Filing # 37547819 E-Filed 02/08/2016 04:13:45 PM

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 4D-2460
19th Cir. No. 562011CA003562

RECEIVED, 02/08/2016 04:18:30 PM, Clerk, Supreme Court

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PREFACE

Petitioner, Elizabeth White, seeks to review 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). Respondents are home health care agencies, Mederi Caretenders Visiting Services of Southeast Florida, LLC, and Almost Family, Inc. This brief refers to respondents collectively as "Almost Family."

The Fourth District in this case (A:2) and in its earlier decision in *Infinity Home Care, L.L.C. v. Amedisys Holding, LLC*, 40 Fla. L. Weekly D2589, D2592 (Fla. 4th DCA Nov. 18, 2015),[1] certified direct conflict with the decision of the Fifth District in *Florida Hematology & Oncology v. Tummala*, 927 So. 2d 135, 138-39 (Fla. 5th DCA 2006). In turn, the Fifth District reaffirmed its holding in *Tummala* and certified direct conflict with *Infinity*. *See Hiles v. Americare Home Therapy, Inc.*, 41 Fla. L. Weekly D67, D70 (Fla. 5th DCA Dec. 31, 2015).

[1] All emphasis is supplied unless indicated otherwise. Citations to the Fourth District's decision in this case are to the slip opinion in the attached appendix (A:[page of slip opinion]). The plaintiff in *Infinity* sought review in this Court, but later voluntarily dismissed the proceedings (Case No. SC15-2331).

STATEMENT OF THE CASE AND FACTS

Almost Family is a home health care agency (A:1). Almost Family sued its former employee, Elizabeth White, for tortious interference and breach of a non-compete agreement (A:1). Almost Family claimed that its patient referral sources could be protected by a non-compete agreement under section 542.335(1), Florida Statutes (2011) (A:1-2).

White responded that under *Florida Hematology & Oncology v. Tummala*, 927 So. 2d 135, 138-39 (Fla. 5th DCA 2006), patient referral sources are not a "legitimate business interest" protected by section 542.335 (A:1). The *Tummala* decision "held that referral sources for patients in the health care industry were not 'legitimate business interests'" protected by section 542.335 (A:1). The trial court followed *Tummala* and entered final summary judgment in favor of White (A:1).

On appeal, the Fourth District reversed and held that a home health agency's patient referral sources can be protected by a non-compete agreement under section 542.335 (A:1-2). The Fourth District certified direct conflict with *Tummala* in this case and in its earlier decision in *Infinity Home Care, L.L.C. v. Amedisys Holdings, LLC*, 40 Fla. L. Weekly D2589, D2592 (Fla. 4th DCA Nov. 18, 2015) (A:2). The

Fourth District reversed the trial court's order awarding White attorney's fees because it had reversed the underlying final summary judgment for White (A:2).

SUMMARY OF ARGUMENT

The Fourth District and Fifth District have both certified direct conflict on the issue of whether a home health care agency can enforce a non-compete agreement restricting a former employee's use of patient referral sources. The Fifth District holds that under the plain language of section 542.335(1), Florida Statutes, patient referral sources are not a legitimate business interest that can be protected by a restrictive covenant. In direct conflict with these decisions, the Fourth District holds that a home health agency can enforce a non-compete agreement protecting patient referral sources.

This Court should exercise its discretion to resolve the certified direct conflict. The public policy of Florida disfavors restrictive covenants, which are void and unenforceable unless the agreement strictly complies with section 542.335(1). Resolution of the certified conflict issue will have a broad impact on employment agreements throughout Florida. This Court should accept jurisdiction and quash the decisions of the Fourth District.

ARGUMENT

THIS COURT SHOULD ACCEPT JURISDICTION TO REVIEW THE CERTIFIED DIRECT CONFLICT BECAUSE A HOME HEALTH CARE AGENCY'S PATIENT REFERRAL SOURCES ARE NOT A LEGITIMATE BUSINESS INTEREST THAT CAN BE PROTECTED BY A NON-COMPETE AGREEMENT.

This Court has the power to review decisions certified by the district court to be in direct conflict with the decision of another district court. *See* Art. V, § 3(b)(4), Fla. Const. The Fourth and Fifth Districts have both certified that their decisions on this issue directly conflict with each other. *Mederi Caretenders Visiting Servs. of Se. Fla., LLC v. White*, 179 So. 3d 564 (Fla. 4th DCA 2015) (A:2); *Infinity Home Care, L.L.C. v. Amedisys Holdings, LLC*, 40 Fla. L. Weekly D2589, D2592 (Fla. 4th DCA Nov. 18, 2015); *Hiles v. Americare Home Therapy, Inc.*, 41 Fla. L. Weekly D67, D70 (Fla. 5th DCA Dec. 31, 2015).

This Court should exercise its discretion to review this issue and resolve the certified direct conflict. 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"). Section 542.335, Florida Statutes (2011), governs the enforceability of non-

compete agreements. Under this statute, "[a]ny restrictive covenant not supported by a legitimate business interest is **unlawful** and is **void and unenforceable**." § 542.335(1).

To be enforceable, a non-compete agreement must be reasonable in time, area, and line of business, and it must be justified by a "legitimate business interest." § 542.335(1), (1)(b). The types of "legitimate business interest" that may be protected by a non-compete agreement are restricted by the statute and include the following:

> 1. Trade secrets . . . .
>
> 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).

Almost Family claimed that it has a legitimate business interest in its patient referral sources (A:1). Section 542.335(1)(b) does not expressly protect patient referral sources.

In *Florida Hematology & Oncology v. Tummala*, 927 So. 2d 135, 138-39 (Fla. 5th DCA 2006), the Fifth District held that patient referral sources are not protectable under section 542.335(1). In that case, Dr. Tummala, a board certified hematologist and oncologist, was hired by an oncology group in Lake County, Florida. *Tummala*, 927 So. 2d 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 his employment and Dr. Tummala opened up his own office within the restricted area. *Id.*

In his new practice, Dr. Tummala did not solicit any of his former employer's patients and took "extraordinary measures" to avoid accidentally treating any of those patients. *Id.* at 137. Still, his former employer sued him for breach of his non-compete agreement, alleging that it suffered a significant drop in new patient referrals from area physicians. *Id.* at 137-38. The Fifth District held that patient referral sources are not a legitimate business interest under the express

language of the statute:

> What referring physicians supply is a stream of **unidentified prospective patients** with whom Appellants had no prior relationship. 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**. . . . We see no way to recognize referring physicians as a legitimate business interest and still give effect to the plain language of the statute.

Id. at 139 (footnote omitted). The Court acknowledged that medical specialists receive a large portion of their new patients through referrals from other physicians, but properly held that the plain language of section 542.335 controlled. *Id*. at 139.

The Fifth District recently applied *Tummala* in the context of whether a home health care agency could enforce a restrictive covenant to protect patient referral sources. *See Hiles*, 41 Fla. L. Weekly at D68-70. The *Hiles* decision held that "pursuant to *Tummala*, **unidentified prospective patients**, and correspondingly **referral physicians**, do not qualify as legitimate business interests for the purpose of enforcing restrictive covenants." *Id.* at D69. As in *Tummala*, the patient referral sources "merely act as a conduit to supply these unidentified prospective patients to the home health care agencies." *Id.* As a result, "the trial court erred in holding that the referral sources were a legitimate

business interest." *Id.*

In direct conflict with *Tummala* and *Hiles*, the Fourth District held in this case and in *Infinity* that that a home health care agency's patient referral sources are a legitimate business interest under section 542.335(1) (A:1-2). *See Infinity*, 40 Fla. L. Weekly at D2591-92. The Fourth District disagreed with *Tummala* that "the statute should be so narrowly construed as to exclude referral sources as a legitimate business interest." *Infinity*, 40 Fla. L. Weekly at D2591. The Fourth District reasoned that section 542.335(1) "does not expressly exclude referral relationships." *Infinity*, 40 Fla. L. Weekly at D2591. The Fourth District concluded that "referral sources appear to us to be a legitimate business interest as contemplated by section 542.335." *Infinity*, 40 Fla. L. Weekly at D2591.

This case, just like *Hiles* and *Infinity*, involves whether a home health agency can enforce a restrictive covenant to protect patient referral sources (A:1). *See Hiles*, 41 Fla. L. Weekly at D69-70; *Infinity*, 40 Fla. Weekly at D2591-92. The Fourth District relied upon its earlier decision in *Infinity* and held "that referral sources are protectable legitimate interests and that an employment contract containing non-compete and non-solicitation provisions was enforceable." (A:1).

Almost Family's goal in attempting to protect referral sources with a non-compete is to ensure a steady stream of **new, unidentified and unidentifiable patients**. Under the plain language of section 542.335(1), Almost Family cannot protect an interest in prospective patients, even if they come from a referral source. *See Hiles*, 41 Fla. L. Weekly at D69-70; *Tummala*, 927 So. 2d at 138-39. The fact that referral sources constitute a significant source of business for Almost Family is not controlling. As the *Hiles* and *Tummala* decisions explained, a relationship with an unidentified prospective patient "does not become a legitimate business interest simply by virtue of being referred by a physician." *Hiles,* 41 Fla. L. Weekly at D69 (quoting *Tummala,* 927 So. 2d at 139). Not all sources of business constitute legitimate business interests under the statute. Courts are bound to apply the plain language of the statute and controlling case law.

The Fourth District's decisions in this case and *Infinity* cannot be squared with the Fifth District's decisions in *Tummala* and *Hiles.* Both the Fourth District and the Fifth District have certified direct conflict on this issue of whether a home health agency can enforce a non-compete protecting patient referral sources. This Court should accept jurisdiction and resolve this conflict. Resolution of this issue will have a state-wide impact on non-compete agreements in all types of health care contexts. This Court should accept jurisdiction and quash the Fourth

District's decision in this case, disapprove the Fourth District's decision in *Infinity*, and approve the decisions of the Fifth District in *Hiles* and *Tummala*.

CONCLUSION

This Court should accept jurisdiction to review the direct certified conflict issue and quash the decision of the Fourth District in this case, disapprove the Fourth District's decision in *Infinity*, and approve the decisions of the Fifth District in *Hiles* and *Tummala*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished via e-mail this 8th day of February, 2016, 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.

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CERTIFICATE OF FONT

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

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