IN THE SUPREME COURT OF FLORIDA

CASE NO. SC16-28

ELIZABETH WHITE,

Petitioner,

v.

MEDERI CARETENDERS VISITING SERVICES OF SOUTHEAST FLORIDA, LLC, and ALMOST FAMILY, INC., a Delaware corporation,

Respondents.
_____/

L.T. CASE NOS.
4D14-488 and 4D14-2460
19th Cir. No. 562011CA003562

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PREFACE

Petitioner, Elizabeth White, seeks review of the decision of the Fourth District in *Mederi Caretenders Visiting Services of Southeast Florida, LLC v. White*, 179 So. 3d 564 (Fla. 4th DCA 2015). The Fourth District held that referral sources for patients in the home health care industry are a legitimate business interest, protectable by a non-compete agreement, under section 542.335, Florida Statutes, relying on its earlier decision in *Infinity Home Care, L.L.C. v. Amedisys Holding, LLC*, 180 So. 3d 1060 (Fla. 4th DCA 2015). In this case and in *Infinity Home Care*, the Fourth District certified direct conflict with the decision of the Fifth District in *Florida Hematology & Oncology v. Tummala*, 927 So. 2d 135 (Fla. 5th DCA 2006). The slip opinion in *Mederi Caretenders* is included in the appendix to this brief.

A related case is pending in this Court, *Americare Home Therapy, Inc. v. Hiles* (Case No. SC16-400), in which the Fifth District reaffirmed its holding in *Tummala* and certified conflict with the Fourth District's decision in *Infinity Home Care*. *See Hiles v. Americare Home Therapy, Inc.*, 183 So. 3d 449 (Fla. 5th DCA 2015).

STATEMENT OF THE CASE AND FACTS

A. Introduction

Respondents, the plaintiffs in the trial court, Mederi Caretenders and Almost Family ("Almost Family"), are licensed home health care agencies (R:2/E:9).[1] They provide skilled nursing and physical therapy services to homebound patients.

Elizabeth White was an account representative for Almost Family for approximately one year (R:2-3/E:9-10). She was assigned to solicit physicians and health care providers for referrals of new patients (R:2-3/E:9-10). She left to work for a competing home health care agency within the non-compete territory for a short period of time (R:3/E:10; R:36/E:43). Almost Family sued White to enforce a Confidentiality and Non-Compete Agreement (R:1-12/E:8-19).

B. The home health care industry is subject to strict federal and state regulations that limit home health agencies' relationships with referral sources.

This case involves home health care agencies, which provide health services for homebound (primarily elderly) patients. The agencies must obtain separate

[1] The following symbols are used: (R:[page]/E:[.pdf page]) refers to the Record in the Fourth District Court of Appeal in case no. 4D14-488; (T:[page]/E:[.pdf page]) refers to the transcript of the summary judgment hearing, which is located in volume VI of the record; (Fee R:[page]/E:[.pdf page]) refers to the Record in the Fourth District Court of Appeal in case no. 4D14-2460, the fee appeal. All emphasis is supplied unless otherwise indicated.

licenses in each of the eleven health care districts in Florida in which they have an office. *See* §§ 400.464(2), 408.032(5), Fla. Stat. (2016). Home health agencies provide services such as skilled nursing, physical therapy, occupational therapy, speech therapy and social work services, as defined in section 400.462(14), Florida Statutes (2016). Most home health care services are paid through Medicare at Medicare reimbursement rates, although some private insurance is involved (R:44-45/E:51-52; R:572/E:582).

Home health care agencies are highly regulated on the state and federal levels. On the state level, Florida's Home Health Services Act, administered by the Agency for Health Care Administration ("AHCA"), sets forth the licensure requirements and basic standards for providing care to home health care patients. *See* §§ 400.461-.5185, Fla. Stat. (2016). On the federal level, 42 U.S.C. §§1395-1395lll (2012) and Medicare/Medicaid regulations are the governing provisions.

Home health agencies receive their business primarily through referrals from medical facilities and physicians (R:121/E:129). Information about referral sources is public and common knowledge to home health care agencies (R:171-72/E:179-80; R:572-73/E:582-83; T:14-15/E:749-50). Information on the market shares of home health care agencies and to whom they refer is also public and

available for purchase from several sources (R:572/E:582; T:14-15/E:749-50).

Under Medicare and AHCA regulations, patient choice and the patient's best interest are of utmost importance in choosing a home health care provider. *See* 42 U.S.C. § 1395a (Supp. III 2015); § 400.487(4), Fla. Stat. (2016) ("Each patient has the right to be informed of and to participate in the planning of his or her care.") (s*ee also* R:170/E:178). A list of Medicare home health care providers in each of Florida's eleven districts is published in a book, which is provided to patients and available to the public (R:172/E:180; R:572-73/E:582-83).

State and federal regulations strictly limit what home health care marketing representatives can do to obtain referrals from referral sources. Federal "Stark Laws" prohibit referring Medicare patients to an entity with which the physician has any compensation agreement or financial interest. 42 U.S.C. § 1395nn(a) (2012); 42 C.F.R. §§ 411.353, 411.354 (2015). Non-monetary gifts to referring physicians and their staff are limited to a few hundred dollars per year. 42 C.F.R. § 411.357(k) (2015).

Likewise, referral agreements are illegal under state law, and subject to a $15,000 penalty for each violation. §§ 400.518, 456.053(5)(f), Fla. Stat. (2016).

Home health agencies are prohibited from providing nurses, assistants or aids without charge to referring facilities. § 400.518(4). Hospitals and surgical centers are prohibited from requiring physicians to refer to any home health agency in which they have an ownership or financial interest. § 400.518(2).

C. White's employment with Almost Family

White was an entry-level account representative for Almost Family (R:2/E:9; R:81-82/E:88-89; R:646/E:656). Her job responsibilities were to solicit physicians and medical facilities for home health care referrals in Martin and St. Lucie Counties and to assist in the patients' discharge (R:2/E:9; R:82/E:89; R:646-47/E:656-57).

Almost Family requires all marketing representatives in Florida, including White, to execute a Confidentiality and Non-Compete Agreement as a condition of employment (R:7-12/E:14-19; R:82/E:89; R:647/E:657). Almost Family does not require its corporate executives to sign non-compete agreements (R:647/E:657).

In the non-compete section of the agreement, White agreed that she would not work for a competing home health care agency within Martin and St. Lucie Counties for one year after leaving Almost Family (R:8/E:15; R:12/E:19). She

also agreed that she would not "[s]olicit business from or contact, directly or indirectly, any of the current or former **customers/clients** of Almost Family, wherever located." (R:8/E:15). She agreed not to discuss the subject of her leaving Almost Family with any employee of Almost Family (R:8/E:15). In the confidentiality section of the agreement, White agreed not to disclose or use any of Almost Family's confidential information (R:8-9/E:15-16).

In June 2011, White resigned from Almost Family because she was unhappy with its management (R:81/E:88). She returned all of Almost Family's materials upon her resignation and did not share any materials with her new employer (R:83/E:90).

D. White's employment after leaving Almost Family

As soon as she resigned from Almost Family, White began working for Omni Home Health, another home health care agency (R:81-82/E:88-89). For a short time at the beginning of her employment with Omni, White worked in the non-compete territory (R:82/E:89; R:647/E:657). When Almost Family threatened to sue White, Omni assigned her to a different territory that was not covered by the non-compete (R:82/E:89). In accordance with the non-compete agreement, White stayed out of the non-compete territory for over one year (R:82/E:89).

In 2012, White left Omni and went to work for Nurse on Call, also a home health care agency (R:81-82/E:88-89). She continued to work outside the non-compete territory until her non-compete agreement expired (R:82/E:89).

E. Almost Family sued White, alleging violations of the non-compete agreement, as well as the non-solicitation and confidentiality clauses.

Almost Family sued White, alleging that she breached her non-compete agreement by working for Omni and soliciting Almost Family's referral sources in the non-compete territory, soliciting Almost Family employees to work for Omni, and disclosing or using Almost Family's confidential information (R:1-12/E:8-19). Almost Family also claimed that White tortiously interfered with Almost Family's advantageous business relationships with its employees and customers/clients (R:5/E:12).

White moved for summary judgment, arguing that Almost Family's non-compete agreement is unenforceable for several reasons (R:35-55/E:42-62). First, as a matter of law, referral sources are not a legitimate business interest under section 542.335, Florida Statutes, and *Florida Hematology & Oncology v. Tummala*, 927 So. 2d 135 (Fla. 5th DCA 2006) (R:36/E:43; R:40-46/E:47-53). Second, White did not receive any "extraordinary or specialized training" from Almost Family (R:46-47/E:53-54). Finally, information about home health care

referral sources is not confidential and White did not take or use any of Almost Family's confidential information (R:36/E:43; R:47-49/E:54-56). White conceded the enforceability of the confidentiality clause and her obligation not to solicit existing patients and staff; however she asserted that she did not violate these (R:83/E:90; R:653/E:663).

Almost Family opposed summary judgment, arguing primarily that Almost Family's referral sources constitute a legitimate business interest that supports enforcement of a restrictive covenant (R:91-115/E:98-122). Almost Family asserted that Kentucky Law controls enforcement of its non-compete agreement because of a choice-of-law provision in the agreement (R:98-100/E:105-07). Almost Family contended that, even under Florida law, its referral sources are protectable under section 542.335, along with its employees and clients (R:100-104/E:107-11). Almost Family also contended that summary judgment should be denied because there were material issues of fact regarding whether White's training or knowledge of Almost Family's confidential information constituted a legitimate business interest (R:107-110/E:114-17).

The trial court granted White's motion for summary judgment and entered final judgment against Almost Family (R:646-63/E:656-73). The court, applying

Florida law, ruled that Almost Family's referral sources are not protectable business interests as a matter of law, citing *Tummala* as the controlling decision in Florida (R:649-50/E:659-60). The court also granted summary judgment on the issues of confidential information and training and on Almost Family's tortious interference claim, finding that White did not have any confidential information, had not solicited fellow employees, and had received ordinary training given to all other entry level marketing staff (R:650-53/E:660-63).

F. The Fourth District reversed the summary judgment based on referral sources.

The Fourth District reversed the summary judgment. *Mederi Caretenders Visiting Servs. of Se. Fla., LLC v. White*, 179 So. 3d 564 (Fla. 4th DCA 2015). The Fourth District relied on its recent decision, *Infinity Home Care, LLC v. Amedisys Holding, LLC*, 180 So. 3d 1060 (Fla. 4th DCA 2015), and held that referral sources can be protectable under section 542.335. *Mederi Caretenders*, 179 So. 3d at 564. The Fourth District in this case and *Infinity Home Care* certified conflict with the decision of the Fifth District in *Tummala*.[2] *Mederi Caretenders*, 179 So. 3d at 564; *Infinity Home Care*, 180 So. 3d at 1067. The Fourth District did not address

[2] Infinity Home Care, LLC, sought review of this decision in this Court, but voluntarily dismissed prior to briefing. *See Infinity Home Care, LLC v. Amedisys Holding, LLC*, No. SC15-2331, 2016 WL 661413 (Fla. Feb. 18, 2016) (unpublished).

the trial court's other bases for granting summary judgment: White lacked confidential information and specialized training and did not solicit other staff or patients. This Court accepted jurisdiction based on certified conflict.

G. The *Hiles* decision in the Fifth District followed *Tummala*.

Shortly after the Fourth District's decision in this case, the Fifth District decided *Hiles v. Americare Home Therapy, Inc.*, 183 So. 3d 449 (Fla. 5th DCA 2015). In *Hiles*, the Fifth District reaffirmed its holding in *Tummala* and certified conflict with the Fourth District's decision in *Infinity*. *Hiles*, 183 So. 3d at 453-55. This Court also accepted jurisdiction in *Hiles* (Case No. SC16-400).

SUMMARY OF ARGUMENT

The Fourth District allowed a home health care agency to enforce a covenant non-to-compete against White, a low-level marketing representative. Her former employer, Almost Family, claims that gratuitous, non-exclusive referral sources are a protected, legitimate business interest under section 542.335, Florida Statutes.

Referral sources are not a protectable business interest based on the plain language of section 542.335, its history, and public policy. Section 542.335 protects only those legitimate business interests that, if misappropriated, would

lead to unfair competition. The kinds of interests listed in the statute are those that require substantial investment by the employer to develop. Gratuitous referral sources do not equate to the interests listed in section 542.335. This is especially true in the home health care industry, where referral agreements are prohibited and gifts to referral sources are strictly limited. Referral sources simply supply the possibility of unidentified patients and clients, which are not protectable business interests.

Protecting referral sources would circumvent the plain language of the statute. The Fifth District properly interpreted section 542.335 in *Tummala* and *Hiles*, and correctly held that referral sources are not protectable as a matter of law. The non-exclusive language in section 542.335 must be read together with the other provisions of the statute and in accord with the legislative history and judicial action, both before and after its passage. That language is not an invitation for courts to enforce every restrictive covenant simply because the business interest in question is important to the employer. To outweigh the public policy in favor of free competition and the ability of the employee to freely move from job to job, there also must be an investment by the employer that creates a propriety business asset that is unfairly misappropriated to the competitor.

This Court should approve the decisions of the Fifth District in *Tummala* and *Hiles* and quash the decisions of the Fourth District in *Infinity Home Care* and *Mederi Caretenders*.

ARGUMENT

POINT I

REFERRAL SOURCES ARE NOT PROPRIETARY BUSINESS INTERESTS PROTECTED BY SECTION 542.335, AS A MATTER OF LAW.

A. Standard of Review

This Court reviews de novo these questions of statutory interpretation. *Borden v. E.-European Ins. Co.*, 921 So. 2d 587, 591 (Fla. 2006). The standard for reviewing an order granting summary judgment is also de novo. *See Volusia Cnty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000).

B. A court's function when interpreting statutes is to determine the legislative intent.

A court's role is not to legislate, but rather to determine the legislative intent and give effect to that intent. *See Borden*, 921 So. 2d at 595; *Bennett v. St. Vincent's Med. Ctr., Inc.*, 71 So. 3d 828, 837-38 (Fla. 2011); *see also* § 20.02(1), Fla. Stat. (2016) (explaining the constitutional separation of powers of the three branches of government). Thus, the issue to be decided in this appeal is **not**

whether the employer or the Court considers referral sources an important interest warranting protection, but whether the Legislature intended to include referral sources within the statutory framework of section 542.335, Florida Statutes.

C. History of common law and statutory enactments on enforcement of non-compete agreements—the Legislature intended to adopt the "legitimate business interest" not the "contract" approach.

The common law prohibited agreements in restraint of trade.[3] *Frumkes v. Beasley-Reed Broad. of Miami, Inc.*, 533 So. 2d 942, 943 (Fla. 3d DCA 1988). Section 542.335 carves out certain exceptions to this common law rule. Because section 542.335 is in derogation of the common law, it must be narrowly construed. *See, e.g.*, *Ady v. Am. Honda Fin. Corp.*, 675 So. 2d 577, 581 (Fla. 1996); *Fullerton v. Fla. Med. Ass'n*, 938 So. 2d 587, 592 (Fla. 1st DCA 2006). Section 542.335 should not be interpreted to displace the common law any further than is necessary to effect the intent of the statute. *See, e.g.*, *Ady*, 675 So. 2d at 581; *Carlile v. Game & Fresh Water Fish Comm'n*, 354 So. 2d 362, 364 (Fla. 1977) (explaining that courts, when interpreting a statute in derogation of common law, will infer that the statute was not intended to change the common law beyond that which the Legislature specifically and plainly pronounced).

[3] Legislative history can be used to support the Court's interpretation of the plain meaning of statutes. *See, e.g., Hawkins v. Ford Motor Co.*, 748 So. 2d 993, 1000 (Fla. 1999).

Under the English common law, a contract not to compete was against public policy and void because of the historical perception that these contracts left people "in involuntary servitude" or unable to provide for themselves and their dependents. *See Hapney v. Cent. Garage, Inc.*, 579 So. 2d 127, 129 (Fla. 2d DCA 1991), *disapproved on other grounds*, *Gupton v. Village Key & Saw Shop, Inc*., 656 So. 2d 475, 476 (Fla. 1995). The *Hapney* court recounted this history:

> Under the common law of England, a contract restricting a person's right to pursue his trade or occupation was deemed void as against public policy. Medieval concepts that a person could not pursue a trade in which he had not been apprenticed made the rule necessary, because prohibiting a person from working under the supervision of one other than his original employer would leave the person in involuntary servitude or unable to provide for himself and his dependents.

579 So. 2d at 129 (citing *Standard Newspapers, Inc. v. Woods,* 110 So. 2d 397, 399 (Fla. 1959)).

The *Hapney* court went on to explain that, over time, in more modern common law, limited exceptions to the rule against restraints on trade were recognized in **special circumstances** where they were necessary and proper to protect the employer's **proprietary** rights. 579 So. 2d at 129. Contracts prohibiting competition per se remained invalid, even though an employer may have an important interest in limiting competition. *See id.* at 129, 134. This

approach balances the strong public policy in favor of free competition and the employee's ability to advance his position against the employer's interest in protecting proprietary business assets and the unfairness of misappropriating those assets to the competition.

Florida public policy strongly disfavors non-compete agreements, which are in derogation of the common law. *See, e.g., Mazzoni Farms, Inc. v. E.I. DuPont De Nemours & Co.*, 761 So. 2d 306, 312 (Fla. 2000) (stating that non-compete claims "are vigorously disfavored by Florida courts"). Traditionally, Florida courts were averse to agreements that restricted competition, particularly between employer and employee. *See Love v. Miami Laundry Co.*, 160 So. 32, 33-34 (Fla. 1934). Until 1953, Florida courts were reluctant to uphold contracts restricting trade or commerce. *See, e.g., id.*; *see also Hapney*, 579 So. 2d at 129, 131.

In 1953, the Florida Legislature enacted section 542.12, the first Florida statute that recognized some of the exceptions to the common law and authorized certain contractual restrictions on competition, including employment agreements. *See Capelouto v. Orkin Exterminating Co. of Fla.*, 183 So. 2d 532, 534 (Fla. 1966). Over time, the pendulum swung and courts began routinely enforcing all non-compete agreements whether or not they were supported by a proprietary,

legitimate business interest, so long as the parties agreed in the contract that the interest was protectable. *See* John A. Grant, Jr. & Thomas T. Steele, *Restrictive Covenants*: *Florida Returns to the Original "Unfair Competition" Approach for the 21st Century*, 70 Fla. B.J. Nov. 1996, at 53. This is referred to as the "contract" approach. *See id.*

The 1953 statute was silent on whether non-compete contracts, to be valid, must relate to the protection of a **proprietary** legitimate business interest of the employer. *Hapney*, 579 So. 2d at 129. The *Hapney* court held that such a requirement was necessarily implied in the statute, thus reaffirming the validity of the common law, legitimate business interest approach to restrictive covenants. *Id.* at 130-31; *see also* Grant & Steele, *supra*, at 53-54. Some courts, however, still interpreted section 542.12 using the contract-oriented approach, rather than the legitimate business interest approach. Grant & Steele, *supra*, at 53-54. In 1990, the Legislature attempted to clarify the law by adopting section 542.33, Florida Statutes. *See* Ch. 90-216, § 1, Laws of Fla. (1990). However, this statute did not provide sufficient guidance. *See* Grant & Steele, *supra*, at 53.

Decisions after *Hapney* were in disarray. Grant & Steele, *supra*, at 54. Some courts questioned the *Hapney* court's revival of the legitimate business

interest approach. Grant & Steele, *supra*, at 53. In 1996, the Legislature adopted section 542.335, Florida Statutes, which was designed to implement the *Hapney* common law, legitimate business interest or "unfair competition" approach. *See* Grant & Steele, *supra*, at 54. The Legislature intended for section 542.335 to codify the common law balance between protecting legitimate, proprietary business assets from being unfairly misappropriated and the public policy interest in free competition and an employee's ability to move freely from job-to-job, seeking advancement. *See* Grant & Steele, *supra*, at 55 (explaining that "the legislature made certain that [section 542.335] is a balanced statute that does not unnecessarily impede competition, the ability of competitors to hire experienced workers, or the efforts of employees to secure better-paying positions"). The Legislature, in adopting section 542.335, rejected the "contract approach" that some courts had been using under prior versions of the non-compete statute. *See* Grant & Steele, *supra*, at 54.

The Legislature made clear in section 542.335 that a non-compete agreement must be justified by a "legitimate business interest" to be enforceable. § 542.335(1)(b). "Any restrictive covenant not supported by a legitimate business interest is unlawful and is void and unenforceable." *Id.*; *see also Colucci v. Kar Kare Auto. Grp., Inc.*, 918 So. 2d 431, 438, 440 (Fla. 4th DCA 2006).

Section 542.335 specifies that the types of legitimate business interests that can be protected by a non-compete agreement include, but are not limited to, the following:

> 1. Trade secrets, as defined in s. 688.002(4).
>
> 2. Valuable confidential business or professional information that otherwise does not qualify as trade secrets.
>
> 3. Substantial relationships with specific prospective or existing customers, patients, or clients.
>
> 4. Customer, patient, or client goodwill associated with:
>
> a. An ongoing business or professional practice, by way of trade name, trademark, service mark, or "trade dress";
>
> b. A specific geographic location; or
>
> c. A specific marketing or trade area.
>
> 5. Extraordinary or specialized training.

§ 542.335(1)(b).

Each of the enumerated interests is **proprietary** in nature and had previously been recognized as an asset protected under the common law. *See Hapney*, 579 So. 2d at 131 (discussing types of legitimate business interests worthy of protection under common law). They are "identifiable business asset[s]" that have been acquired through an investment by the employer and which, if used in competition

or misappropriated, would give the new owner an unfair advantage. *See* Grant & Steele, *supra*, at 54. In 1996, the Legislature did not include gratuitous referral sources as a protected interest, even though referral sources existed at that time and were certainly part of the "lifeblood" of many industries.

D. Gratuitous referral sources are not a legitimate, proprietary business interest under the plain language of section 542.335, the legislative intent and Florida public policy.

1. The Fifth District in *Tummala* held that referral sources are not protectable business interests as a matter of law under the plain reading of the statute.

Until the Fourth District issued its decision in *Infinity Home Care, L.L.C. v. Amedisys Holding, LLC*, 180 So. 3d 1060 (Fla. 4th DCA 2015), the only Florida appellate decision expressly discussing whether referral sources are a legitimate business interest under section 542.335 was *Florida Hematology & Oncology v. Tummala*, 927 So. 2d 135 (Fla. 5th DCA 2006). *Tummala* held that referral sources were not a protectable interest as a matter of law. 927 So. 2d at 139.

Most importantly, the Fifth District decided *Tummala* 10 years ago. The Legislature has not amended section 542.335 in the 10 years since *Tummala*. Legislative inaction since *Tummala* shows the Legislature accepted this judicial construction of section 542.335. *See, e.g.*, *State v. Cable*, 51 So. 3d 434, 443 (Fla.

2010) (stating that "[l]ong-term legislative inaction after a court construes a statute amounts to legislative acceptance or approval of that judicial construction") (internal quotation omitted); *see also Malu v. Sec. Nat'l Ins. Co.*, 898 So. 2d 69, 75-76 (Fla. 2005); *Goldenberg v. Sawczak*, 791 So. 2d 1078, 1081 (Fla. 2001).

The Fifth District properly interpreted section 542.335, and held that gratuitous referral sources are not a protectable business interest. *Tummala*, 927 So. 2d at 139. Dr. Tummala, a board certified hematologist and oncologist, was hired by an oncology group in Lake County, Florida. *Id.* at 136-37. He signed a covenant not to practice medicine within fifteen miles of his employer's offices for two years after termination of his employment. *Id*. at 137. Eight years later, the oncology group terminated Dr. Tummala's employment and he opened up his own office within the restricted area. *Id.* His former employer sued him for breach of his non-compete agreement, alleging that it suffered a significant drop in new patients being referred from area physicians. *Id.*

The Fifth District held that referral sources do not constitute a "legitimate business interest" under the express language of section 542.335. *Tummala*, 927 So. 2d at 139. The court explained that "[w]hat referring physicians supply is a stream of **unidentified prospective patients** with whom Appellants had no prior

relationship." *Id.* The Fifth District stated:

> **Therefore, to accept referring physicians as a statutory "legitimate business interest," would completely circumvent the clear statutory directive that "prospective patients" are not to be recognized as such.** The trial court correctly found that: "[A]s stated in [*University of Florida, Board of Trustees v.*] *Sanal* [, 387 So. 2d 512 (Fla. 1st DCA 2003)], to qualify as a 'legitimate business interest,' a 'relationship' with a 'prospective patient' must be substantial and one with a specific, identifiable individual and the lack of such a relationship with a patient does not become a legitimate business interest simply by virtue of being referred by a physician." *Sanal*, 837 So.2d at 515-16. **We see no way to recognize referring physicians as a legitimate business interest and still give effect to the plain language of the statute.**

Tummala, 927 So. 2d at 139 (footnote omitted).

The First and Second Districts followed *Tummala*. The Second District relied on *Tummala* in issuing a per curiam affirmance with citation in *Almost Family, Inc. v. Sprow*, 150 So. 3d 258 (Fla. 2d DCA 2014). The First District and Second District have *per curiam* affirmed, without opinion, two orders denying injunctive relief and one final summary judgment where Almost Family lost on the issue of whether referral sources constitute a protected business interest. *See Caretenders of Jacksonville, LLC v. Leath*, 73 So. 3d 762 (Fla. 1st DCA 2011); *Caretenders Visiting Servs. of Jacksonville v. Leath*, 146 So. 3d 1174 (Fla. 1st DCA 2014); *Mederi Caretenders Visiting Servs. of Sw. Fla., LLC v. Kissane*, 90

So. 3d 287 (Fla. 2d DCA 2012).[4] Thus, the majority of courts that have addressed this issue have decided that referral sources are not a legitimate, proprietary business interest.

2. *Hiles* reaffirmed *Tummala*.

In *Hiles v. Americare Home Therapy, Inc.*, 183 So. 3d 449 (Fla. 5th DCA 2015), the Fifth District reaffirmed its *Tummala* holding. Hiles worked for Americare, a home health care company, in a sales and marketing position. *Id.* at 450. She signed a non-compete agreement. *Id.* After resigning from Americare, Hiles went to work for a competitor home health care company. *Id.* at 452. Americare sued Hiles and obtained a temporary injunction. *Id.* The Fifth District reversed the temporary injunction against soliciting Americare's referral sources, based on *Tummala*. *Hiles*, 183 So. 3d at 453-54. The court explained that "to accept referral sources here as a statutorily-protected legitimate business interest would completely circumvent the statutory directive that prospective patients are not to be recognized as a legitimate business interest." *Id*. at 454. The court stated Americare's clients are its patients, and "referral sources merely act as a conduit to supply these unidentified prospective patients to the home health care agencies." *Id.* The Fifth District certified conflict with *Infinity Home Care*. *Hiles*, 183 So. 3d

[4] White filed the orders on appeal in *Sprow*, *Leath*, and *Kissane* in support of her summary judgment motion (R:56-80/E:63-87).

at 455.

3. *Sanal* supports the holdings in *Tummala* and *Hiles*.

The Fifth District in *Tummala* relied, in part, on the First District's decision in *University of Florida, Board of Trustees v. Sanal*, 837 So. 2d 512 (Fla. 1st DCA 2003). Dr. Sanal, a hematologist and oncologist, formerly worked as a professor of medicine at the University of Florida. 837 So. 2d at 513. He signed a non-compete agreement that prohibited him from practicing medicine in a community-based clinical practice within 50 miles of his former employer for two years after his termination. *Id.* at 514. The University sued Dr. Sanal for breach of the non-compete agreement when he began practicing in the restricted area soon after he left his position at the University. *Id.*

The University asserted that it had a legitimate business interest under section 542.335, in all persons within a 50-mile radius because all of those persons were "prospective patients" of the University. 837 So. 2d at 514. The First District disagreed, holding that "to qualify as a 'legitimate business interest' pursuant to section 542.335(1)(b)3, a 'relationship' with a 'prospective patient' must be, in addition to 'substantial,' **one with a particular, identifiable, individual.**" *Id.* at 516. The University's position that all persons within a 50-

mile radius were prospective patients under section 542.335 was untenable because "one cannot have 'substantial relationships' with 'prospective patients' who are unidentified, and unidentifiable." *Id.*

The Court in *Sanal* recognized that the language in section 542.335(1)(b)3—"Substantial relationships with **specific** prospective or existing customers, patients, or clients"—is unambiguous and must be given its plain and ordinary meaning. 837 So. 2d at 516. The *Sanal* Court emphasized the legislative intent of section 542.335, which is not designed to unnecessarily impede the efforts of employees to obtain better paying jobs unless they are misappropriating the assets of their prior employer. 837 So. 2d at 516.

4. The Fourth District's decisions in *Infinity Home Care* and *Mederi Caretenders* revert back to the "contract" approach.

In *Mederi Caretenders Visiting Services of Southeast Florida, LLC v. White*, 179 So. 3d 564 (Fla. 4th DCA 2015), the Fourth District relied on its earlier decision in *Infinity Home Care LLC v. Amedisys Holding, LLC*, 180 So. 3d 1060 (Fla. 4th DCA 2015). *Mederi Caretenders*, 179 So. 3d at 564. In both cases, the Fourth District certified conflict with *Tummala*. *Mederi Caretenders*, 179 So. 3d at 564; *Infinity Home Care*, 180 So. 3d at 1067. This brief focuses on *Infinity Home Care*, which formed the basis of the Fourth District's decision in this case.

In *Infinity Home Care*, the Fourth District held that referral sources are a protectable legitimate business interest under section 542.335. *Infinity Home Care*, 180 So. 3d at 1067. The Fourth District reasoned that "[t]he statute does not expressly exclude referral relationships and neither does the holding in *Sanal*." 180 So. 3d at 1065. The court noted that the list of legitimate business interests in section 542.335 is not exclusive, allowing courts "to examine the particular business plans, strategies, and relationships of a company in determining whether they qualify as a business interest worthy of protection." *Id.*

The Fourth District Court disagreed with the reasoning in *Tummala*, stating that "[r]elationships with specific referral sources, which are not mentioned in the statute, are not the same as relationships with unidentified prospective patients." 180 So. 3d at 1065. Looking at the facts in *Infinity*, the court stated that the record showed the employer "developed substantial relationships" with its referral doctors and clinics, which were "the 'lifeblood' of its home health care business." *Id.* at 1066. The court also noted that the restrictive covenant at issue in that case specifically mentioned referral sources as a valuable business interest. *Id.*

This analysis in *Infinity Home Care* was a clear retreat to the old "contract-oriented" approach, where the court enforces a restrictive covenant because the

parties agreed in the contract that the interest is an important business interest. *See* Grant & Steele, *supra*, at 53. The Fourth District did not conduct any significant analysis of whether the interest in referral sources in the home health care industry is proprietary in nature—having been acquired after substantial investment—or whether the restriction is simply designed to stifle competition. Nor did the court address the public policies of free competition and the employee's ability to freely move within the market.

The Fourth District in *Infinity Home Care* cited *Southernmost Foot & Ankle Specialists, P.A. v. Torregrosa*, 891 So. 2d 591 (Fla. 3d DCA 2004), as a decision where "the Third District accepted the trial court's finding that 'referral doctors' are a legitimate business interest." *Infinity Home Care*, 180 So. 3d at 1063. However, *Torregrosa* contains no analysis of this issue. The Third District simply stated in *Torregrosa* that the trial court properly found "a prima facie case that the restrictive covenant was reasonably necessary to protect [the podiatry group's] legitimate business interests in its patient base, referral doctors, specific prospective and existing patients, and patient goodwill." 891 So. 2d at 594. There is no indication in the decision that Dr. Torregrosa ever challenged referral sources

as a legitimate business interest, in the trial court or on appeal.[5] This Court should give no weight to dicta in *Torregrosa* regarding referral sources because the court did not actually discuss this issue. *See, e.g., State v. Du Bose*, 128 So. 4, 6 (Fla. 1930) ("[N]o decision is authority on any question not raised and considered, although it may be involved in the facts of the case."); *Esaw v. Esaw*, 965 So. 2d 1261, 1265 (Fla. 2d DCA 2007); *Goldman v. State Farm Fire Gen. Ins. Co.*, 660 So. 2d 300, 304 (Fla. 4th DCA 1995).

5. The Legislature did not intend that gratuitous referral sources be considered protectable, proprietary business interest under section 542.335.

"[L]egislative intent is the polestar that guides a court's statutory construction analysis." *Knowles v. Beverly Enters.-Fla., Inc.*, 898 So. 2d 1, 5 (Fla. 2004). Analysis of legislative intent starts with the plain language of the statute, and goes no further than that if the plain language is clear and unambiguous. *Id.*

The Fifth District's decisions in *Tummala* and *Hiles* are consistent with the

[5] The Fifth District in *Tummala* noted, in a footnote, the **appearance** of a conflict with *Torregrosa*. *Tummala*, 927 So. 2d at 139 n.4. This Court initially accepted jurisdiction based on express and direct conflict between *Tummala* and *Torregrosa*. *Fla. Hematology & Oncology Specialists v. Tummala*, 937 So. 2d 122 (Fla. 2006). However, after holding oral argument, this Court dismissed that appeal because "jurisdiction was improvidently granted." 969 So. 2d 316 (Fla. 2007).

plain language of section 542.335, which is a codification of the common law "legitimate business interest" approach, protecting only those proprietary interests or assets that, if misappropriated, would lead to unfair competition.

Under the plain reading of the statute, as *Hiles* correctly held, referral sources are not a home health care agency's customers, patients, or clients and, thus, are not a protectable business interest. *Hiles*, 183 So. 3d at 454; *see also* § 542.335(1)(b)3. Almost Family's customers are its patients, to whom Almost Family provides home health care. Almost Family does not sell anything to the physicians or facilities to which it markets, nor does it have any contracts with them. It simply solicits them for gratuitous referrals, which the physicians have no obligation to provide to Almost Family. The referral sources are not exclusive to Almost Family. Lists of referral sources are publicly available and common knowledge to home health care marketing representatives. (R:171-72/E:179-80; R:572-73/E:582-83; T:14-15/E:749-50). Referral sources do not fall within the plain meaning of section 542.335(1)(b)3. "[T]o accept referral sources here as a statutorily-protected legitimate business interest would completely circumvent the statutory directive that prospective patients are not to be recognized as a legitimate business interest." *Hiles*, 183 So. 3d at 454.

The Fourth District's reading of the statute is contrary to the plain language and the legislative intent. Section 542.335 expressly defines the types of relationships with patients that can be protected by restrictive covenant. Those relationships must be with "specific prospective or existing" patients with whom the plaintiff has a "substantial relationship." § 542.335(1)(b)3; *see also Hiles*, 183 So. 3d at 454; *Tummala*, 927 So. 2d at 137-38; *Sanal*, 837 So. 2d at 516.

Further, courts cannot add or delete words that the legislature has written, such as the express restriction in section 542.335 against protecting relationships with unidentified prospective patients. *See Lawnwood Med. Ctr., Inc. v. Seeger*, 990 So. 2d 503 (Fla. 2008); *Dade Cnty. v. Nat'l Bulk Carriers, Inc.*, 450 So. 2d 213, 216 (Fla. 1984) (cautioning that courts cannot add language to statutes to cover a situation that is not within the meaning of the statute). To do so would be an abrogation of legislative power. *Bay Holdings, Inc. v. 2000 Island Blvd. Condo. Ass'n*, 895 So. 2d 1197, 1197 (Fla. 3d DCA 2005). The doubt should be resolved against the power of the courts to supply words missing from a statute. *Armstrong v. City of Edgewater*, 157 So. 2d 422, 425 (Fla. 1963). Further, "[i]t is axiomatic that all parts of a statute must be read *together* in order to achieve a consistent whole." *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992). Protecting referral sources as a legitimate business interest would

circumvent the express language of section 542.335 and violate these principles of statutory construction.

Thus, under the plain language of section 542.335, an employer like Almost Family cannot use a restrictive covenant to protect relationships with unidentified and unidentifiable patients. Courts should not construe section 542.335 as protecting a business interest that is directly at odds with the express list of protectable interests in the statute.

6. The non-exclusive language in section 542.335 should not be construed to allow inclusion of non-proprietary interests not intended by the Legislature.

The Fourth District erred in reasoning that Almost Family's restrictive covenant is enforceable because "[t]he statute does not expressly exclude referral relationships." *Infinity*, 180 So. 3d at 1065; *see also Mederi Caretenders*, 179 So. 2d at 564. This approach is a return to the "contract" approach that was rejected by the Legislature. *See* Grant & Steele, *supra*, at 54. Instead, courts must look to the kinds of interests that are expressly protected under the statute when determining whether an unmentioned interest is the kind of proprietary "legitimate business interest" that the Legislature meant to protect. Gratuitous referral sources are not this type of interest.

In 1996, when section 542.335 was adopted, the Legislature attempted to codify the then-recognized common law exceptions to a prohibition on contracts in restraint of trade. The common law exceptions were for agreements protecting legitimate, proprietary business interests where the business owner has substantially invested over and above the norm, and which would lead to unfair competition if misappropriated to another employer. *See* Grant & Steele, *supra*, at 54. The home health care industry was certainly well-established in 1996. Referral sources were important to many business and professions, such as accounting, law, and stock brokers. Yet, the Legislature did not include referral sources in the list of protected legitimate business interests in section 542.335.

Non-exclusive, gratuitous referral sources are not a proprietary interest or asset of a home health care agency. Thus, as *Tummala* and *Hiles* held, referral sources are not a protectable business interest under section 542.335. In fact, in the home health care industry, it is illegal to invest sums of money to establish relationships with referral sources. *See* 42 U.S.C. § 1395nn(a) (2012); 42 C.F.R. §§ 411.353, 411.354, 411.357(k) (2015); §§ 400.518, 456.053(5)(f), Fla. Stat. (2016). In addition, referral sources cannot be exclusive or contract with the agencies. *See* §§ 400.518, 456.053. Physicians are required to refer based on the best interests of the patients. *See* 42 U.S.C. § 1395a (Supp. III 2015); §

400.487(4), Fla. Stat. (2016). And, information about referral sources is public knowledge to home health care agencies (R:171-72/E:179-80; R:572-72/E:582-83; T:14-15/E:749-50).

The Fifth District got it right when it stated that there is "no way to recognize referring physicians as a legitimate business interest and still give effect to the plain language of the statute." *Tummala*, 927 So. 2d at 139. Referral sources are simply in a different class than the proprietary interests listed in the statute. *See Moonlit Waters Apartments, Inc. v. Cauley*, 666 So. 2d 898, 900 (Fla. 1996) (explaining that the doctrine of *expressio unius est exclusio alterius* means that "the mention of one thing implies the exclusion of the other").

It is not enough that the home health care agencies pay their marketing representatives to call on referral sources. An analogy can be drawn to the difference between ordinary on-the-job training and unique, extraordinary training, only the latter of which is protected under section 542.335. *See Hapney*, 579 So. 2d at 132; *Dyer v. Pioneer Concepts, Inc.*, 667 So. 2d 961, 964 (Fla. 2d DCA 1996). The home health care agency is paying the representative to do the job of soliciting patient referrals and assisting in the transition from hospital or facility back to home. This is hardly an investment into the acquisition of an asset. There

is no relationship built on an expensive "wine and dine," golf outing or entertainment budget, thereby creating an investment into a business asset. That type of relationship is illegal in the home health care context.

The fact that referral sources constitute a significant source of business for home health care agencies is not controlling. Not all sources of business lead to a protectable, legitimate business interest under section 542.335. *See Hapney*, 579 So. 2d at 130 (recognizing that "any competition by a former employee may well injure the business of the employer" but "[i]n order for an employer to be entitled to protection, there must be **special facts** present **over and above ordinary competition**") (quoting *Hasty v. Rent-A-Driver, Inc.*, 671 So. 2d 471, 473 (Tenn. 1984)). This is especially true in the highly regulated home health industry, where the patient's choice and best interest are paramount, and exclusive referral contracts and kickbacks are prohibited.

There are many other **important** business interests that are clearly not protected, such as time invested in ordinary training, general knowledge and experience of an employee, and suppression of competition. *See, e.g., Hapney*, 579 So. 2d at 132; *Renpak, Inc. v. Oppenheimer*, 104 So. 2d 642, 645 (Fla. 2d DCA 1958). Even non-exclusive customers who order from many sources are not

considered a protected business asset. *See, e.g., Anich Indus., Inc. v. Raney*, 751 So. 2d 767, 771 (Fla. 5th DCA 2000). All of these interests are important to a business owner, but they do not outweigh the interests of society in free competition and of the employee in being able to freely move from job to job to better his or her station in life.

The Court can look to other areas of jurisprudence in deciding whether gratuitous, non-exclusive referral sources are a business asset protected by section 542.335. For example, the law on tortious interference supports the notion that gratuitous referral relationships are not protected. To recover on a claim of tortious interference, a plaintiff must prove the existence of a business relationship under which the plaintiff has legal rights. *See Ethan Allen, Inc. v. Georgetown Manor, Inc.*, 647 So. 2d 812, 814-15 (Fla. 1994). "[S]peculative hope of future business" is insufficient. *St. Johns River Water Mgmt. Dist. v. Fernberg Geological Servs., Inc.*, 784 So. 2d 500, 505 (Fla. 5th DCA 2001). Similarly, referral sources, which provide only a speculative hope of future business, should not be protectable under section 542.335.

Notably, protectable interests surrounding a referral source—such as compilations of information about the referral source—can be protected by less

drastic means, such as a confidentiality clause. If the restrictive covenant is overly broad, a court can modify the agreement to include only what is reasonably necessary to protect legitimate interests. § 542.335(1)(c); *see also Austin v. Mid State Fire Equip. of Cent. Fla., Inc.*, 727 So. 2d 1097, 1098 (Fla. 5th DCA 1999). Thus, a court may strike, as a matter of law, a general non-compete clause or non-solicitation of referral sources, but keep intact clauses relating to non-solicitation of patients and confidential information. *See* § 542.335(1)(c); *Tummala*, 927 So. 2d at 138 n.3; *Health Care Fin. Enters. v. Levy*, 715 So. 2d 341, 342-43 (Fla. 4th DCA 1998) (discussing court's general ability to blue pencil agreements).

E. Although other district court decisions have mentioned referral sources, they did not decide the issue.

Almost Family may attempt to rely upon several cases, like *Torregrosa*, where referral sources are mentioned, but the direct issue of whether referral sources are protected interests was not raised or argued on appeal.

One example is *Smart Pharmacy, Inc. v. Viccari*, 41 Fla. L. Weekly D1274 (Fla. 1st DCA May 31, 2016). There, Smart Pharmacy appealed an order denying injunctive relief based on a non-compete agreement. *Id.* The issues on appeal were whether the presence of an adequate remedy at law or lack of irreparable injury precluded injunctive relief and whether the trial court's conclusion regarding

speculative damages and use of trade secrets was correct. *Id.* It was apparently undisputed that Smart Pharmacy's former employee, Viccari, violated his non-compete agreement by soliciting some of the same physicians he solicited while he worked for Smart Pharmacy. *Id.* Although the decision mentions referral sources, the issue of whether gratuitous, non-exclusive referral relations are a protected interest was not raised or decided on appeal. *Id*. at D1275. Like with *Torregrosa*, this Court should not give weight to dicta regarding referral sources because the court did not actually discuss this issue.[6] *See, e.g.*, *State v. Du Bose*, 128 So. 4, 6 (Fla. 1930).

The same holds true for *Open Magnetic Imaging, Inc. v. Nieves-Garcia*, 826 So. 2d 415 (Fla. 3d DCA 2002). There, the "legitimate business interest" upon which the opinion was based was a database that was created as part of a confidential marketing plan—not relationships with referring physicians. 826 So. 2d at 419.

[6] Indeed, to construe *Smart Pharmacy* as holding that referral sources are protectable would be directly at odds with how the First District handled this precise issue in its earlier per curiam affirmances in *Caretenders of Jacksonville, LLC v. Leath*, 73 So. 3d 762 (Fla. 1st DCA 2011), and *Caretenders Visiting Services of Jacksonville v. Leath*, 146 So. 3d 1174 (Fla. 1st DCA 2014) (*see also* R:56-80/E:63-87).

F. Even if some referral sources could be protected as a matter of law, such a rule should not apply to gratuitous referral sources in the home health care industry.

For all the reasons stated above, this Court should approve *Tummala* and *Hiles* and quash *Infinity Home Care* and *Mederi Caretenders*. In the alternative, this Court could limit its holding as prohibiting restrictive covenants protecting referral sources in the home health care industry because of the unique restrictions placed on developing relationship with referral sources within this industry.

POINT II

ALTERNATIVELY, THE DETERMINATION OF WHETHER THE REFERRAL SOURCES IN THIS CASE CONSTITUTE A LEGITIMATE BUSINESS INTEREST REQUIRES A FACTUAL INQUIRY.

If this Court were to overrule *Tummala* and *Hiles*, then the case should be remanded to the trial court to determine whether Almost Family's relationships with referral sources are "substantial" and to identify the specific referral sources. Almost Family must prove more than the fact that it had relationships with referral sources. It must prove that those relationships were exclusive or substantial. *See* § 542.335, Fla. Stat.; *Anich Indus., Inc. v. Raney*, 751 So. 2d 767, 771 (Fla. 5th DCA 2000). For example, in *Anich*, the Fifth District held that the employer did not prove it had "substantial" relationships with its customers. 751 So. 2d at 771. Those customers all testified that they made their purchases "based primarily on

cost and the supplier's ability to provide the goods quickly" and "[t]here was little evidence of any exclusive" relationships. *Id.* Similarly, in *Tummala*, the referring physicians all testified that "they make their referrals based upon their assessment of the individual doctor to whom they direct their patients." 927 So. 2d at 139. Those doctors did not refer to any business or practice, but instead to a particular doctor—Dr. Tummala. *Id.* The Fifth District held that even if referral relationships were a legitimate business interest, the Plaintiffs had not proven that they had "substantial" relationships as a matter of fact. *Id.* Thus, even if this Court agrees with the Fourth District, it should remand to the trial court for further proceedings to determine whether Almost Family has proven, in fact, that its relationships with specific referral sources were substantial.

POINT III

WHITE IS ENTITLED TO ATTORNEY'S FEES UNDER SECTION 542.335(1)(k).

A. If White prevails, she is entitled to statutory attorney's fees.

A question of entitlement to fees that depends on the interpretation of a statute or contract is reviewed de novo. *See Bauer v. DILIB, Inc.*, 16 So. 3d 318, 320 (Fla. 4th DCA 2009).

Section 542.335(1)(k), Florida Statutes, gives courts the authority to award

prevailing party attorney's fees "in any action seeking enforcement of, or challenging the enforceability of, a restrictive covenant." That statute expressly precludes courts from enforcing "any contractual provision limiting the court's authority under this section." *Id.* The trial court awarded prevailing party fees to White (Fee R:25-26/E:31-32; Fee R:30-33/E:36-39). If White prevails in this case, this Court should remand for the Fourth District to affirm that award of fees.

B. If White does not prevail, then no party should be awarded fees until the conclusion of the case.

If this Court affirms the Fourth District, then the case will be remanded to the trial court for a determination as to whether Almost Family's non-exclusive relationships with the referral sources are indeed substantial enough to warrant protection under section 542.335, as a matter of act. *See supra*, Point II. If that happens, Almost Family is not entitled to recover attorney's fees unless it also prevails in the case following the remand to the trial court. *See Moritz v. Hoyt Enters., Inc.*, 604 So. 2d 807, 810 (Fla. 1992); *Johnson v. Maroone Ford LLC*, 944 So. 2d 1059, 1061 (Fla. 4th DCA 2006).

CONCLUSION

This Court should approve the decisions of the Fifth District in *Tummala* and *Hiles* and quash the decisions of the Fourth District in *Infinity Home Care* and

Mederi Caretenders.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of September, 2016, I will electronically file the foregoing with the Clerk of Court using the Florida Courts E-Filing Portal, which will then send a copy of such filing to: PATRICK M. MULDOWNEY, JAMES W. SEEGERS, BAKER & HOSTETLER LLP, 200 South Orange Avenue, Sun Trust Center, Suite 2300, Orlando, FL 32802-0112, pmuldowney@bakerlaw.com, dbichard@bakerlaw.com, jseegers@bakerlaw.com, dmanser@bakerlaw.com, Counsel for Respondents, Mederi Caretenders Visiting Services of Southeast Florida, LLC and Almost Family, Inc.

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CERTIFICATE OF FONT

The Initial Brief of Petitioner has been typed using the 14-point Times New Roman font.

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