

IN THE SUPREME COURT OF FLORIDA

RUBEN FLORES,

Petitioner,

APPEAL NUMBER: 0028-2281

vs.

ALLSTATE INSURANCE COMPANY,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

On Review from the Second District Court of Appeal
Case No. 2D98-4115

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF ARGUMENT	9
ARGUMENT	11
I. Neither the Trial Court Nor the District Court Erred in Applying the Concealment/Fraud Clause to the Entire Policy of Insurance.	11
a. Florida Law Requires Judicial Enforcement of the Concealment/Fraud Provision	11
b. Public Policy, Logic and the Statutory Scheme of Insurance Regulation Support the Application of the Concealment/Fraud Provision to Bar the Petitioner’s UM Claim	17
c. Florida’s Cancellation Statute, Section 627.728, Does Not Bar Judicial Enforcement of the Concealment/Fraud Provision	21
d. Florida’s UM Statute, Section 627.727, Does Not Bar Judicial Enforcement of the Concealment/Fraud Provision	24
e. Judicial Enforcement of the Concealment/Fraud Provision Does Not Act to Void Liability Insurance as to Injured Third-Parties ...	27
f. Florida Law Contains Adequate Safeguards for Innocent Co-Insureds Against Loss of Insurance on Account of Fraudulent PIP Claims by Resident Relatives	28
II. Evidence of Fraud Did Not Unfairly Prejudice the Jury.	30
CONCLUSION	36
CERTIFICATE OF SERVICE	37

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Allstate Indemnity Co. v. Clark</i> , 23 Fla. L. Weekly D2051 (Fla. 2d DCA Sept. 4, 1998)	33
<i>Allstate Ins. Co. v. Boynton</i> , 486 So. 2d 552 (Fla. 1986)	11, 12
<i>Allstate Ins. Co. v. Manasse</i> , 707 So. 2d 1110 (Fla. 1998)	33
<i>American Insurance Co. v. Robinson</i> , 163 So. 17 (Fla. 1935)	12
<i>American Reliance Ins. Co. v. Kiet Investments, Inc.</i> , 703 So. 2d 1190 (Fla. 3d DCA 1997)	12
<i>Auto-Owners Insurance Co. v. Christopher</i> , 749 So. 2d 581 (Fla. 5th DCA 2000)	25
<i>Callaway v. Sublimity Ins. Co.</i> , 858 P.2d 888 (Or. Ct. App. 1993)	13, 14
<i>Carguillo v. State Farm Mutual Automobile Insurance Co.</i> , 529 So. 2d 276 (Fla. 1988)	25
<i>Collier v. South Carolina Ins. Co.</i> , 422 S.E.2d 52 (Ga. Ct. App. 1992)	13
<i>Dauksis v. State Farm Mut. Auto. Ins. Co.</i> , 623 So. 2d 455 (Fla. 1993)	20
<i>Devilliers v. Allstate Insurance Co.</i> , 681 So. 2d 885 (Fla. 3d DCA 1996)	26

TABLE OF AUTHORITIES (con't)

<u>Cases</u>	<u>Page(s)</u>
<i>Douglass v. Nationwide Mutual Insurance Co.</i> , 913 S.W.2d 277 (Ark. 1996)	23
<i>Fischer v. State Farm Mutual Automobile Insurance Co.</i> , 495 So. 2d 909 (Fla. 3d DCA 1986)	26
<i>Fitzgerald v. Molle-Teeters</i> , 520 So. 2d 645 (Fla. 1988)	33
<i>Government Employees Insurance Co. v. Rebel</i> , 434 So. 2d 29 (Fla. 3d DCA 1983)	26
<i>Hartford Fire Insurance Co. v. Hollis</i> , 59 So. 785, 64 Fla. 89 (Fla. 1912)	15, 16
<i>Johnson v. South State Ins. Co.</i> , 341 S.E.2d 793 (S.C. 1986)	14
<i>Klein v. Allstate Insurance Co.</i> , 367 So. 2d 1085 (Fla. 1st DCA 1979)	26
<i>McCullough v. State Farm Fire & Casualty Co.</i> , 80 F.3d 269 (8th Cir. 1996)	13
<i>Midwest Mutual Insurance Co. v. Santiesteban</i> , 287 So. 2d 665 (Fla. 1974)	25
<i>Motors Insurance Corp. v. Marino</i> , 623 So. 2d 814 (Fla. 3d DCA 1993)	23
<i>Mullis v. State Farm Mutual Automobile Insurance Co.</i> , 252 So. 2d 229 (Fla. 1971)	24

TABLE OF AUTHORITIES (con't)

<u>Cases</u>	<u>Page(s)</u>
<i>Nat'l Union Fire Ins. Co. v. Cubberly</i> , 67 So. 133, 68 Fla. 253 (Fla. 1914)	16
<i>Overton v. Progressive Insurance Co.</i> , 585 So. 2d 445 (Fla. 4th DCA 1991)	29
<i>Palma Del Mar Condominium Ass'n v. Commercial Laundries of West Florida, Inc.</i> , 586 So. 2d 315 (Fla. 1991)	22
<i>Plaza Builders, Inc. v. Regis</i> , 502 So. 2d 918 (Fla. 2d DCA 1986)	32
<i>Ramos v. Northwestern Mutual Insurance Company</i> , 336 So. 2d 71 (Fla. 1976)	28
<i>Reid v. Allstate Insurance Co.</i> , 344 So. 2d 877 (Fla. 4th DCA 1977)	26
<i>Salas v. Liberty Mutual Fire Insurance Co.</i> , 272 So. 2d 1 (Fla. 1972)	24
<i>Sauvageot v. Hanover Ins. Co.</i> , 308 So. 2d 583 (Fla. 2d DCA 1975)	22
<i>Stahl v. Metropolitan Dade County</i> , 438 So. 2d 14 (Fla. 3d DCA 1983)	31
<i>State Farm Gen'l Ins. Co. v. Best in the West Foods, Inc.</i> , 667 N.E.2d 1340 (Ill. App. 1996)	13
<i>State v. Ashley</i> , 701 So. 2d 338 (Fla. 1997)	21

TABLE OF AUTHORITIES (con't)

<u>Cases</u>	<u>Page(s)</u>
<i>Tempelis v. Aetna Casualty & Surety Co.</i> , 485 N.W.2d 217 (Wis. 1992)	19
<i>United Security Insurance Co. v. Michigan Comm’r of Insurance</i> , 348 N.W.2d 34 (Mich. App. 1984)	23
<i>Wales v. Wales</i> , 422 So. 2d 1066 (Fla. 1st DCA 1982)	32
<i>Williams v. United Fire & Casualty Co.</i> , 594 So. 2d 455 (La. Ct. App. 1991)	13-15
<i>Wong Ken v. State Farm Fire & Casualty Co.</i> , 685 So. 2d 1002 (Fla. 3d DCA 1997)	12, 15
<i>Young v. Aggressive Southeastern Insurance Co.</i> , 753 So. 2d 80 (Fla. 2000)	24

TABLE OF AUTHORITIES (con't)

<u>Statutes</u>	<u>Page(s)</u>
Section 626.989, Florida Statues	20
Section 626.9891, Florida Statutes	20
Section 627.409, Florida Statutes (1997)	20
Section 627.414, Florida Statutes (1995)	24
Section 627.727, Florida Statutes	24, 25
Section 627.728, Florida Statutes (1995)	21, 24
Section 627.736, Florida Statutes (1995)	11, 20, 25
Section 633.175, Florida Statutes	20
Section 817.234, Florida Statutes	20

TABLE OF AUTHORITIES (con't)

<u>Other Authorities</u>	<u>Page(s)</u>
2 COUCH ON INSURANCE 3d § 23:3 n.27 (1997)	16
2 COUCH ON INSURANCE 3d § 23:7 (1997)	17
2 COUCH ON INSURANCE 3d § 30:3	23
83 A.L.R. 2d 1104, Section 1	28
Alan R. Miller & Charles B. Mitchell, Jr., <i>Lie Once and Lose</i> , The Brief 14 (Spring 1993)	18, 19
APPLEMAN ON INSURANCE § 3595 (rev. ed. 1970)	16
Coalition Against Insurance Fraud Studies	17, 18
Douglas M. Moore, Jr., <i>A Judge's View of Insurance Fraud: An Analysis of the Nature and Scope of the Problem and Challenges to Legislation to Combat Insurance Fraud</i> , in Defense Practice Seminar Coursebook for Insurance Fraud Seminar 27 (D.R.I. May 1999)	17, 18
Fla. Std. Jury Instr. (Civil) 5.1(a)	31

STATEMENT OF THE CASE AND FACTS

This appeal arises out of a motor vehicle accident that occurred on January 22, 1995, between a motor vehicle owned by Antonio Meza and another vehicle owned by Leticia Rodriguez but operated by Ruben Rodriguez. (R. 1-2). At the time of the accident, Ruben Flores and Bobby Flores were passengers in Antonio Meza's vehicle which was operated by Norma Flores. (R. 1, 6). Ruben and Norma Flores are the parents and natural guardians of Bobby Flores. (R. 5).

Ruben, Bobby and Norma Flores, as additional insureds, filed a four-count complaint against Antonio Meza's insurer, Allstate Insurance Company. Counts I, II, and III sought uninsured/underinsured motorist benefits from Allstate and Mr. and Mrs. Flores sought loss of their son's services in count IV. (*See* R. 1-11). In its answer, Allstate raised several affirmative defenses including the failure to use "operational and available seat belts," and fraud and misrepresentation on the part of Ruben and Norma Flores in the submission of their PIP claims. (R. 16-17).

On January 15, 1997, the Plaintiffs moved for summary judgment on whether Allstate's fraud and misrepresentation affirmative defenses were legally sufficient. (R. 29). The sum and substance of this one paragraph motion was as follows: "Affirmative Defenses Eight and Nine are legally insufficient as defenses to an

Uninsured Motorist claim relating as they do to claims for PIP benefits.” (R. 29). The trial court denied this motion. (R. 74, 97).

On July 16, 1997, the Plaintiffs moved to sever their claims on the ground that evidence of Ruben Flores’ fraud would prejudice the claims of Norma and Bobby Flores. (R. 71, 77, 80-81, 130). On September 15, 1997, the trial court denied this motion and stated:

In making this ruling, the Court has weighed the potential prejudicial effect of hearing the fraud issue in the same trial as Plaintiffs’ claim for damages, but has determined that the more appropriate procedure is to try all claims together. Plaintiffs’ position is that, if the alleged fraud is determined by a jury to be of a minimal nature and therefore not material, it might still taint their verdict. Another way of stating the Plaintiffs’ position would be to contend that the Plaintiffs should not be harmed by a little bit of fraud. The difficulty of this position is apparent when one considers the contrary side of that issue which is that the Plaintiffs should not be rewarded by committing a little bit of fraud, but not having to risk any consequences therefrom. All of the cases cited by Plaintiffs in support of their position that the fraud issue should be treated as a coverage issue and tried separately were cases dealing with the statute concerning the non-joinder of insurance companies. The purpose of that statute is to keep the existence of insurance from the jury. That reasoning does not apply in this case which is an uninsured motorist claim in which the underlying policy of insurance will be in evidence.

The Plaintiffs are also concerned that the alleged fraud of one insured might void the insurance coverage of other insureds. This Court further rules that only insureds who have committed or participated in the commission of fraud which materially violated the policy are subject to forfeiting their benefits under the policy.

(R. 97-98).

At trial, Allstate presented evidence that Ruben Flores submitted three bills for reimbursement under his PIP coverage which he did not pay for (\$5, \$10, \$27.50), and another bill that he altered from \$30 to \$130 by the insertion of a “1.” (Tr. 145 *et seq.*; 209). Kari Dumouchel-Moore, a member of Allstate’s special investigation unit, testified, *inter alia*, as to Allstate’s policy provision regarding fraud or misrepresentation. (Tr. 205 *et seq.*). She first read the policy provision under which Allstate denied UM coverage to Ruben Flores which provides:

Allstate does not provide coverage for any loss which occurs in connection with any material misrepresentation, fraud, or concealment of material facts. . .

(Tr. 211, 212, 214-16)(hereinafter referred to as the “concealment/fraud provision”).

Ms. Moore then testified that this provision was found in the “General Conditions” section of the policy which is at the beginning of the policy and applied to all coverages under the policy. (Tr. 210). Ms. Moore also testified that at the time of the discovery of Petitioner’s fraud, Allstate had paid approximately \$1,304 to Ruben Flores, \$2,000 to Norma Flores, and \$11,648 to Bobby Flores. (Tr. 211). Allstate continued to pay Bobby Flores’ claim even after Petitioner’s fraud was discovered. (Tr. 212). She also testified that in May 1995, after Allstate began investigating the suspected fraud and reported it to one of Petitioner’s doctors, no more fraudulent bills were submitted by Petitioner. (Tr. 220).

During his cross-examination, Petitioner made numerous statements inconsistent with his deposition and examination under oath (EUO) testimony. During his EUO, Petitioner stated that he paid cash for a \$10 prescription; at trial, Petitioner denied that fact. (*See* Tr. 149-50). Petitioner previously testified that the bill for \$27.50 was a “mistake” and that he never filled it; at trial he changed his testimony and stated that there was nothing wrong with the prescription. (*See* Tr. 150-51). Petitioner also denied at his EUO that the handwriting on the \$27.50 bill was his, but admitted such during trial. (Tr. 153).

The evidence presented at trial also indicated that, as a result of the accident, Petitioner sustained a fracture to his left cheek bone, a laceration of his lip, and damage to his teeth and gums. (R. 483). He missed only ten days of work from the time of the accident to approximately a year and a half later. (R. 491). When the Petitioner was examined by his neurologist, Robert Martinez, M.D., approximately a year and a half after the accident, his neck had full range of motion, his gait was normal, his motor examination was normal, and he was not suffering from any alleged memory problems. (R. 492-94). Although recommended, Petitioner never elected to undergo nerve blocks or physical therapy for his alleged injuries. (R. 497-98). Francis DeRito, M.D., the otolaryngologist who treated Petitioner for his lacerated lip, testified that as of May 1, 1995, Petitioner “had healed well with little visible

scarring” with no marked tenderness in the facial area with equal sense of touch on both sides of his mouth. (R. 347).

Additionally, on two employment applications completed some twenty months after the accident in September 1996, Petitioner testified that he did not check any boxes on the medical questionnaires which indicated he had any limitations to work and any type of physical problems including back problems. (Tr. 173-74; R. 644-48, 655).

On April 23, 1998, after a three-and-one-half day trial, the jury returned its verdict. It found that Ruben Flores, but not Norma Flores, committed fraud with respect to the insurance claim submitted to Allstate. (R. 546). It also found that Ruben Flores’ failure to wear a seatbelt was the legal cause of his injuries and that Norma Flores’ failure to wear a seatbelt was the legal cause of 50% of her injuries. (R. 546-47). The jury apportioned damages among the Plaintiffs as follows:

Norma Flores:

Past Lost Wages	\$2,500.00
Past Medical Expenses	\$3,273.87
Past Pain & Suffering	\$8,000.00
Future Pain & Suffering	\$35,000.00

Ruben Flores:¹

Past Medical Expenses	\$5,457.50
Future Medical Expenses	\$5,000.00
Past Pain & Suffering	\$5,000.00
Future Pain & Suffering	\$5,000.00

Bobby Flores:

Past Medical Expenses	\$12,932.00
Future Medical Expenses	\$15,000.00
Past Pain & Suffering	\$5,000.00
Future Pain & Suffering	\$35,000.00

(R. 547-48).

On May 4, 1998, Plaintiffs moved for a new trial and additur. (R. 571-73). In their motion for a new trial, Plaintiffs contended that the verdict was “against the manifest weight of the evidence and was influenced by matters outside the record, namely, the evidence of fraud in Ruben Flores’ claim.” (R. 571). Plaintiffs then requested an additur of \$10,000 for Norma Flores’ past pain and suffering damages

¹Despite Allstate’s protestations during the charge conference, the trial court permitted the jury to assess Ruben Flores’ responsibility for his failure to use an operational seatbelt and his damages even if it found he committed fraud. (Tr. 332-33, *see also* Tr. 274). The jury was also instructed to assess Ruben Flores’ damages even though the jury apportioned 100% responsibility to him for his own injuries.

Appellee notes that the charge conference is not part of the record on appeal. The transcript references above, however, foretell Allstate’s position at the charge conference.

and a \$20,000 additur for Bobby Flores' past pain and suffering damages. (R. 572-73). The trial court denied the Plaintiffs' motion for a new trial, denied Norma Flores' motion for additur, but granted Bobby Flores' motion for additur in the amount of \$10,000 for past pain and suffering. (R. 595).

On October 12, 1998, the trial court entered final judgment in favor of Allstate against Ruben Flores by ordering him to pay Allstate its costs. (R. 597). On October 26, 1998, Ruben and Norma Flores timely appealed the trial court's denial of their motion for a new trial and the granting of Allstate's motion to tax costs. (R. 599). On October 28, 1998, the trial court entered judgment in favor of Bobby Flores in the amount of \$70,420.07, which included the \$10,000 additur. (R. 601). On October 29, 1998, the trial court entered final judgment in favor of Norma Flores in the amount of \$26,899.19. (R. 600). The judgments in favor of Bobby and Norma Flores have been paid by Allstate. Subsequently, Norma Flores voluntarily dismissed her appeal.

Ruben Flores asserted two errors in the appellate court below: that the trial court erred in permitting Allstate to raise a PIP fraud defense in an Uninsured Motorist claim; and that evidence of fraud influenced the jury, causing it to make findings that were shocking, unconscionable and against the manifest weight of the evidence. The

Second District Court of Appeal affirmed the orders and judgment of the trial court and certified the following question to be of great public importance:

DOES AN INSURED LOSE ALL BENEFITS UNDER A DIVISIBLE INSURANCE POLICY WHERE THE INSURED'S FRAUD IS COMMITTED WITH RESPECT TO ONE PART OF THE POLICY BUT THE APPLICABLE GENERAL FRAUD PROVISION OF THE POLICY PROVIDES THAT FRAUD IN ANY PORTION OF THE POLICY VOIDS THE ENTIRE POLICY?

This Court waived jurisdictional briefs and ordered the parties to proceed on the merits.

SUMMARY OF ARGUMENT

The jury found Ruben Flores guilty of submitting fraudulent PIP claims. The insurance policy contained a concealment/fraud provision in the general conditions section of the contract which stated:

Allstate does not provide coverage for any loss which occurs in connection with any material misrepresentation, fraud, or concealment of material facts. . .

The trial judge properly allowed this provision to be utilized as a defense by Allstate in the presentation of Ruben Flores' claim for uninsured motorist benefits. The other insureds were not affected by the ruling, and they each received all their benefits under the policy. Ruben Flores now asks this Court to ignore his fraud, and to ignore the concealment/fraud clause in the parties' contract so that he may recover UM benefits. Florida common law, and the public policy of this state to deter fraud, give effect to the concealment/fraud provisions in insurance policies. Nothing in Florida's financial responsibility statutes prohibits an insurer from including a concealment/fraud clause in its policy, or prohibits a court from giving effect to such a provision against a fraudulent claimant.

Both the trial judge and the district court carefully crafted their rulings to give effect to the concealment/fraud provision in the contract, without violating Florida's financial responsibility statutes and without harming the rights that innocent, injured parties may have under automobile insurance policies. These rulings should be affirmed by this Court.

ARGUMENT

I. Neither the Trial Court Nor the District Court Erred in Applying the Concealment/Fraud Clause to the Entire Policy of Insurance.

a. Florida Law Requires Judicial Enforcement of the Concealment/Fraud Provision

Flores argues, as he argued in the district court, that section 627.736(1)(a), Fla. Stat. (1995) [the PIP statute], allows an insurer to deny PIP benefits only if the medical charges are unreasonable or unnecessary, and therefore an insurer may not deny UM coverage if the insured submits a fraudulent PIP claim. This is a *non sequitur* and, as the district court noted in its opinion, Flores cited no authority to the district court to support this proposition.

On appeal to this Court, Flores attempts to rectify the omission by citing to *Allstate Ins. Co. v. Boynton*, 486 So. 2d 552 (Fla. 1986) claiming that case stands for the proposition that “a UM defense may not conflict with a Florida Statute.” *See* Initial Brief of Petitioner at 9. But *Boynton* deals with the definition of an “uninsured motor vehicle” and the term “legally entitled to recover.” *Boynton, supra* at 553.

Boynton does not address the issue presented in this case, *i.e.*, will the court enforce the concealment/fraud clause in an insurance policy to preclude UM coverage because of fraud committed by an insured in another claim for benefits for the same loss.

The law that governs the enforceability of a concealment/fraud provision is *American Insurance Co. v. Robinson*, 163 So. 17, 20 (Fla. 1935); *American Reliance Ins. Co. v. Kiet Investments, Inc.*, 703 So. 2d 1190, 1191 (Fla. 3d DCA 1997); *Wong Ken v. State Farm Fire & Casualty Co.*, 685 So. 2d 1002, 1003 (Fla. 3d DCA 1997), as cited in the district court's opinion at *5.

The concealment/fraud provision in this case was correctly used to bar Petitioner's UM claim even though the fraud occurred in the submission of his PIP claim. The concealment/fraud provision of an insurance contract typically states that any intentional misrepresentation or concealment of a material fact by an insured voids the policy. The different versions of the anti-fraud provision can be divided into three categories: (1) those that state that any misrepresentation will void the entire policy; (2) those that state that any misrepresentation as to a particular coverage part voids coverage under that part; and (3) those that neither reference the "entire policy" nor "this coverage part." The concealment/fraud provision in the policy at issue falls into this last category and provides, in pertinent part:

Allstate does not provide coverage for any loss which occurs in connection with any material misrepresentation, fraud, or concealment of material facts. . .

(See Tr. 211, 212, 214-16).

Aside from the district court's opinion in this case, no reported decision in Florida has passed on the issue of whether this provision allows an insurer to deny coverage under a part of the policy in which the fraud did not occur. However, the majority of jurisdictions which have decided cases involving similar policy language have found that any misrepresentation as to part of the claim will void coverage for the entire loss. See, e.g., *Williams v. United Fire & Casualty Co.*, 594 So. 2d 455 (La. Ct. App. 1991); *Callaway v. Sublimity Ins. Co.*, 858 P.2d 888 (Or. Ct. App. 1993); see also *McCullough v. State Farm Fire & Casualty Co.*, 80 F.3d 269 (8th Cir. 1996)(holding that policy language which voided policy if the insured intentionally concealed or misrepresented a material fact voided coverage for a fraudulent fire loss and subsequent burglary); *State Farm Gen'l Ins. Co. v. Best in the West Foods, Inc.*, 667 N.E.2d 1340 (Ill. App. 1996)(holding that policy language which voided policy if insured "intentionally concealed or misrepresented any material fact" voided both fraudulent inventory claim and the legitimate claims for lost equipment and income); *Collier v. South Carolina Ins. Co.*, 422 S.E.2d 52 (Ga. Ct. App. 1992)(without referencing policy language, court held that fraud in no-fault application for benefits

voided an insured's coverage for both UM and no-fault benefits). One court has even found that an "overwhelming majority of jurisdictions hold that any fraud or misrepresentation as to any portion of property [loss] under an insurance policy voids the entire policy." See *Johnson v. South State Ins. Co.*, 341 S.E.2d 793, 795 (S.C. 1986).

In *Callaway*, the insureds made false statements and submitted altered receipts in connection with their automobile claim for theft. One of the insureds also submitted false receipts for purchases he never made. 858 P.2d at 889. The insurance policy at issue contained the following anti-fraud provision:

We do not provide coverage for any "insured" who has made fraudulent statements or engaged in fraudulent conduct in connection with any accident or loss for which coverage is sought under the policy.

In light of this provision, the court concluded that "[t]he entire insurance contract was voided by plaintiffs' fraudulent conduct." *Id.* at 890.

A similar provision was at issue in *Williams*. In that case, the anti-fraud provision provided:

We do not provide coverage for an insured who has: (a) intentionally concealed or misrepresented any material fact or circumstance; or (b) made false statements or engaged in fraudulent conduct; relating to this insurance.

594 So. 2d at 457. In that case, the insured had intentionally claimed compensation for some items which were removed from the insured home by the insured after the burglary. Other items claimed represented valid losses. Nevertheless, the court voided the entire policy and even affirmed the trial court's order directing the insured to repay an advance to the insurer. *Id.* at 458.

As a final matter, although not asserted by Plaintiff below or on appeal, an argument may be made that the Plaintiff's fraud with respect to the PIP claim should not affect his UM claim because his PIP coverage is severable from his UM coverage. While this argument has been posited in dicta by the Third District Court of Appeal, *see Wong Ken v. State Farm, supra*, Florida law and the law of other jurisdictions are clear that an insurance contract is not severable when the insured commits fraud.

First, the fraud provision is located in the "General Conditions" section of the policy and so applies to the entire policy.

Second, in *Hartford Fire Insurance Co. v. Hollis*, 59 So. 785, 64 Fla. 89 (Fla. 1912), this Court first announced the rule - from which it has never receded - that an insurance policy may be severable but not when there are misrepresentations and fraud:

[I]n the absence of misrepresentations and fraud, where a fire insurance policy covers different classes of property, each of which is separately valued and is insured for a distinct amount, the contract is severable, and

a breach of the contract of insurance, that relates to and directly affects only one of the classes of the property insured, does not invalidate the policy as to the other class of property, unless it appears that such was the intention of the parties.

Id. at 785, 64 Fla. at 91 (cited with approval in 2 COUCH ON INSURANCE 3d § 23:3 n.27 (1997))(emphasis added); *see also Nat'l Union Fire Ins. Co. v. Cubberly*, 67 So. 133, 68 Fla. 253, 259 (Fla. 1914)(reaffirming rule in *Hollis*).

Two renowned treatises on insurance law agree with Florida's position on this issue and even state that Florida's rule is the general rule. In one treatise the author states: "The general rule seems to be that fraud, attempted fraud, or false swearing as to any part of the property included in a proof of loss prevents recovery for any portion thereof." APPLEMAN ON INSURANCE § 3595 (rev. ed. 1970)(citing to cases from New York, Oregon, Virginia and West Virginia). Similarly, in another treatise the author states:

Even when the rules discussed above permit a contract of insurance to be regarded as divisible, in the absence of statute, an insured whose breach consists of wilful fraud is regarded as having no standing in court, even as to items with the insurance of which there was no fraud. As a result, fraud may defeat an entire policy which would otherwise be held severable, especially where the stipulation is, in effect, that any fraud shall forfeit all claims under the policy. . .

2 COUCH ON INSURANCE 3d § 23:7 (1997)(citing to cases from Kentucky, Mississippi, New York, Oklahoma, Oregon, Tennessee, Wisconsin and North Carolina)(footnote omitted and emphasis added).

The answer to the district court's certified question is this: even if the policy were severable, fraud in any part of the policy, given the language of the concealment/fraud provision in this case, bars all coverage to the fraudulent claimant.

b. Public Policy, Logic and the Statutory Scheme of Insurance Regulation Support the Application of the Concealment/Fraud Provision to Bar the Petitioner's UM Claim

Public policy supports the trial court's application of the concealment/fraud provision in this case. First, insurance fraud is one of the most costly white-collar crimes in the United States, ranking second to tax evasion. *See Douglas M. Moore, Jr., A Judge's View of Insurance Fraud: An Analysis of the Nature and Scope of the Problem and Challenges to Legislation to Combat Insurance Fraud, in Defense Practice Seminar Coursebook for Insurance Fraud Seminar 27 (D.R.I. May 1999)(seminar held in San Francisco, California, May 13-14, 1999).*

The Coalition Against Insurance Fraud Studies provide evidence of how pervasive fraud is: (1) A study of injury claims from automobile accidents in Massachusetts (a no-fault state) found that 48% have some aspect of fraud or abuse;

and (2) At least 30% of 302 property/casualty insurance company insolvencies between 1969 to 1990 were due to fraudulent activities. *Id.* The Insurance Information Institute estimates that property/casualty insurance fraud cost insurers \$20 billion in 1997. A 1996 study by Conning and Company estimates that fraud cost the entire insurance industry \$120 billion in 1995. *Id.*

Additionally, there is a real need for laws to discourage fraud since the cost of fraud to insurance companies is passed on to insureds through increased premiums. Alan R. Miller & Charles B. Mitchell, Jr., *Lie Once and Lose*, The Brief 14, 14 (Spring 1993). The Coalition Against Insurance Fraud estimates the average American family pays \$1,030 a year in higher insurance premiums, taxes and increased cost of goods and services affected by insurance fraud. Moore, *supra*, at 27.

Furthermore:

The law should establish an environment that discourages fraud. Too often such an environment does not exist because insurers are fearful of extracontractual damages for bad faith.

Insurers are regulated by every state. The states' laws should recognize the need of insurers to evaluate claims and discourage fraud. If insurers are needlessly exposed to extracontractual claims, they will be deterred from investigating claims or they will expose themselves to extracontractual damages that will be passed on to the pool of policyholders.

Miller & Mitchell, *supra*, at 41 (endnote omitted). One state supreme court judge has espoused a similar opinion:

By not deciding that the proof of loss concealment provision voids coverage, this court is encouraging insureds to exaggerate losses, thereby burdening insurance companies with judicially mandated suspicion for every proof of loss statement submitted and ultimately increasing costs to all consumers.

Tempelis v. Aetna Casualty & Surety Co., 485 N.W.2d 217 (Wis. 1992)(Steinmetz, J., dissenting).

Logic requires the enforcement of the concealment/fraud provision in the policy. If the general provision in this case does not void other coverages under the policy then insureds could indulge in fraud as to one type of coverage without fear of forfeiting their other coverages. Insureds would not be deterred from committing fraud since there would be no real penalty for submitting a fraudulent claim. For example, if an insured submits altered medical bills with regard to a PIP claim and his fraud is discovered, the policy would only allow the insurer to void the insured's PIP coverage. However, the only true penalty imposed is the non-payment of those fraudulent bills. The insured will be no worse off for committing the fraud since the fraudulent bills were not originally payable.

Further, under an auto policy, if an insured's PIP coverage is voided due to fraud but other coverages are not, damages no longer recoverable under PIP may still be recovered under an insured's UM coverage since there is an overlap of coverage between PIP and UM. That is, under Florida's no-fault scheme, an insured may recover his medical expenses and lost income as PIP benefits. *See* section 627.736(1), Fla. Stat. (1997). These same damages are recoverable under an insured's UM coverage. *See Dauksis v. State Farm Mut. Auto. Ins. Co.*, 623 So. 2d 455, 456-57 (Fla. 1993).

Numerous state statutes echo the public policy that insurance fraud needs to be deterred, investigated and punished. *See, e.g.*, section 627.409, Fla. Stat. (1997)(material misrepresentations in insurance applications void the policy); section 626.989 (recognizing and empowering the Division of Insurance Fraud); section 626.9891 (mandating that insurers create anti-fraud investigative units); section 633.175 (immunizing insurers who supply information regarding non-accidental fires to state agencies); section 817.234 (imposing criminal penalties for fraudulent insurance claims). Enforcement of the concealment/fraud provision is consistent with both the laws of the state and established public policy.

**c. Florida’s Cancellation Statute, Section 627.728, Does Not Bar
Judicial Enforcement of the Concealment/Fraud Provision**

Flores argues that section 627.728, Fla. Stat. (1995), “provides a motor vehicle carrier with its only remedy for fraud, *i.e.*, ‘cancellation after notice’.” If Flores is correct, then the concealment/fraud provision in every auto policy issued in the state of Florida is null, meaningless surplusage, of no effect or consequence. If Flores is correct, the legislature, when it enacted this statute in 1967, abrogated an insurer’s common law and contractual right to include this provision in its policy without ever expressing such an intention. If Flores is correct, this unexpressed intention has remained hidden from the courts and lawmakers of Florida for over 30 years.

Flores takes an extreme and unwarranted position that crosses the grain of Florida statutory and common law. If the legislature had intended to abrogate an insurer’s common-law right to rescind a policy for making a fraudulent claim, it would have said so, or made it obvious. *State v. Ashley*, 701 So. 2d 338 (Fla. 1997) (“Unless a statute unequivocally states that it changes the common law, or is so repugnant to the common law that the two cannot coexist, the statute will not be found to have changed the common law”).

The statute cannot be read to implicitly destroy an insurer's freedom to insert the concealment/fraud provision in the contract. *Palma Del Mar Condominium Ass'n v. Commercial Laundries of West Florida, Inc.*, 586 So. 2d 315 (Fla. 1991) (holding that a statute must be interpreted in the way that least restricts a party's constitutional right to contract). And as the district court noted in this case, the "legislature never intended to preclude an insurer from defending a suit on the policy relating to misrepresentation in the application," citing to *Sauvageot v. Hanover Ins. Co.*, 308 So. 2d 583 (Fla. 2d DCA 1975).

This Court should note that Allstate did not purport to extra-judicially, independently, and unilaterally, cancel the entire policy. Instead, Allstate raised the concealment/fraud provision as an affirmative defense to a lawsuit brought against it by Petitioner. The judgment of the trial court, pursuant to the determination of the jury, barred Ruben Flores' recovery under the policy; not any extra-judicial act of Allstate. The question presented here is whether the courts have the power to enforce this concealment/fraud provision in the context of a breach of contract lawsuit brought by a fraudulent claimant where the rights of co-insureds and innocent, injured third-parties are not an issue.

Finally, Allstate did not purport to “cancel” the policy. The policy coverage for Ruben Flores was voided by judicial decree. “Cancellation” refers to the prospective operation of a contract. 2 COUCH ON INSURANCE 3d § 30:3. Other states’ courts have addressed this question in the context of those states’ financial responsibility laws, and have held that similar cancellation statutes do not abrogate an auto carrier’s common law and contractual right to right rescind the contract, let alone bar a court from enforcing a contractual provision precluding coverage as to a fraudulent claimant. *See, e.g., Douglass v. Nationwide Mutual Insurance Co.*, 913 S.W.2d 277 (Ark. 1996)(rescission for misrepresentations in applications not barred by cancellation statute); *United Security Insurance Co. v. Michigan Comm’r of Insurance*, 348 N.W.2d 34 (Mich. App. 1984)(holding cancellation statute did not restrict insurer’s right to deny coverage to fraudulent claimant in absence of harm to injured third-party). *See also Motors Insurance Corp. v. Marino*, 623 So. 2d 814 (Fla. 3d DCA 1993)(cancellation for material misrepresentation in application is a complete defense not requiring compliance with cancellation statute).

If Flores is correct and the cancellation statute were an insurer’s only remedy for fraud, then every insured would have both a motive and an opportunity to make fraudulent insurance claims, risk-free. The only penalty might be the cancellation (upon 45 days notice, of course) of their policy, if they were caught. And if caught,

only the fraudulent portion of the claim could be denied. This is the law that Flores urges this Court to make for the State of Florida, *i.e.*, that there should be no negative contractual consequences whatsoever for attempting fraud. Is this what the legislature intended in enacting section 627.728 (Florida's cancellation statute)?

d. Florida's UM Statute, Section 627.727, Does Not Bar Judicial Enforcement of the Concealment/Fraud Provision

Flores argues that because uninsured motorist coverage is a creature of statute, insurance carriers may not insert any policy conditions that diminish that mandated coverage, citing to *Mullis v. State Farm Mutual Automobile Insurance Co.*, 252 So. 2d 229 (Fla. 1971) and *Salas v. Liberty Mutual Fire Insurance Co.*, 272 So. 2d 1 (Fla. 1972). The analysis this Court undertakes in determining whether a UM policy provision is either void or acceptable is to determine whether it is "contrary to the uninsured motorist statute and void as against the public policy of the statute." *Young v. Aggressive Southeastern Insurance Co.*, 753 So. 2d 80, 83 (Fla. 2000).

Foremost, the uninsured motorist statute does not purport to state the entire contract between the insured and the insurer. Additional policy provisions, of course, are permitted. Section 627.414, Fla. Stat. (1995) provides that "a policy may contain additional provisions not inconsistent with this code and which are . . . desired by the insurer and neither prohibited by law nor in conflict with any provisions required to

be included therein.” Neither section 627.736, Fla. Stat. (1995)(personal injury protection statute) nor section 627.727 Fla. Stat. (1995)(uninsured motorists statute) prohibited the inclusion of the concealment/fraud condition in the policy.

Courts have stricken policy provisions that limit coverage mandated by statute. But here Allstate provided all the coverages that are required by law. Indeed, Flores never challenged the coverage of Allstate’s policy. Further, the concealment/fraud provision does not restrict coverage; rather it discourages and prevents an insured from submitting improper and/or fraudulent claims that might otherwise be compensable. The concealment/fraud provision is a part of the fundamental, underlying agreement of the parties, the basis on which the mandated coverage is provided.

The courts of this state have consistently enforced contractual exclusions, even though they were not identified in section 627.727 as “permitted exclusions,” to defeat uninsured motorists claims. In the following cases, claims for uninsured motorists benefits have been defeated by “unlisted” policy provisions. *Carguillo v. State Farm Mutual Automobile Insurance Co.*, 529 So. 2d 276 (Fla. 1988) (exclusion for off-road vehicle enforceable); *Midwest Mutual Insurance Co. v. Santiesteban*, 287 So. 2d 665 (Fla. 1974) (claimant did not meet policy definition of “insured” or “resident relative”); *Auto-Owners Insurance Co. v. Christopher*, 749 So. 2d 581 (Fla. 5th DCA

2000) (UM benefits denied because exclusion for vehicles for which premium not paid was enforceable); *Devilliers v. Allstate Insurance Co.*, 681 So. 2d 885 (Fla. 3d DCA 1996) (no UM benefits payable because policy definition of “insured” was enforceable); *Fischer v. State Farm Mutual Automobile Insurance Co.*, 495 So. 2d 909 (Fla. 3d DCA 1986) (territorial restrictions limiting scope of UM coverage were valid); *Government Employees Insurance Co. v. Rebel*, 434 So. 2d 29 (Fla. 3d DCA 1983)(definition of “insured” within policy was enforceable); *Klein v. Allstate Insurance Co.*, 367 So. 2d 1085 (Fla. 1st DCA 1979)(failure of insureds to give prompt notice under terms of policy defeated UM claim); *Reid v. Allstate Insurance Co.*, 344 So. 2d 877 (Fla. 4th DCA 1977)(policy definition of “insured vehicle” was enforceable to defeat UM claim).

As in all these cases, the present case merely enforced a non-ambiguous, valid contractual provision that barred an insured’s UM claim. In fact, had Allstate not raised the concealment/fraud clause as an affirmative defense, it would have waived any right to challenge Ruben Flores’ fraud in response to the claim for insurance benefits presented by his complaint.

e. Judicial Enforcement of the Concealment/Fraud Provision Does Not Act to Void Liability Insurance as to Injured Third-Parties

Flores argues the district court's decision will deny innocent, injured third parties the benefit of the liability portion of auto policies if the carrier is allowed to void the policy due to PIP fraud. While Flores' concern for such innocent parties is laudable, those interests are not at stake in this case, and if they were, would already be protected by a rule that does not have the effect of excusing his fraud and rewriting the contract.

First, no innocent, injured third party is at issue here. The only person who lost benefits on account of the fraud of Ruben Flores was Ruben Flores. Therefore, this issue does not exist in this case and, as a result, is not ripe for review.

The district court's certified question is whether "*an insured* lose[s] all benefits under a divisible insurance policy. . ." Flores at *9. [Emphasis supplied]. And the circuit court ruled "that only *insureds* who have committed or participated in the commission of fraud. . . are subject to forfeiting their benefits under the policy." [Emphasis supplied.] The district court held "that only *insureds* who have committed or participated in the commission of fraud which materially violated the policy are subject to forfeiting their benefits under the policy." Flores at *3. [Emphasis supplied.] Again, no innocent third-party rights are at issue in this case.

Second, this Court appears to have addressed the issue in *Ramos v. Northwestern Mutual Insurance Company*, 336 So. 2d 71 (Fla. 1976) (insured's failure to cooperate with liability carrier prevented coverage). Other courts that have addressed similar issues have held that the financial responsibility statutes may abrogate an insurer's right to rescind a policy as to an injured third party, but that they do not abrogate the insurer's right to rescind as to the fraudulent insured. *See* annotation, *Rescission or Avoidance, for Fraud or Misrepresentation, of Compulsory, Financial Responsibility, or Assigned Risk Automobile Insurance*, 83 A.L.R. 2d 1104, section 1. In any event, the concealment/fraud provision does not purport to void the policy as to innocent third-parties, and it was not applied, in this case, to that effect.

Therefore, the district court opinion does not conflict with any Florida law protecting third parties and there is no danger that the holding will cause any harm to innocent third parties.

f. Florida Law Contains Adequate Safeguards for Innocent Co-Insureds Against Loss of Insurance on Account of Fraudulent PIP Claims by Resident Relatives

The last line of Ruben Flores' argument reads: "The difficulty with the decision below becomes clear when we consider the fact that a fraudulent PIP claim may be made by a resident relative of the tortfeasor."

First, the meaning or point of this line is obscure. Presumably Flores is concerned that the fraud of one insured may void the coverage for an innocent co-insured or innocent third party. These concerns are groundless, both under the facts of this case and for the law in general. In this case, the trial judge ruled that only insureds who committed or participated in the commission of fraud would stand to forfeit any benefits under the policy. (R. 97-98). This ruling was expressly affirmed by the district court. Therefore, there is no issue in this regard. No innocent insured has been harmed or stands to lose under the district court's decision.

Second, the legal principles governing coverage afforded an innocent co-insured in the face of fraud by another co-insured is well-established in Florida jurisprudence. *See, e.g., Overton v. Progressive Insurance Co.*, 585 So. 2d 445 (Fla. 4th DCA 1991) (innocent insured wife not barred from recovery on account of fraud of co-insured husband).

II. Evidence of Fraud Did Not Unfairly Prejudice the Jury.

Ruben Flores contends that evidence of his fraud “inflamed” the jury in four ways: (1) it produced a “shocking and unconscionable” award for past pain and suffering damages for Bobby Flores for which the court granted an additur of \$10,000; (2) the jury found Petitioner’s failure to wear a seatbelt was the sole cause of his injuries; (3) the jury found the admitted negligence of the tortfeasor was not the legal cause of Petitioner’s injuries; (4) the jury’s award of \$5000 in past and \$5000 in future pain and suffering damages for Petitioner was both shocking and unconscionable. *See* Initial Brief of Petitioner at 12-13.

Argument (1) is meritless because there is no logical connection shown, let alone proven, between the fraud of Ruben and the jury’s award to Bobby.

If this Court finds that the trial court did not abuse its discretion in allowing Allstate to assert the affirmative defense of fraud to the UM claim, Arguments (2), (3), and (4) asserted by Petitioner are moot. That is, the jury in this case answered the first interrogatory on the verdict form in the affirmative, (*see* R. 546), and found that Ruben Flores committed fraud, thereby disentitling him to any UM benefits. The jury was asked to award damages and to determine Mr. Flores’ negligence even if it found he committed fraud because the trial court wished to avoid a retrial in the event the ruling on the first issue in this case was reversed on appeal. (*See* Tr. 273). Therefore,

Petitioner's challenges to the verdict relating to damages or the negligence apportioned to Ruben Flores are irrelevant if this Court finds that the trial court did not abuse its discretion in allowing Allstate to assert the affirmative defense of fraud to the UM claim.

Nevertheless, assuming *arguendo* that this Court found that the trial court abused its discretion in allowing Allstate to assert the affirmative defense of fraud, issues (2), (3) and (4) still have no merit. Issues (2) and (3) are interrelated and will be addressed together. To reiterate, Petitioner contends that the evidence of fraud prejudiced the jury because it found that his failure to wear a seatbelt was the cause of his injuries and that the admitted negligence of the tortfeasor was not the legal cause of his injuries.

Allstate concedes it never disputed the liability of the tortfeasor for the motor vehicle accident. (*See* Tr. 357). However, Allstate did challenge whether Petitioner's injuries were proximately caused by the tortfeasor's negligence. Under the common law, there are four elements to a cause of action for negligence: (1) duty; (2) breach; (3) proximate causation; and (4) damages. *See Stahl v. Metropolitan Dade County*, 438 So. 2d 14, 17 (Fla. 3d DCA 1983); *see also* Fla. Std. Jury Instr. (Civil) 5.1(a).

In this case, Allstate proved to the jury that Petitioner's failure to wear a seatbelt was the proximate cause of his injuries. (R. 546-47). There is substantial

competent evidence in the record demonstrating that Petitioner was not wearing a seatbelt at the time of the accident (Tr. 226, 248; R. 490), and that the seatbelt was operational (Tr. 240), contrary to Petitioner's testimony that he was wearing a seatbelt (Tr. 175), and that the seatbelt malfunctioned (Tr. 244).² See *Plaza Builders, Inc. v. Regis*, 502 So. 2d 918, 921 (Fla. 2d DCA 1986)(holding that trial court's findings and conclusions will not be disturbed where is competent, substantial evidence to support such findings and conclusions); *Wales v. Wales*, 422 So. 2d 1066, 1067 (Fla. 1st DCA 1982)(holding that where judgment or order appealed is based on resolution of factual dispute, appellate court must affirm if the trial court's decision is supported by competent substantial evidence). Most importantly, there is substantial competent evidence in the record that Petitioner would not have sustained any of the injuries he did had he been wearing a seatbelt. (Tr. 227, 254).

Lastly, there is no merit to issue (4) – whether the jury's award for Petitioner's past and future pain and suffering damages was shocking and unconscionable. First, as stated above, the jury's damage award to Petitioner was only made in the event this Court found Petitioner's first argument on appeal meritorious. Additionally, to even

²During the trial, Petitioner maintained that he was wearing a seatbelt at the time of the accident (Tr. 175) and that it "busted in half" (Tr. 176-77) when the accident occurred. However, the seatbelt was introduced into evidence at trial and it was completely intact and in one piece. (Tr. 245 et seq.). Brad Rimbey, P.E., also testified that the seatbelt was fully operational at the time of the accident. (Tr. 240).

address the inadequacy of jury award for pain and suffering, this Court would also have to find that the jury was prejudiced when it found that the Petitioner's failure to wear a seatbelt was the proximate cause of his damages.

Assuming Petitioner overcomes these two hurdles, there is substantial competent evidence in the record to support the jury's award of \$10,000 for Petitioner's past and future pain and suffering damages. Upon review of an order denying a motion for a new trial based upon amount of damages, an appellate court is bound to test the adequacy of the verdict, not by what the reviewing court would have decided had it tried the case, but rather whether it can be said that the jurors as reasonable persons could not have reached the verdict they did. *See Fitzgerald v. Molle-Teeters*, 520 So. 2d 645, 648 (Fla. 1988). A jury can disbelieve a plaintiff's testimony regarding pain and suffering or may even conclude there was no compensable pain and suffering even when the plaintiff had incurred medical expenses. *Id.*; *Allstate Indemnity Co. v. Clark*, 23 Fla. L. Weekly D2051 (Fla. 2d DCA Sept. 4, 1998); *see also Allstate Ins. Co. v. Manasse*, 707 So. 2d 1110, 1111 (Fla. 1998)(holding that insured's permanent injury and award of future medical expenses did not entitle her to future pain and suffering damages from her UM carrier).

As a result of the accident in this case, Petitioner sustained a fracture to his left cheek bone, a laceration of his lip, and damage to his teeth and gums. (R. 483). Petitioner missed only ten days of work from the time of the accident to approximately a year and a half later. (R. 491). When the Petitioner was examined by his neurologist, Robert Martinez, M.D., approximately a year and a half after the accident, his neck had full range of motion, his gait was normal, his motor examination was normal, and he was not suffering from any alleged memory problems. (R. 492, 493-94). Moreover, Petitioner never elected to undergo nerve blocks or physical therapy for his alleged injuries. (R. 497-98). Francis DeRito, M.D., the otolaryngologist who treated Petitioner for his lacerated lip, testified that as of May 1, 1995 Petitioner “had healed well with little visible scarring” with no marked tenderness in the facial area with equal sense of touch on both sides of his mouth. (R. 347).

Additionally, on two employment applications completed some twenty months after the accident in September 1996, the Petitioner himself did not check any boxes on the medical questionnaires to indicate he had any limitations to work or any type of physical problems, including back problems. (Tr. 173-74; R. 644-48; 655).

In sum, the jury's award of \$10,000 for past and future pain and suffering was supported by competent substantial evidence. Therefore, even if this Court finds that the trial court abused its discretion by allowing Allstate to present evidence supporting its fraud defense, it should affirm the trial court's order denying Plaintiff's motion for new trial.

CONCLUSION

The judgment of the trial court and the decision of the district court of appeal should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to:

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by United States Mail on January _____, 2001.

ANTHONY J. RUSSO, ESQ.