

**IN THE SUPREME COURT OF FLORIDA**

**CASE NO.: SC16-28**

**ELIZABETH WHITE,**

**Petitioner,**

**vs.**

**L.T. CASE NOS.**

**4D14-488, 4D14-2460 and 19<sup>th</sup> Cir.**

**No. 562011CA003562AXXXHC**

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

**Respondents.**

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**RESPONDENTS' AMENDED BRIEF ON JURISDICTION**

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## I. STATEMENT OF THE CASE AND OF THE FACTS

The instant matter arises from the alleged breach by the Petitioner, Elizabeth White (the “Petitioner”) of a non-compete agreement with the Respondents, Mederi Caretenders Visiting Services of Southeast Florida, LLC (“Mederi”), and Almost Family, Inc. (“Almost Family”) (collectively, the “Respondents”). The specific question before the Court in the instant appeal is whether a home health care agency’s referral sources are a protectable business interest under Section 542.335, Florida Statutes. The Fourth District Court of Appeal answered the question in the affirmative based on its prior decision in *Infinity Home Care, L.L.C. v. Amedisys Holding, LLC*, 180 So.3d 1060, 1066 (Fla. 4th DCA 2015). *Visiting Services of Southeast Florida, LLC v. White*, 179 So. 3d 564 (Fla. 4th DCA 2015).<sup>1</sup> (A:1-A:2). In doing so, the Fourth District certified conflict with the Fifth District’s decision in *Florida Hematology & Oncology v. Tummala*, 927 So. 2d 135, 138-39 (Fla. 5th DCA 2006). (A:2).

Almost Family is a Delaware corporation primarily engaged in the business of providing home health care services through various subsidiaries; Mederi is one of those subsidiaries. The Petitioner was employed as an Account Executive for the Respondents. During the Petitioner’s employment with the Respondents, the Petitioner’s primary duty was to solicit potential referral sources for home health

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<sup>1</sup> Citations to the Fourth District’s decision in this case are to the slip opinion in the attached appendix (A: [page of slip opinion]).

care services in the hope that the referral sources would refer patients to the Respondents. Over time, the Petitioner established substantial referral relationships with health care providers who refer and authorize patients to receive home health care services.

As a condition of her employment with the Respondents, the Petitioner executed an agreement not to compete (the “Non-Compete Agreement”) with the Respondents which, *inter alia*, prohibited her from competing with the Respondents for one (1) year in the same territory in which she worked for them. The Petitioner ultimately resigned from her employment with the Respondents and shortly thereafter went to work in her former territory for a direct competitor of the Respondents. In connection with her new employment, she directly marketed to and solicited the same referral sources that she previously solicited while employed by the Respondents – all in violation of her Non-Compete Agreement.

Because of the Petitioner’s violations of the Non-Compete Agreement, the Respondents filed suit against the Petitioner for breach of contract and tortious interference. In response, the Petitioner asserted that under *Tummala*, 927 So. 2d at 138-39, the Non-Compete Agreement was void because referral sources are not a “legitimate business interest” under Section 542.335, Florida Statutes. The Petitioner ultimately moved for summary judgment in her favor on the Respondents’ claims, which the trial court granted in reliance upon *Tummala*.

(A:1). On appeal, however, the Fourth District reversed the trial court’s entry of summary judgment based upon its prior decision in *Infinity Home Care*, which had rejected the Fifth District’s reasoning in *Tummala* and held that referral sources for home health care agencies are “legitimate business interests” under Section 542.335. (A:1-A:2). *See Infinity Home Care*, 180 So. 3d at 1066.<sup>2</sup> As it had in *Infinity Home Care*, the Fourth District certified a direct conflict between its decision herein and *Tummala*. (A:2). *See Infinity Home Care*, 180 So.3d at 1066. Meanwhile, the Fifth District has issued an opinion regarding referral sources within the home health care industry that followed *Tummala* and certified therein a direct conflict with *Infinity Home Care*. *See Hiles v. Americare Home Therapy, Inc.*, No. 5D15-9, 2015 WL 9491847, at \*7 (Fla. 5th DCA 2015).

## II. SUMMARY OF ARGUMENT

A certified direct conflict exists between the Fourth and Fifth Districts on the issue of whether specific referral sources for home health care agencies are legitimate business interests. The Fourth District correctly acknowledged that contrary to the Fifth District’s holding in *Tummala*, the list of “legitimate business interests” contained in Section 542.335 is not an exclusive list, and it distinguished

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<sup>2</sup> In addition to arguing that the Non-Compete Agreement was enforceable under Section 542.335, the Respondents asserted that it was enforceable under Kentucky law, which was the jurisdiction set forth in the agreement’s choice-of-law provision. The trial court rejected the Respondents’ argument as to this issue, and the Fourth District did not mention the argument in its opinion reversing the trial court.

“relationships with specific referral sources” from “relationships with unidentified prospective patients,” which *Tummala* had relied upon in refusing to find referral sources to be protectable. *Infinity Home Care*, 180 So. 3d at 1066. Moreover, after examining the business model of home health agencies, the Fourth District has held that relationships with the specific referral sources were legitimate business interests and an employment contract containing non-compete and non-solicitation provisions was enforceable. *Id.*

In direct conflict with the Fourth District’s decisions here and in *Infinity Home Care*, the Petitioner relies on the *Tummala* decision, in which the Fifth District held that, based upon *Univ. of Fla. Bd. of Trustees v. Sanal*, 837 So. 2d 512 (Fla. 1st DCA 2003), recognizing referring physicians as a legitimate business interest would circumvent the statutory directive that “unidentified prospective patients” are not legitimate business interests. (A:1-A:2). *See Tummala*, 927 So. 2d at 139 (*citing Sanal*, 837 So. 2d at 515-16). The Fifth District’s reasoning in *Tummala*, however, is flawed and the Court should accept jurisdiction and reject such reasoning because the specific and identifiable physicians and institutions that refer patients to the Respondents are, for all practical purposes, distinguishable from the concept of “unidentified prospective patients” referenced in *Tummala* and *Sanal*. *See Infinity Home Care*, 180 So. 3d at 1065 (noting the distinction between

a relationship with a specific referral source and a relationship with an unidentified prospective patient).

This Court should exercise its discretion to resolve the certified direct conflict. Determining whether specific referral source relationships are a legitimate business interest would have a broad impact on employment agreements across the state and would also provide clarity to employers seeking to draft non-compete agreements in compliance with Section 542.335. Accordingly, this Court should accept jurisdiction, adopt the Fourth District's rationale herein and in *Infinity Home Care*, and reject *Tummala* and its progeny.

### III. ARGUMENT

**THIS COURT SHOULD ACCEPT JURISDICTION TO REVIEW THE CERTIFIED DIRECT CONFLICT BECAUSE A HOME HEALTH CARE AGENCY'S SPECIFIC REFERRAL SOURCES ARE A LEGITIMATE BUSINESS INTEREST THAT CAN BE PROTECTED UNDER A NON-COMPETE AGREEMENT.**

#### A. Standard Of Review.

The Supreme Court may exercise jurisdiction over an appeal that is certified to be in direct conflict with decisions of other district courts of appeal. *Fla. R. App. P.* § 9.030(2)(A)(vi). Because the Fourth and Fifth Districts have both certified that their decisions on this issue directly conflict with each other, this Court should exercise its discretionary jurisdiction to resolve the direct conflict.

(A:2). *Infinity Home Care*, 180 So. 3d at 1066; *Hiles*, No. 5D15-9, 2015 WL 9491847 at \* 8.

**A Conflict Exists Because The Analysis And Holdings Of The Fourth District In This Case And In *Infinity Home Care* Are Directly Contrary To The Analysis Employed By The Fifth District In *Tummala* And *Hiles*.**

The Fifth District’s decisions in *Tummala* and *Hiles* ignore the practical realities of the home health care industry and narrowly construe the definition of “legitimate business interests” by attempting to fit specific and identifiable referral source relationships into the enumerated category of “substantial relationships with specific prospective or existing customers, patients, or clients.” *See Tummala*, 927 So. 2d at 138-39; *see also Fla. Stat.* § 542.335(1)(b)(3). First of all, this approach ignores the fact that specific referral source relationships do not need to fit into any of the enumerated categories of “legitimate business interests” under Section 542.335 because it is not an exclusive list of every possible “legitimate business interest.” *Infinity Home Care*, 180 So. 3d at 1065. Furthermore, the Fifth District’s approach also erroneously pigeonholes the issue by construing the end result of a specific referral relationship, *i.e.*, access to a “stream of unidentified prospective patients,” as being prohibited by the express language of Section 542.335. Instead, the Fifth District failed to recognize whether specific and identifiable referral relationships are a “legitimate business interest” in their own

right as the Fourth District did in this case and in *Infinity Home Care*. *Infinity Home Care*, 180 So. 3d at 1065-66.

In direct conflict with *Tummala* and *Hiles*, the Fourth District, has disagreed with the Fifth District's narrow interpretation of Section 542.335 by recognizing that "Section 542.335 clearly states that the legitimate business interests listed in the statute are not exclusive." *Id.* at 1065. As a result, the Fourth District went on to "examine the particular business plans, strategies and relationships" of the plaintiffs in *Infinity Home Care* and in doing so, concluded that "relationships with specific referral sources are not the same as relationships with unidentified prospective patients." *Id.*

In *Infinity Home Care*, the Fourth District explained that the appellees were not trying to protect relationships with unidentified prospective patients, but rather they were trying to protect the "substantial [referral] relationships" with doctors and clinics that they "carefully cultivated over time and heavily depended upon as a source of business." *Id.* at 1065-66. This distinction is paramount, and illustrates how the Fourth District accounted for the practical realities that exist with respect to patient referral sources and home health care agencies instead of attempting to fit specific referral source relationships into one of the enumerated categories under Section 542.335. By ignoring the fact that home health care agencies develop substantial, specific and identifiable referral relationships with other health

care providers, the Fifth District’s analysis and holdings in *Tummala* and *Hiles* are erroneous and directly conflict with this case and *Infinity Home Care*.

In light of these contrary holdings, a certified conflict exists on the issue of whether a home health care agency’s specific referral source relationships are “legitimate business interests” under Section 542.335(1)(b). This Court should accept jurisdiction to provide consistency to the application of Section 542.335.

**C. The District Court Conflict Over Whether Referral Source Relationships Are Legitimate Business Interests Under Section 542.335 Is A Matter Of Great Public Importance And Should Be Decided By This Court.**

Pursuant to Section 542.335(1), “[a]ny restrictive covenant not supported by a legitimate business interest is unlawful and is void and unenforceable.” *Fla. Stat.* § 542.335(1). In order for a non-compete agreement to be enforceable, it must be reasonable in time, area, and line of business, and it must be justified by a “legitimate business interest.” *Fla. Stat.* § 542.335(1)(b). The term “legitimate business interest” includes, **but is not limited to:**

- (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.

*Fla. Stat.* § 542.335(1)(b)(1-5). (emphasis added).

Admittedly, referral sources are not specifically listed as a legitimate business interest, but nonetheless, because the above list from Section 542.335 is not an exclusive list, the Fourth District held that the proper way to determine whether something is a legitimate business interest is to “examine the particular business plans, strategies, and relationships of a company.” *Infinity Home Care* 180 So. 3d at 1065.

Home health care agencies, like the Respondents, invest significant resources in developing referral relationships with doctors, clinics, skilled nursing facilities, assisted living facilities and other health care providers to inform such business sources about the services they offer. Because home health care agencies typically do not have access to information about the patients who need their services they usually cannot directly market their services to patients. In addition, Florida law also prohibits licensed home health care agencies, like the Respondents, from providing skilled services for a patient without a physician first signing a treatment order—similar to the procedure for prescribing medication. *Fla. Stat.* § 400.487(2).

As a result of these practical realities, the vast majority of the Respondents’ patients engage the Respondents’ services through referrals from the same health care provider that issues the treatment order. Accordingly, the specific referral

source relationships that are cultivated over time and at the expense of the Respondents are, for all practical purposes, the “lifeblood” of their business. *Infinity Home Care*, 180 So. 3d at 1066. As such, specific referral source relationships between home health agencies and other health care providers should be recognized as a “legitimate business interest” under Florida law.<sup>3</sup>

#### IV. CONCLUSION

This Court should accept jurisdiction to review the direct certified conflict issue, affirm the decisions of the Fourth District in this case and in *Infinity Home Care*, and disapprove the decisions of the Fifth District in *Tummala* and *Hiles*.

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<sup>3</sup> Indeed, in an analogous situation, the United States Supreme Court found that the relationship between referring physicians and pharmaceutical sales representatives – whose duty to their employer (much like the Petitioner’s primary duty) was to obtain nonbinding commitments from physicians to prescribe their employer’s products – was in fact a sales relationship under the Fair Labor Standards Act (“FLSA”). *See Christopher v. Smithkline Beecham Corp.*, 132 S.Ct. 2156 (2012). Numerous other courts, including those applying Florida law, have found that referral sources are a legitimate business interest. *See Electrostim Med. Servs. v. Lindsey*, No. 8-11-cv-2467-T-33TMB, 2012 WL 1405705, at \*7 (M.D. Fla. Mar. 13, 2012); *see also Wellspan Health v. Bayliss*, 869 A.2d 990, 999 (Pa. Super 2005); *Idbeis v. Wichita Surgical Specialists*, 112 P.3d 81, 90 (Kan. 2005); *Cnty. Hosp. Group v. More*, 869 A.2d 884, 896 (N.J. 2005).

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on March 28, 2016, a true and correct PDF copy of the foregoing has been electronically filed with the Clerk of the Court using this Court's E-Filing Portal, which will send a notice of electronic filing to the following:

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**CERTIFICATE OF COMPLIANCE**

Respondents' Amended Brief on Jurisdiction has been typed using the 14-point Times New Roman font.

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