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 REPLY BRIEF ON THE MERITS

JANE KREUSLER-WALSH,
REBECCA MERCIER VARGAS and
STEPHANIE L. SERAFIN
LAW OFFICE OF KREUSLER-WALSH, COMPIANI & VARGAS, P.A.
501 South Flagler Drive, Suite 503
West Palm Beach, FL 33401-5913
(561) 659-5455

MARGARET COOPER
JONES, FOSTER, JOHNSTON & STUBBS, P.A.
505 South Flagler Drive, Suite 1100
West Palm Beach, FL 33401
(561) 659-3000

JOEL C. ZWEMER and
DARYL J. KRAUZA
DEAN, MEAD, MINTON & ZWEMER
1903 South 25th Street, Suite 200
Fort Pierce, FL 34947
(772) 464-7700

Counsel for Petitioner, Elizabeth White

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS, CONT'D

TABLE OF CITATIONS, CONT'D

Statutes & Other Authorities

TABLE OF CITATIONS, CONT'D

ARGUMENT ON APPEAL

POINT I

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

A. Almost Family's argument renders the statutory language meaningless; the legislative intent is to omit referral sources.

Almost Family argues that the list of protectable business interests the Legislature chose to include in section 542.335, Florida Statutes (2016), is open-ended and a "non-exhaustive list of examples only" (AB:17). Almost Family suggests an interest is protectable under section 542.335 simply because it is important to the employer. This argument renders the statutory language and inclusion of examples of protectable interests meaningless. Referral sources are not a protectable, legitimate business interest under section 542.335 because they are not comparable to the specific list of examples that the Legislature protected.

The Florida 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). The Legislature created a list of specific examples of protectable business interests. *Id.* The common thread for all of these interests is that they are proprietary in nature and were the types of interests that had been recognized as protectable at common law. *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). Referral sources and industries relying on referral sources were common in 1996 when section 542.335 was adopted. Yet, the Legislature chose to exclude referral sources from the exemplar list. And, before adoption of the statute, referral sources were not recognized by Florida courts as a protectable business asset.

It is telling that the Legislature has not amended section 542.335 in the 10 years since the Fifth District decided *Florida Hematology & Oncology v. Tummala*, 927 So. 2d 135 (Fla. 5th DCA 2006). This is a significant factor in determining legislative intent. *See, e.g., State v. Cable*, 51 So. 3d 434, 443 (Fla. 2010); *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).

All of the proprietary interests listed in the statute represent "an investment by the proponent of the restriction such that, if the asset were misappropriated by a competitor . . . its use in competition against its former owner would be 'unfair competition,'" not merely an ordinary competitive advantage. 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 54; *see also Hapney*, 579 So. 2d at 130. Preventing ordinary competition may be important to an employer, but it is not a legitimate business interest. *See Colucci v.*

Kar Kare Auto. Grp., Inc., 918 So. 2d 431, 440 (Fla. 4th DCA 2006); *Hapney*, 579 So. 2d at 130. The Legislature made clear through the list of examples that a business interest must be **a proprietary, asset-like** interest to be protectable under the statute, not just an important interest.

The language "including but not limited to" in section 542.335 is not completely open-ended, contrary to Almost Family's argument. While that language suggests that the list is not exhaustive, rules of statutory construction require that any non-listed interest must be comparable or similar to the interests in the specific list the Legislature chose to include. *See, e.g., Lally v. Flieder*, 986 A.2d 652, 654 (N.H. 2009) (explaining that where a legislature uses the phrase "including, but not limited to," the application of the statute is limited to items **comparable** to those listed by the Legislature); *In re Carr*, 938 A.2d 89, 96 (N.H. 2007) (where child support statute used words "including, but not limited to" and listed examples that were all financial in nature, court held that phrase "and other special circumstances" must involve similar economic factors); *see also* 73 Am Jur. 2d *Statutes* § 126 (explaining that the doctrine of *ejusdem generis* means that "the general term or category is restricted to those things that are similar to those which are enumerated specifically"). Florida adheres to this principle of statutory construction. *See State v. Weeks*, 41 Fla. L. Weekly S399, S402 (Fla. 2016); *see also State ex rel. Wedgworth Farms, Inc. v. Thompson*, 101 So. 2d 381, 385 (Fla.

1958) (explaining the maxim of *noscitur a sociis* "means that general and specific words capable of analogous meaning when associated together take color from each other so that the general words are restricted to a sense analogous to the less general").

Almost Family's open-ended interpretation would improperly render the Legislature's inclusion of an exemplar list of protectable interests meaningless. *See Am. Home Assurance Co. v. Plaza Materials Corp.*, 908 So. 2d 360, 367-68 (Fla. 2005) (explaining that is a "fundamental rule of statutory interpretation" that courts should "avoid readings that would render part of a statute meaningless") (internal quotation omitted).

Referral sources are not similar to the protectable interests listed in section 542.335 because they are not proprietary in nature, i.e., an asset acquired by investment, and their use in competition does not lead to an unfair advantage. They are gratuitous and non-exclusive, particularly in the highly regulated home health care industry. The home health industry is subject to strict regulations that govern the type of relationships that can be formed between physicians and agencies. Almost Family acknowledges these regulations but fails to acknowledge their significance with determining whether referral sources are protectable under section 542.335.

Home health agencies can spend only nominal sums on referral sources and

cannot form exclusive relationships with them. *See* 42 U.S.C. § 1395nn(a) (2012); 42 C.F.R. §§ 411.353, 411.354, 411.357(k) (2015); §§ 400.518, 456.053, Fla. Stat. (2016). Physicians who refer to home health agencies must do so based on the patient's best interest. *See* 42 U.S.C. § 1395a (Supp. III 2015); § 400.487(4), Fla. Stat. (2016). Thus, home health agencies cannot expend significant capital on referral sources as a matter of law. These physicians and their patients have access to abundant information about home health agencies from sources available to the public (R:171-72/E:179-80; R:572-73/E:582-83; T:14-15/E:749-50). And, if there is any confidential information at issue, section 542.335 allows the employer to protect that information with a confidentiality agreement, without restricting referral sources. Referral sources are not an asset which is proprietary to any singular health care company.

Almost Family argues that it made an investment by paying marketers to call on referral sources. To the contrary, this is nothing more than paying marketers to do their job, which is to call on referral sources, advertise services, and assist patients and their families in the transfer to home health. Paying marketers to do their job is akin to investing in ordinary job training, which is not a protectable business interest. *See Hapney*, 579 So. 2d at 132. Only extraordinary or specialized training is protectable. *See* § 542.335(1)(b)5.; *Hapney*, 579 So. 2d at 132.

The Fifth District understood these concepts of statutory construction and the nature of referral source relationship when it interpreted section 542.335 in *Florida Hematology & Oncology v. Tummala*, 927 So. 2d 135 (Fla. 5th DCA 2006), and *Hiles v. Americare Home Therapy, Inc.*, 183 So. 3d 449 (Fla. 5th DCA 2015) (pending review in case number SC16-400). The Legislature directed that protectable relationships with customers, patients or clients must be both "substantial" and "specific." § 542.335(1)(b)3. *See Hiles*, 183 So. 3d at 454; *Tummala*, 927 So. 2d at 139; *see also Univ. of Fla., Bd. of Trs. v. Sanal*, 837 So. 2d 512, 516 (Fla. 1st DCA 2003). Relationships with unidentified, prospective customers, patients or clients are, thus, expressly excluded from the statute. *See Hiles*, 183 So. 3d at 454; *Tummala*, 927 So. 2d at 139; *see also Sanal*, 837 So. 2d at 516. So, too, are referral sources.

The Fifth District properly looked to the statutory analysis in *Sanal*. The *Sanal* decision is important because the First District acknowledged the statutory directive in section 542.335 that relationships with unidentified, prospective patients are not a legitimate business interest. *Sanal*, 837 So. 2d at 516. *Tummala* was right to acknowledge that the statutory analysis in *Sanal* naturally extends to the analysis of whether the legislature intended for referral sources to be a protectable business interest. *See Tummala*, 927 So. 2d at 139.

Referral sources are not customers, patients or clients of home health

agencies. Instead, referral sources provide home health agencies with the mere possibility of establishing relationships with **unidentified, prospective patients**. The Legislature expressly excluded speculative relationships with unidentified patients from section 542.335 because they are not proprietary in nature. *See Grant & Steele, supra,* at 54. To protect those relationships indirectly, through referral sources, a court would have to "circumvent the clear statutory directive." *Tummala*, 927 So. 2d at 139. Moreover, insulating referral sources from competition runs afoul of other statutes and regulations where the Legislature clearly protects and promotes patient choice and prohibits monetary investments with referral sources.

The Fourth District misapplied section 542.335 in *Infinity Home Care, L.L.C. v. Amedisys Holding, LLC*, 180 So. 3d 1060 (Fla. 4th DCA 2015), and in this case. The Fourth District mistakenly viewed section 542.335 as completely open-ended as to the types of business interests that might justify a non-compete agreement. The Fourth District should have looked at types of interests listed in the statute and examined whether referral sources are a proprietary interest, like those listed as examples. They are not, as the Fifth District recognized when it performed this analysis in *Tummala* and *Hiles*.

The Fourth District's decision and analysis are reminiscent of the contract-oriented approach to restrictive covenants that the Legislature rejected by enacting

section 542.335. *See* Grant & Steele, *supra*, at 54. This approach is contrary to the purpose of section 542.335, which is far broader than simply enforcing a contract. The purpose of the statute is to protect legitimate, propriety business interests or assets of the employer without harming the public interest and without inflicting an unduly harsh or oppressive result on the employee. *Capelouto v. Orkin Exterminating Co. of Fla.*, 183 So. 2d 532, 534 (Fla. 1966) (discussing the purpose of section 542.12, Florida Statutes, the predecessor to section 542.335); *see also Sanal*, 837 So. 2d at 516.

Enforcing non-compete agreements in the home health industry will be particularly harmful and oppressive because the employees who are subject to these agreements are typically entry-level employees who lack the ability to easily transfer to another geographical area or another career. The approach the Fifth District used in *Tummala* and *Hiles* is the more accurate and well-reasoned approach to this issue of statutory construction.

The Fourth District also wrongly concluded that the home health care agency was trying to protect its relationship with referral sources, not its relationship with unidentified prospective patients. *Infinity Home Care, L.L.C.*, 180 So. 3d at 1065-66. At the end of the day, it is the patients to whom the agency provides services and it is the patients who pay for those services (usually through Medicare) (R:44-45/E:51-52; R:176/E:185; R:179/E:187; R234-35/E:242-43). *See*

Hiles, 183 So. 3d at 454. The Legislature expressly excluded these unidentified prospective patients from section 542.335. And *Tummala* properly rejected the argument that an employer can get around the plain language of the statute by restricting solicitation of referral sources. 927 So. 2d at 139.

The out-of-state cases Almost Family cites are not instructive. First, Almost Family fails to note that even a case it cites recognizes that there is a split in opinion among the states on whether referral sources are a protectable business interest. *Idbeis v. Wichita Surgical Specialists, P.A.*, 112 P.3d 81, 89 (Kan. 2005). Second, the issue here is interpretation of Florida's non-compete statute and the intent of Florida's Legislature when it enacted that statute.

Almost Family's statutory interpretation argument is contrary to the plain language of section 542.335, principles of statutory interpretation, and legislative intent. The Fifth District properly interpreted the statute and held that referral sources are not a legitimate business interest.

B. Referral sources in the home health care industry are not a proprietary, legitimate business interest simply because they are important.

Almost Family urges this Court to approve the decisions of the Fourth District because referral sources are an important aspect of a home health agency's business model. The Fifth District did not miss the importance of referral sources in *Tummala*, contrary to Almost Family's argument (AB:25). The Fifth District noted the significance of referral relationships, but understood that the court's role

was to interpret what the Legislature intended in section 542.335, not for the court to legislate. *See Tummala*, 927 So. 2d at 138-39; *see also Borden v. East-European Ins. Co.*, 921 So. 2d 587, 595 (Fla. 2006) (stating that a court's role is not to legislate, but to determine legislative intent and give effect to that intent). Although the appellants in *Tummala* had made a "compelling argument that the law should recognize" referral sources as a legitimate business interest, the "express language of the statute" prohibited the court from doing so. 927 So. 2d at 138.

An interest is not a legitimate business interest simply because it is important to the employer, or else any business interest would be protectable. For example, stability of staff is an important interest, but this cannot justify a non-compete agreement designed to keep staff from moving to a better paying job. The interest must be of the same nature as the legitimate business interests that the Legislature included as examples in section 542.335. The interest certainly cannot be directly at odds with one of the Legislature's statutory examples, as referral sources are. *Tummala* got this analysis right.

Almost Family attempts to distinguish physician-to-physician referral sources from referral sources in the home health care industry, arguing that even if *Tummala* is correct, referral sources in the home health industry deserve protection (AB:29-34). This attempted distinction falls flat. Referral sources are just as

important to physician specialists as they are to home health care agencies, and referrals from primary care physicians can be required in some circumstances. Yet, for both physician specialists and home health care agencies, referral sources provide only a speculative hope of future business from unidentified patients. This is not a protectable interest under section 542.335.

Almost Family relies on several decisions from Florida and federal courts that do not specifically address the issue here. None of these cases should sway this Court's decision. In *Smart Pharmacy, Inc. v. Viccari*, 41 Fla. L. Weekly D1274 (Fla. 1st DCA May 31, 2016), the First District made clear that the employee did not challenge the employer's claim of a legitimate business interest. The decision shows only that the court followed the principle of addressing only issues raised by the parties.

Similarly, *Southernmost Foot & Ankle Specialists, P.A. v. Torregrosa*, 891 So. 2d 591 (Fla. 3d DCA 2004), contains no analysis of the issue of legitimate business interests and no indication that the employee raised that issue. Neither the *Southernmost* nor the *Smart Pharmacy* decision is authority on the issue of whether referral sources are a legitimate business interest. *See, e.g., State v. Du Bose*, 128 So. 4, 6 (Fla. 1930).

Electrostim Medical Services, Inc. v. Lindsey, No. 8:11-cv-2467-T-33TBM, 2012 WL 1405707 (M.D. Fla. Mar. 13, 2012) (unpublished), a trial court order, is

distinguishable on the facts. It involved a medical products company that sued a former sales representative for breach of the non-compete agreement. *Id.* at *1-3. The court found that the physician "referral sources" actually engaged in a "consignment relationship" with the medical products company. *Id.* at *7. The physicians stocked the medical supplies in their facilities and used them on their patients. *Id.* In addition, the physician, not the patient, chose the type of medical device to prescribe. *Id.* The court observed that this was more than a mere referral relationship and, therefore, could constitute a legitimate business interest. *Id.* This is a very different relationship than that between physicians and home health care agencies, especially considering the many restrictions on the type of relationship home health agencies can have with their referring physicians. *Electrostim* is, therefore, not instructive.

In *Open Magnetic Imaging, Inc. v. Nieves-Garcia*, 826 So. 2d 415, 419 (Fla. 3d DCA 2002), the legitimate business interest at issue was confidential information, not referral sources. Confidential information is a separately protected business interest under section 542.335. Here, it was undisputed that White did not take any confidential information with her when she left Almost Family (R:651-53/E:661-63).

Finally, *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012), involves a completely different issue – interpretation of the federal Fair Labor

Standards Act. The Court's analysis of the FLSA has no bearing, even by analogy, on the issue here.

If there is a distinction between physician specialists and home health care agencies, it is the vast regulation of home health care agencies on the state and federal level. This prevents home health referral sources from becoming a proprietary interest. It is White's position that section 542.335 excludes all referral sources from protection. However, if this Court is inclined, it could limit this exclusion to referral sources in the home health care industry.

POINT II

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

Almost Family concedes that if this Court approves the decision of the Fourth District, this case must be remanded to the trial court for further proceedings. White does not agree that Almost Family will win on remand. The "facts" Almost Family presents in its Answer Brief are highly disputed. And, the trial court always has the authority to narrow the scope of the restrictive covenant based on the facts and circumstances of the case. *See* § 542.335(1)(c), Fla. Stat.; *see also Austin v. Mid State Fire Equip. of Cent. Fla., Inc.*, 727 So. 2d 1097, 1098 (Fla. 5th DCA 1999).

Thus, even if this Court were to approve the decision of the Fourth District,

it should remand to the trial court for further proceedings, where Almost Family must prove that its relationships with specific referral sources were substantial enough to warrant protection, in addition to proving the other elements of its claim. White would also have the opportunity to try to narrow the scope from a general non-compete to a non-solicitation of specific referral sources.

POINT III

WHITE IS ENTITLED TO ATTORNEY'S FEES UNDER SECTION 542.335.

Almost Family has abandoned its argument that Kentucky law applies to this case. The Fourth District applied Florida law to reach its decision on the merits, rejecting Almost Family's choice-of-law argument. Almost Family does not challenge the Fourth District's use of Florida law. It cannot selectively argue that the choice-of-law provision applies to attorney's fees, but not on the merits.

Even if choice-of-law were an issue, Florida law applies. Where application of another state's law violates strong Florida public policy, then courts must apply Florida law. *Mazzoni Farms, Inc. v. E.I. DuPont De Nemours & Co.*, 761 So. 2d 306, 311 (Fla. 2000). Florida has a strong public policy of awarding prevailing party attorney's fees in cases governed by section 542.335, Florida Statutes, even absent a contractual right to fees. *See* § 542.335(1)(k). The Legislature made this policy clear by stating: "A court shall not enforce any contractual provision limiting the court's authority under this section." § 542.335(1)(k). Kentucky law

does not give courts this discretion to award fees in the absence of a contract. *See Reynolds v. Sonitrol of Lexington, Inc.*, No. 2009-CA-000106-MR, 2010 WL 1508100, at *4 (Ky. Ct. App. Apr. 16, 2010). Here, Almost Family's non-compete agreement contains a one-way fee provision in favor of Almost Family. This violates strong Florida public policy.

Almost Family's focus on the discretion afforded to trial courts under section 542.335(1)(k) misses the point. That discretion does not diminish the strong Florida public policy supporting the availability of prevailing party fees in non-compete cases. While courts have discretion to award fees, they have no authority to enforce a contractual provision that would entirely eliminate their discretion, such as the choice-of-law provision here. If White prevails in this appeal, this Court should reinstate the trial court's order awarding White prevailing party attorney's fees.

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*.

JANE KREUSLER-WALSH,
REBECCA MERCIER VARGAS and
STEPHANIE L. SERAFIN of
LAW OFFICE OF KREUSLER-WALSH,
COMPIANI & VARGAS, P.A.
501 South Flagler Drive, Suite 503
West Palm Beach, FL 33401-5913
(561) 659-5455
Primary: janewalsh@kwcvpa.com
rvargas@kwcvpa.com
sserafin@kwcvpa.com
Secondary: eservice@kwcvpa.com
and
MARGARET COOPER
JONES, FOSTER, JOHNSTON & STUBBS, P.A.
505 South Flagler Drive, Suite 1100
West Palm Beach, FL 33401
(561) 659-3000
mcooper@jonesfoster.com
aferrara@jonesfoster.com
and
JOEL C. ZWEMER and
DARYL J. KRAUZA
DEAN, MEAD, MINTON & ZWEMER
1903 South 25th Street, Suite 200
Fort Pierce, FL 34947
(772) 464-7700
Primary: jzwemer@deanmead.com
dkrauza@deanmead.com
Secondary: dmercer@deanmead.com
Counsel for Petitioner, Elizabeth White

By: /s/ *Stephanie L. Serafin*
STEPHANIE L. SERAFIN
Florida Bar No. 58390

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22nd day of November, 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.

By: /s/ *Stephanie L. Serafin*
STEPHANIE L. SERAFIN
Florida Bar No. 58390

CERTIFICATE OF FONT

Petitioner's Reply brief has been typed using the 14-point Times New Roman font.

By: /s/ *Stephanie L. Serafin*
STEPHANIE L. SERAFIN
Florida Bar No. 58390