ORIGINAL

IN THE SUPREME COURT OF FLORIDA

Case No. SCOO- 1322

RANDOLPH HANSBROUGH,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

On Appeal from the District Court of Appeal
of the State of Florida, Fourth District
DCA-4 No. 99-00 169

PETTTTONER'S REPLY BRIEF

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INTRODUCTION

The Petitioner herein, Dr. Randolph Hansbrough, was the Defendant at the trial level and the Appellant in the action on appeal to the Fourth District Court of Appeals. The Respondent, State of Florida, was the prosecution at the trial level and the Appellee in the action on appeal. The parties will be referred to by proper name or by their designation. The record on appeal will be referred to as "R-l ," etc., and references to the State's Answer Brief will be cited as "SB- 1," etc.

I.

SUMMARY OF THE ARGUMENT

The fact that the plain language of §8 17.234(8), Fla. Stat., is clear and unambiguous does not preclude an examination of legislative history or intent where, on its face, the statute is an unconstitutional restriction on commercial free speech. Our Judiciary maintains a duty to interpret a statute within the purview of constitutional guarantees while conforming to legislative intent and purpose. However, where a statute infringes on a fundamental right and contains no language to support a restrictive interpretation, or no way to save the statute via its construction, a court must simply find the statute unconstitutional.

Only where the statue is read to include an implied element of intent to defraud can §8 17.234(8) survive analysis under Central Hudson. As the State cannot reach its burden of demonstrating how this restriction on commercial speech directly and materially advances the prevention of intentional insurance fraud, it cannot constitutionally suppress such speech. Further, because the restriction is neither narrowly drawn, nor proportionate to the State's goal, it is an unconstitutional ban on a protected fundamental right.

II.

ARGUMENT

Petitioner seeks a determination by this Honorable Court that §8 17.234(8), Fla. Stat., is unconstitutional on its face and as applied, in that the statute impermissibly abridges the right of commercial free speech.[1] While the State seeks to uphold the constitutionality of the statute in question, its argument is inaccurate, fundamentally flawed and plainly presumptuous.[2]

A

COURTS HAVE A DUTY TO CONSTRUE A STATUTE SO AS NOT TO INFRINGE ON CONSTITUTIONAL GUARANTEES AND, WHERE POSSIBLE, IN ACCORDANCE WITH LEGISLATIVE INTENT

In its Answer Brief, the State wastes valuable time and space discussing the plain language of §8 17.234(8). Nowhere in his argument does Petitioner Hansbrough argue that the plain language of the statute is vague or ambiguous.

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[1] Petitioner hereby incorporates by reference Petitioner's Initial Brief, the arguments and case law cited therein.

[2] Additionally, Respondent's Statement of the Case and Facts is patent propaganda to the extent that the State alleges that any solicitation by Dr. Hansbrough, through Prebeck Consulting, was for the purpose of filing a PIP claim (SB-3). The Record itself indicates that in referring potential patients to Dr. Hansbrough, Susan Prebeck's main concern was whether individuals were symptomatic, and did not concern herself with whether they could or would be paying for chiropractic services via PIP insurance (R-l 98). Further, William Ponsoldt gave a sworn statement that insurance of any type was never discussed with Dr. Hansbrough, and specifically did not recall any reference to insurance or PIP claims during the solicitation call from Prebeck (R-203).

What the State misses is Hansbrough's fundamental point that, although clear on its face, the statute is *facially unconstitutional*.[3]

It is disingenuous, to say the least, for the State to argue that "a clear and unambiguous statute precludes an examination of legislative history or intent" (SB- 12).[4] Similarly, while the Respondent brashly states, "the legislature has the prerogative to determine what is a crime and to define or redefine the elements of the crime" (SB-12), clearly the legislature cannot enact legislation that infringes upon a constitutional guarantee and escape scrutiny thereby.[5] Where a fundamental right is at risk, the legislature's use of clear and unambiguous language, does not obviate the duty of the judiciary to scrutinize a statute within

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[3] To the Trial Court, the Appellate Court, and to this Honorable Court, Petitioner argued, and continues to argue, that the plain language of the statute renders it unconstitutional as a overbroad ban on commercial free speech. Petitioner has likewise argued at all levels that, in order to save the statute from constitutional scrutiny, and in keeping with legislative intent, courts may read an element of intent to defraud into the statute which must be alleged and proven by the state in order to impose criminal sanctions against an individual found in violation of §817.234(8). However, where a statute infringes on a fundamental right and contains no language to support a restrictive interpretation, or no way to save the statute via its construction, a court must simply find the statute unconstitutional. Brown v. State, 358 So.2d 16 (Fla. 1978).

[4] Apparently the State recognizes its own fallacy, while on the same page stating, "statutes are to be construed to effectuate legislative intent" (SB-12).

[5] The absurdity of the State's argument is easily seen. Were we to adopt the State's position, the legislature's only obligation in enacting a statute would be to phrase a law in plain, unambiguous terms, clearly setting forth the elements of the crime.

the perimeters of the Constitution and in accordance with legislative purpose.[6] In relying on the plain language of §8 17.234(8) to save the statute, the State butchers our rules of statutory construction and insults our intelligence.

While Respondent spends much of its time reciting §8 17.234 in full, and delves, *ad nausium,* into the legislative history behind the statute, it lands on one irrefutable truth: this statute, entitled "False and fraudulent insurance claims,"[7]

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[6] Attempting to bolster its argument that this Court cannot construe a statute to include an implied element of intent, the State offers State v. Hubbard, 751 So.2d 552 (Fla. 1999) (SB-15-16). Therein, this Court construed a DUI manslaughter statute, and found that there was no legislative intent to include negligence as an element of the offense. However, this Court was clear to distinguish the statute before it from other statutes which impliedly hold an element of intent:

> As a final consideration, the concerns we voiced in Chicone v. State, 684 So.2d 736 (Fla. 1996), do not appear present in the DUI manslaughter context. There, we held that the State was required to prove that the defendant knowingly possessed illegal drugs even though the applicable statutes did not specifically include scienter requirements. . . . We also noted that interpreting the drug possession statutes without a knowledge requirement would "criminalize a broad range of apparently innocent conduct." Such a danger does not appear to exist where an intoxicated person enters and drives an automobile and subsequently causes a fatal accident. That is, it would seem unreasonable to label driving while intoxicated as "apparently innocent conduct" requiring a knowledge or at least an independent negligence element.

Hubbard, 75 1 So.2d at 564-65 (citations omitted). For painfully apparent reasons, Hubbard is simply not harmonious with the issues involved in the case at bar, and proffering it as such demonstrates the dishonesty of the State's argument.

[7] Interestingly, the State admits that during the very same legislative sitting, Section 817.234 was retitled to reflect concerns of fraudulent insurance claims while adding subsection (8) (SB-21). So to meet constitutional requirements, a

was enacted, *admittedly,* in response to concerns of fraud infecting the insurance industry? In the same breath, the State suggests that we should now disregard title and lengthy legislative history relating concerns of fraudulent activity, and focus instead on the legislature's true concern: the "evil" of "solicitation in and of itself' (SB-23). The State thus takes the position that the statute at issue is not an anti-fraud statute, but an anti-solicitation statute, as if this argument would somehow alleviate the strictures of the Central Hudson analysis.'

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statute's title must sufficiently state its goal. See *generally,* North Ridge General Hospital v. Citv of Oakland Park, 374 So.2d 461 (Fla. 1979) (noting the constitutional requirement that the subject of a law must be briefly expressed in its title so to provide reasonable notice to the reader of what the law seeks to forbid).

[8] In its Answer Brief, the State refers to a Dade County Grand Jury Report as the basis for the statute's enactment. In discussing this Report, the State repeatedly acknowledges legislative concern over fraud in piercing the no fault threshold where a "small group" of "unscrupulous" professionals worked together to "inflate or outright falsify" PIP claims, thereby driving up insurance rates through "fraudulent claims" (SB- 18-22).

[9] The State posits one last argument in this area. Although due process was not argued *per se* in Petitioner's Initial Brief, the State appears to think otherwise (SB-24-28). As Dr. Hansbrough has previously asserted, and supported, intent is a requisite element where **a statute** tends to chill First Amendment freedoms or provides for severe criminal penalties. While the State altogether avoids the fact that the statute charges violators with a third degree felony, in addressing Petitioner's First Amendment argument, Respondent points to State v. Olson, 586 So.2d 1239 (Fla. 1 st DCA 1991) (SB-26-27), a case where there was no First Amendment right at issue. Suffice to say, the State cannot find one case wherein a court has refused to require an element of intent where a defendant is exposed to harsh criminal penalties for doing no more than exercising his first amendment rights.

The State, once again, misses the point. If "solicitation in and of itself' is the "evil" feared by the legislature, the statute remains a blanket attempt to prohibit a constitutionally protected activity. So why would solicitation which leads to the filing of a PIP claim be considered evil? Certainly the act of solicitation itself is not inherently evil-to the contrary, it is a fundamental and fervently protected right. Yet once the solicitation results in the filing of a meritorious PIP claim, may the solicitation then be considered nefarious? Although not constitutionally protected activity, submitting a PIP claim surely cannot be considered criminal when our law mandates that Florida drivers carry personal injury protection insurance in order to cover the legitimate medical expenses of those injured in automobile accidents. Thus, the legislature could not have rationally criminalized solicitation that simply results in a PIP claim; nor could the legislature lawfully criminalize such behavior.

B

SECTION 817.234(8), AS WRITTEN AND AS APPLIED TO THE FACTS OF PETITIONER'S CASE, IS AN UNCONSTITUTIONAL RESTRICTION ON COMMERCIAL FREE SPEECH.

Time and again, on into its Central Hudson argument,[10] Respondent argues that §817.234(8) "was enacted to combat insurance fraud" (SB-29).[11] Petitioner's assertion that the prevention of willful and intentional fraud is the substantial governmental interest at issue is not only unchallenged by the State, but supported.[12]

With regard to the Respondent's claim that the statute directly and materially advances the state's interest in preventing insurance fraud, little argument is offered. Instead, the State simply rests on its own conclusion that this Central Hudson prong is satisfied. Referring solely to the 1974 Grand Jury Report relating fears of a small group of professionals falsifying insurance claims, the

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[10] Petitioner feels compelled to note herein that the State's Central Hudson analysis, the crux of this entire argument, is limited to *less than seven pages.*

[11] Thus, Respondents long-winded argument that the statute was implemented to curb the evils of solicitation as opposed to the evils of fraud, a distinction that serves no purpose, is offered for naught.

[12] On page 32 of the State's Answer Brief, three additional interests are advanced by the State as substantial. However, it should be noted that the Central Hudson standard does not permit the State, nor the courts, to supplant the precise interests put forth with other suppositions, particularly where the state has staunchly argued a specific governmental interest. Edenfield v. Fane, 113 S.Ct. **1792,** 1798 (1993).

State offers no findings of fact or evidentiary support whatsoever that filing legitimate PIP claims of solicited individuals works to deter fraud,

Finding itself in quicksand, the State retreats to its newly proffered governmental interest in preventing the "evil" of "solicitation in and of itself":

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

(SB-34) (emphasis in original). Admittedly, Petitioner is confused. What happened to the asserted governmental interest in preventing insurance fraud? Could it be that shutting down free speech in the form of innocuous solicitation neither directly nor materially advances the prevention of insurance fraud? To be sure, the state *cannot* assert one governmental interest for purposes of one prong of the Central Hudson analysis and whimsically assert an altogether different interest as substantial for purposes of another prong. See Ibanez v. Florida Dep't of Bus. & Prof 1 Regulation, 114 S.Ct. 2084 (1994) (the Central Hudson test requires the restriction on speech to target the identifiable harm, and mandates that the restriction directly and effectively alleviate that harm); *accord* Edenfield v. Fane, 113 S.Ct. 1792 (1993).

Finally, in a three-paragraph discussion, the State curtly pays homage to the requirement that the restriction on commercial speech be narrowly tailored to the

asserted interest in preventing insurance fraud. Turning a blind eye to the plethora of case law cited in Petitioner's Brief demonstrating why §817.234(8) is not narrowly tailored to its objective of preventing insurance fraud, the State simply states, "Is too!"

To be sure, there is no limiting language in §817.234(8). The statute makes it a **felony** for **any** person to solicit, in **any** public or private place, individuals who could later file a PIP claim. The statute remains an uncalculated,[13] disproportionate[14] restriction, tenuously,[15] ***at best,*** connected to the prevention of fraud, and unconstitutionally utilized as a prophylactic measure,[16] where less burdensome alternatives exist. [17]

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[13] See Greater New Orleans Broadcasting Ass'n v. United States, 119 S.Ct. 1923, 1932 (1999) ("challenged regulation should indicate that its proponent carefully calculated the costs and benefits associated with the burden on speech imposed by its prohibition").

[14] See Florida Bar v. Went For It, 115 S.Ct. 2371, 2380 (1995) (there must be, at minimum, a reasonable fit between the means and the ends, a fit that is "in proportion to the interest served").

[15] The fact that out of the entire "Operation Chiro-Sweep," fraud was neither alleged nor charged against any defendant, serves to demonstrate the lack of connection between the restriction and the State's asserted interest.

[16] See Edenfield, 113 S.Ct. at 1803-04 ("[b]road prophylactic rules in the area of free expression are suspect").

[17] See 44 Liquormart, Inc. v. Rhode Island, 116 S.Ct. 1495, 1521 (1996) (concurring opinion) ("[t]he availability of less burdensome alternatives to reach the stated goal signals that the fit between the legislature's ends and the means

III.

CONCLUSION

As the State has not shown how criminally charging solicitors for filing legitimate PIP claims either materially advances or is narrowly tailored to the prevention of fraud, §817.234(8), Fla. Stat., is facially unconstitutional. As the Judiciary has the inherent power, and duty, to interpret a statute to accord with constitutional guarantees and legislative intent, instead of declaring §8 17.234(8) unconstitutional, this Court can alternatively find that the statute holds an implied element of intent to defraud, notwithstanding its plain language.

Based on the foregoing, Petitioner, Randolph Hansbrough, respectfully requests that this Honorable Court enter an order declaring §8 17.234(8), Fla. Sta., unconstitutional on its face or as applied to the facts of his case.

Respectfully submitted,

By: _____

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-and-

By: _____

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chosen to accomplish those ends may be too imprecise to withstand First Amendment scrutiny").

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Initial Brief was furnished by U.S. Mail this 5th day of September, 2000, to: FRANK J. INGRASSTA, Assistant Attorney General, Office of the Attorney General, Department of Legal Affairs, 110 S.E. 6th Street, Ft. Lauderdale, Florida 33301.

By: _____
ROBERT ADER