's language is unambiguous, an examination of the legislative history is not warranted.

The plain meaning of §817.234(8) Fla. Stat. (1997) is clear on its face. It provides that:

> (8) It is unlawful for any person, in his or her individual capacity or in his or her capacity as a public or private employee, or for any firm, corporation, partnership, or association, to solicit any business ..... for the purpose of making motor vehicle tort claims or claims for personal injury protection benefits required by s. 627.736.

The statute criminalizes solicitation with the intent to file certain types of claims - namely motor vehicle tort claims or claims for personal injury protection (PIP) benefits. This language requires no clarification or interpretation. The meaning of the statute could not be made any plainer. This statutory section does

not require that an intent to defraud be alleged or proven. To the contrary, the section is plain and simple - all solicitation with the intent to file PIP claims is a criminal act. Any intent to defraud is irrelevant to the crime.

The law requires a court to give the language of the statute its plain meaning. A court is not allowed to judicially modify a statute by adding words not included by the legislature. Such judicial legislating violates Florida's Constitutionally required separation of powers. See B.H. v. State, 645 So.2d 987, 991 (Fla. 1994); Smith v. State, 537 So.2d 982 (Fla. 1989).

The Florida Supreme Court recently reiterated this principle when it addressed and rejected attempts to rewrite other portions of this statute. In the case of State v. Marks, P.A. 698 So.2d 533, 540 (Fla. 1997), this Court addressed this statute and found that the respondents were attempting to limit the express terms of an unambiguous statute. It rejected this attempt as beyond the Court's power. Id. at 540. Likewise, in State v. Copher, 396 So.2d 635 (Fla.2nd DCA 1981), the court rejected an attempt to add a fraud element to a statutory section which did not contain fraud language. In the case at hand, the appellate court erred by making the intent to defraud an element of this section of the statute.

B. STATUTORY CONSTRUCTION

Although this Court needs to look no further than the plain meaning of the statute, if this Court determines that the language

is not clear and must construe it, a reasonable construction of the statute clearly indicates that the intent to defraud is not an element of this section of the statute.

A recent decision from this Court, State v. Hubbard, 24 Fla. L. Weekly S575b (Fla. December 16, 1999), lends guidance as to how to construe a statute. In that case, this Court construed the DUI manslaughter statute after appellate courts were holding that the crime contained an element of negligence. This Court examined the statute and held that the legislature did not intend to make negligence an element of the crime of DUI manslaughter.

> While the statute clearly has a causation element, it does not explicitly contain a negligence element, in contrast to a related statute such as section 322.34(3), which does include such an element. Thus, at least three principles of statutory construction support a conclusion that simple negligence is not an element of DUI manslaughter. See Florida State Racing Comm'n v. Bourquardez, 42 So. 2d 87, 88 (Fla. 1949) (observing that "[t]he legislature is presumed to know the meaning of words and the rules of grammar, and the only way the court is advised of what the legislature intends is by giving the [statutory language its] generally accepted construction"); Department of Health & Rehabilitative Servs. v. M.B., 701 So. 2d 1155, 1160 (Fla. 1997) (finding no "consistency" requirement attached to child victim hearsay exception, as opposed to statute defining nonhearsay, thus "demonstrat[ing] that the legislature knew how to impose a 'consistency' requirement if desired"); Federal Ins. Co. v. Southwest Fla. Retirement Ctr. Inc., 707 So. 2d 1119, 1122 (Fla. 1998) (concluding that absence of express language establishing discovery rule for latent defects is "clear evidence that the legislature did not intend to provide a discovery rule" in

limitations statute).

Id. at S578.

In the case at hand, fraud is not mentioned in section (8) of the statute. However, fraud is an element in five other sections of the statute, clearly indicating that if the legislature intended to have fraud as an element, it certainly knew how to include it. See §817.234 Fla. Stat. sections (1), (2), (3), (4), and (7). "The legislative use of different terms in different portions of the same statute is strong evidence that different meanings were intended." State v. Marks, 698 So. 2d at 541. Because the legislature knew how to make fraud an element of this crime as evidenced by its inclusion in related sections of the same statute, it must be presumed that it intended to omit the fraud element from section (8).

Moreover, inclusion of fraud as an element of section (8) would render this section of the statute meaningless, in violation of another cardinal principle of construction. See Ellis v. State, 622 So. 2d 991, 1001 (Fla. 1993); State v. Summerlot, 711 So. 2d 589 (Fla. 3d DCA 1998). Sections (1) through (4) present a comprehensive scheme that makes illegal any type of fraud. Section (8), added a year after sections (1) - (4), would be unnecessary, redundant, and meaningless if the element of fraudulent intent was added.

Finally, the appellate court's reliance on a general principle

of statutory construction in an effort to explain why it was imposing this additional element of fraud on section (8) was patently wrong. This Court stated

> It is a general principle of statutory construction that statutes enacted during the same session of the legislature dealing with the same subject matter must be considered in pari materia in order to harmonize them and, at the same time, to give effect to the legislative intent. When reading subsection (8) in pari materia with subsection (1)(a), it becomes obvious that the legislature in enacting subsection (8) intended to punish only solicitations made for the sole purpose of defrauding that patient's PIP insurer.

Bradford v. State, 740 So. 2d at 571.

The appellate court incorrectly assumed that all subsections of Florida Statute §817.234 were enacted by the Legislature during the same session. The legislative history is clear that subsections (8) and (9) were enacted in 1977 as anti-solicitation provisions in Chapter 77-468 Laws of Florida. The fraud sections of (1)-(4) were passed in 1976 under the automobile and tort revision of 1976, Chapter 76-266 Laws of Florida. Clearly, these sections of the statute were not "enacted during the same session of the

legislature" to be considered "in pari materia". This "general principle of statutory construction" that the appellate court relies upon to "harmonize" the sections of the statute by requiring a fraud element for every section is inapplicable.

The appellate court violated fundamental principles of statutory construction by adding the element of fraud to section (8). This fraud element was specifically not included by the legislature and not suggested by the rules of construction. Additionally, the appellate court incorrectly relied upon a principle of statutory construction that was inapplicable. The inclusion of a fraud element to section (8) was error.

LEGISLATIVE HISTORY

Besides violating the plain meaning of the statute and a myriad of statutory construction principles, the appellate court overlooked the legislative intent by including a fraud element to section (8) of the statute. A review of the legislative history clearly proves that the legislature did not intend to require the element of intent to defraud in section (8) of this statute.

Florida is a no fault state, with a $10,000 personal injury protection benefit threshold that must be exceeded, related to medical expenses, before an injured insured can recover for excess medical expenses, pain, and suffering in tort by filing a personal injury action.[2] Florida Statute §817.234 was created (as Florida

[2] See §627.736 Fla. Stat (1997).

Statute 627.7375) in 1976 by Section 7 of Chapter 76-266. The Legislature acted in response to concerns that "fraud" in piercing the no fault threshold was documented in a Dade County Grand Jury Report, Fall Term 1974 and dated August 11, 1975, " . . . concerning the practice of a small group of lawyers, physicians, osteopaths, chiropractors and hospitals who work together to inflate or outright falsify personal injury claims." Unscrupulous practitioners (doctors and lawyers) were soliciting individuals involved in car accidents in an attempt to pad their pockets. The result of such fraud was to effectively increase the number of tort recoveries for pain and suffering in personal injury actions, resulting in higher insurance rates. This was disrupting the protective insurance mandated by the State of Florida, driving up insurance rates, increasing litigation based on fraudulent claims, and spiraling rates even higher. See Robert W. Emerson, Insurance Claims Fraud Problems and Remedies, 46 U. MIAMI L. REV. 907 (1992). In other words, persons with "little or no injuries[3]" were solicited by runners for medical treatments that became the basis for making claims of personal injury protection benefits, and when the medical expenses exceeded that threshold, motor vehicle tort claims were

[3] Common sense dictates that a person injured in a motor vehicle accident will seek medical attention, if and when they need it. By seeking to pass a law prohibiting unlawful insurance solicitation, the legislature sought to proscribe persons from seeking out accident victims with a suggestion of medical attention necessity, thereby planting the seed for the harm feared herein.

filed. The net effect was an increase in both the number and dollar value of recoveries for pain and suffering in personal injury actions, ultimately paid by insurance companies and passed on as a cost of doing business to the citizens of the State of Florida by virtue of insurance rate increases.

In April 1976, Senator Kenneth McKay, Jr. introduced Senate Bill (SB) 598 in the Florida Senate in an effort to make changes that would stabilize the automobile insurance industry. SB 598 included a section that addressed fraud in piercing the no-fault threshold. According to the records on SB 598 that are housed in the Florida State Archives, the fraud section of the bill, Section 6, was included as a direct result of the Dade County Grand Jury Report filed August 11, 1975. The summary of the bill included a description of Section 6, "fraudulent conduct in piercing the tort threshold will be unlawful and persons convicted will be guilty of a felony of the third degree." SB 598 was reviewed by the Senate Commerce Committee and they passed a Committee Substitute (CS) of SB 598 which included Section 6 on fraud. SB 598 was eventually passed by the full Senate and sent to the House of Representatives.

Several similar bills were introduced in the House of Representatives in April 1976, House Bill (HB) 2825, 3042, 3043, 3044, and 3155, that addressed the same issues of insurance industry reform as SB 598. These bills eventually were included in one bill CS/HB 2825 which passed out of the House of Representatives and

ended up in Conference Committee with CS/SB 598. Both CS/HB 2825 and CS/SB 598 had similar language addressing the issue of fraud in piercing the no fault threshold. The bill that was agreed upon by the Conference Committee was called CS/HB 2825 and was enrolled as law. The result was General Laws Chapter 76-266, Section 7 which became Florida Statute 627.7375 *Fraud*, and provided:

> (1) Any insured party or insurer or insurance adjuster who, with intent knowing and willfully conspires to fraudulently violate any of the provisions of this part, or who, due to fraud...is guilty of a felony of third degree...
>
> (2) Any physician..., osteopath..., chiropractor... [or other licensed practitioner]... who knowingly and willfully assists, conspires with, or urges any insured party to fraudulently violate any of the provisions of this part...is guilty of a felony of the third degree.
>
> (3) Any attorney who knowingly and willfully assists, conspires with, or urges any claimant to fraudulently violate any of the provisions of this part...is guilty of a felony of the third degree.
>
> (4) No person or governmental unit licensed...to maintain or operate a hospital, and no administrator or employee of any such hospital, shall knowingly and willfully allow the use of the facilities of said hospital by an insured party in a scheme or conspiracy to fraudulently violate any of the provision of this part...is guilty of a felony of the third degree.

The following year as part of a comprehensive reform, Section 36 of Chapter 77-468 (originally Senate Bill 1181) reworded the above and was retitled, 627.7375 False and Fraudulent Claims. The

new statue added subsections (8) and (9), targeting unlawful insurance solicitation, and not making any mention of fraud. The subsections as originally enacted made it a crime for any person or attorney to solicit business "for the purpose of making motor vehicle tort claims".

> (8) It is unlawful for any persons, in his individual capacity or in his capacity as a public or private employee, or for any firm, corporation, partnership, or association, to solicit any business...upon private property of any character whatsoever **for the purpose of making motor vehicle tort claims.**
>
> (9) It is unlawful for any attorney to solicit any business relating to the representation of persons injured in a motor vehicle accident **for the purpose of filing a motor vehicle tort claim.** The solicitation by advertising of any business by an attorney relating to the representation of a person injured in a specific motor vehicle accident is prohibited by this section. Any attorney who violates the provisions of this subsection commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083 or s. 775.084.

Section 36 of the Senate Staff Analysis for SB 1181 states:

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.

(2) Creates a civil case of action for violation of section.

(3) More inclusive definition of statement.

(4) Provides that acting as a runner is a third degree felony.

(5) Special prohibition against an attorney soliciting motor vehicle tort claims (third degree felony and a report to the

state attorney for action).

SB 1181 Staff Analysis, Section 36.

The following year subsections (8)and (9) were amended to read **“for the purpose of making motor vehicle tort claims or a claim for personal injury protection benefits required by Section 627.736".** Laws of Florida Chapter 78-258 Section 3. (emphasis added). Finally, in 1979, Section 627.7375 Florida Statues was renumbered to Section 817.234 Florida Statutes. See Laws of Florida Chapter 79-81, Section 1. Subsections (8) and (9) have since remained unchanged.

In 1979, the Legislature passed a reviser’s bill, c. 79-400, to conform the sections of Florida Statutes 1977 to additions, substitutions and deletions editorially supplied therein in order to remove inconsistencies, redundancies, unnecessary repetition and otherwise clarify the statutes and facilitate their correct interpretation. The Legislature, during this clarification exercise, did not add any language of intent to defraud in subsections (8) or (9).

There is no indication that the legislature intended for the crimes created in sections (8) and (9) to contain any element of fraud. These provisions were designed to target another problem - runners and professionals using runners for solicitation. It would be illogical to require fraudulent intent when the evil addressed was specifically solicitation in and of itself. If a doctor,

lawyer, individual, or business enterprise hires runners to contact accident victims and solicit their business, they violate the statute. No fraudulent intent is necessary.

In sum, Florida Statute §817.234 was created and passed in 1976 (as Florida Statute §627.7375) with only subsections (1)-(4). These subsections each specifically contained language of intent to commit fraud -- "who knowingly and willfully . . . fraudulently violate . . ." In 1977, subsections (1)-(4) were reworded, and subsections (8) and (9) were added. The legislature intentionally did not place any fraudulent intent language in that subsection or in subsection (9). In 1978, the statute was renumbered to §817.234, and the legislature did not add any fraudulent intent language to subsections (8) or (9). Subsection (8) proscribes conduct separate from the conduct proscribed in subsections (1)-(4). Certainly, the legislature did not intend for subsection (8) to contain any element of fraud.

POINT 2

ABSENT THE FRAUD ELEMENT, FLORIDA STATUTE §817.234(8) IS A CONSTITUTIONAL RESTRICTION OF COMMERCIAL SPEECH: IT IS NARROWLY DRAWN AND NOT OVERBROAD.

In Bradford, the appellate court wrote "only to clarify why subsection (8) does not punish purely innocent activity." Bradford v. State, 740 So. 2d at 570. In its clarification, the court seems to say that subsection (8) is not more extensive than necessary to serve the State's interest because subsection (8) only applies to "solicitations made for the sole purpose of defrauding that patient's PIP insurer." Id. at 571. This analysis is in error: subsection (8) is narrowly drawn and not overbroad without the inclusion of any fraud element.

The appellate court correctly applied the four-part test developed by the Supreme Court in Central Hudson Gas & Electric Corp. v. Public Service Comm'n of NY, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980) to determine whether subsection (8) violated First Amendment protections. Bradford v. State, 740 So. 2d at 571.

> First, the court must determine that the expression concerns lawful activity and is not misleading. Second, it must ask whether the asserted state interest behind the restriction is substantial. Third, it must determine whether the regulation directly advances the interest so asserted, and, fourth, whether the regulation is not more extensive than necessary to serve that interest.

Barr v. State, 731 So. 2d at 129. The court noted that in Barr, the statute passed constitutional muster under this test. Bradford at

571. The statute is constitutional under this four-prong test without the inclusion of any fraud element.

The first prong of the test is satisfied because the challenge to the solicitation was not misleading - it was unlawful only because it violated section 817.234(8), and not for any other reason. Bradford at 571; Barr at 129.

The second prong of the test was satisfied because substantial State interests were involved - to combat insurance fraud and a resulting increase in insurance premiums borne by the public. Barr at 129. The following State interests are clearly substantial to satisfy this prong:

> (1) The State has a substantial interest in protecting the public from unnecessarily inflated insurance rates for personal injury protection and liability insurance.
>
> (2) The State has a substantial interest in preventing fraud and misrepresentations by professionals.
>
> (3) The State has a substantial interest in protecting the privacy of its citizens involved in motor vehicle accidents.
>
> (4) The State has a substantial interest in promoting the ethical standards of professionals, consistent with the laws of Florida, who make claims for personal injury protection benefits and motor vehicle tort claims, related to the motor vehicle accidents of its citizens.

The third prong of the test is satisfied. It is not necessary to establish that each of the State's interests will be or are advanced by the regulation. If the evidence shows that even one

substantial interest is directly advanced, the statute will be preserved. See Sciarrino v. City of Key West, Fla., 83 F. 3d 364, 369 (11th Cir. 1996) citing Florida Bar v. Went For It, Inc., 115 S.Ct. 2371, fn. 1 (1995), cert. denied, 117 S.Ct. 768 (1997). While the State may not rely on speculation or conjecture,

> [w]e do not read our case law to require that empirical data come to us accompanied by a surfeit of background information. Indeed, in other First Amendment contexts, we have permitted litigants to justify speech restrictions by references to studies and anecdotes pertaining to different locales altogether, (citations omitted) , or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and 'simple common sense.' (citation omitted).

Florida Bar v. Went For It, Inc., 115 S.Ct. at 2378.

The court in Barr correctly analyzed why subsection (8) directly advances the state's interest in preventing insurance fraud.

> As the [Grand Jury] report suggests, there was a serious problem in the industry of "runners" soliciting automobile accident victims with little or no injuries to undergo unnecessary medical treatment so that they could exhaust the victims' PIP benefits before the victim sued in tort for damages. From an objective standpoint, we believe the statute's prohibition against this type of solicitation provides a direct link to the state's interest in preventing harm to such victims and the insurance industry.

Barr at 129.

There can be no dispute that the harms sought to be alleviated

were quite real. Florida is a no fault insurance state, with a $10,000 personal injury protection benefit medical expense threshold that must be exceeded before an injured person can recover for medical expenses or pain and suffering in tort, by filing a personal injury action. The Grand Jury report documented fraud in piercing Florida's no fault threshold. The fraud, or "harm feared," was that persons with "little or no injuries" were solicited for medical treatments that became the basis for making claims of personal injury protection benefits, and when the medicals exceeded that threshold, motor vehicle tort claims. The effect was an increase in both the number of recoveries and dollar value of recoveries for pain and suffering in personal injury actions. These claims were paid by defendant insurance companies and passed on as a cost of doing business to Florida citizens through unnecessary insurance rate increases.

The statute, by making it a crime to solicit specifically <u>for the purpose of filing a motor vehicle tort claim or claim for personal injury protection benefits</u>, obviously materially advances that substantial interest. Common sense dictates that criminalizing a particular action deters that action.

Lastly, the fourth prong of the test is satisfied because subsection (8) is narrowly drawn.

> The statute is not a blanket ban on all solicitation of business by a chiropractor, but rather, targets only those persons who solicit business for the sole purpose of making motor

> vehicle tort or PIP benefits claims. Although not the least restrictive means available to achieve the state's purpose, we hold the ban on such solicitation is reasonably tailored to the state's interest in preventing insurance fraud and raised premiums.

Barr at 129; Bradford at 571.

The statute does not ban all solicitation under any circumstances resulting in an impermissible restriction of commercial speech. The statute merely restricts the solicitation for chiropractic business **for the purpose of making a claim for PIP benefits**. A chiropractor could hire hundreds of telemarketers to solicit new patients full time and not be in violation of Florida's criminal statute, so long as the chiropractors are not soliciting persons for the purpose of filing a motor vehicle tort claim or claim for personal injury protection benefits -- the limited restrictions imposed by the statute.

Clearly, absent the fraud element imposed by the appellate court, subsection (8) passes constitutional muster and satisfies the four-prong Central Hudson test. It is not overbroad and is narrowly drawn. The appellate court's imposition of the fraud element is not necessary for the statute to be constitutional. It should not have been imposed for the reasons set forth in Points 1 and 2 herein.

CONCLUSION

Wherefore, based upon the foregoing arguments and the authorities cited therein, Petitioner respectfully requests that this Court reverse the appellate court's finding that fraud is an element of §817.234(8) Fla. Stat. (1997).

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Petitioner'S Initial Brief on the Merits" has been furnished by U.S. Mail to: Michael E. Dutko, Esq., Attorney for Respondent, Colonial Bank Building, Suite 500, 600 South Andrews Avenue, Fort Lauderdale, FL 33301 and D. Gray Thomas, Esq., 215 Washington Street, Jacksonville, FL 32202 on April ___, 2000.

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