IN THE SUPREME COURT OF FLORIDA

FLORIDA HEMATOLOGY & ONCOLOGY SPECIALISTS, P.A., a Florida professional association, LAKE COUNTY ONCOLOGY & HEMATOLOGY, P.A., a Florida professional association and ROY M. AMBINDER, M.D.,

Petitioners,

v. Case No. SC06-993

RAMBABU TUMMALA, M.D.,

Respondent.
_____/

RESPONDENT'S BRIEF ON JURISDICTION

On Review from the District Court of Appeal,
Fifth District
State of Florida

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TABLE OF CONTENTS

TABLE OF CITATIONS

Florida Supreme Court

Florida District Courts of Appeal

United States Constitution

Statutes

Rules

INTRODUCTION

The Petitioners, ROY M. AMBINDER, M.D., FLORIDA HEMATOLOGY & ONCOLOGY SPECIALISTS, P.A., and LAKE COUNTY ONCOLOGY & HEMATOLOGY, P.A. will be collectively referred to as the "Petitioners." The Respondent, RAMBABU TUMMALA, M.D., will be referred to as "Tummala."

Citations to the Petitioners' Brief in Support of Notice to Invoke Discretionary Jurisdiction shall be referred to as (Petitioners' Brief, at ____) with the appropriate page number inserted. References to the Fifth District Court of Appeal's Opinion in FLORIDA HEMATOLOGY & ONCOLOGY SPECIALISTS, P.A., ET. AL. v. RAMBABU TUMMULA, M.D., ET. AL. filed April 21, 2006, shall be referred to as "the Opinion, at ____", with the appropriate page number inserted.

SUPPLEMENTAL STATEMENT OF CASE AND FACTS

Tummala relies on and incorporates the facts set forth in the Opinion at page 1 through 3. A brief seeking discretionary review must be "limited solely to the issue of the supreme court's jurisdiction," and must be "accompanied by an appendix containing only a conformed copy of the decision of the district court." Fla. R. App. 9.120(d). The Petitioners' jurisdictional brief violates these limitations by referencing the record proper, and without even providing record citations in support. In this brief, Tummala will address only those matters appearing within the four corners of the Fifth District's published Opinion — not the parties' merits briefs in the District Court, and not the purported "undisputed" facts the Petitioners assert.

Three points set forth in the Petitioners' Statement of the Case and Facts require clarification. First, the Petitioners suggest that Tummala became "dissatisfied" with the practice, and tried to convince another partner to leave with him. Petitioners' Brief, at 2. However, the Opinion establishes that Tummala was concerned with some of the Petitioners' billing practices, voiced those concerns, and they were not resolved to his satisfaction. Subsequently, the Petitioners terminated Tummala without cause. Opinion, at 2.

Secondly, the Petitioners suggest that they presented "uncontroverted evidence" that business from certain referral sources declined after Tummala's departure. Petitioners' Brief, at 3. The Opinion notes that all of the referring physicians who testified at the hearing indicated that they make the referrals not to a practice, but to an individual doctor. Opinion, at 6. The court went on to note:

> Accordingly, they previously sent patients to Appellants' office only because that is where Dr. Tummala practiced. Now that he is gone, they testified that they would not longer refer their patients to the Appellant's office *even if Dr. Tummala no longer practiced anywhere in Central Florida.*

Opinion, at 6 (emphasis in original). The Opinion also noted:

> Interestingly, despite the alleged dramatic decrease in new business, the quarterly bonus received by each doctor employed by the corporate Appellants increased from $324,000 during the last quarter of Tummala's employment to $1,082,000 per physician in the quarter immediately after Tummala's departure.

Opinion, at 3, n.2.

Finally, the Petitioners state that the Fifth District Court of Appeal "recognized that its Opinion conflicted with the Third District Court of Appeal's holding on the same issue. See Footnote 4 of the Opinion at page 6." Petitioners' Brief, at 3. However, the Fifth District stated that the Opinion as well as

the First District's Opinion in University of Florida Board of Trustees v. Sanal, 837 So. 2d 512 (Fla. 1st DCA 2003) "appear" to conflict with Southernmost Foot and Ankle Specialists, P.A. v. Torregrosa, 891 So. 2d 591 (Fla. 3d DCA 2004). Thus, the Opinion did not specifically find conflict, but rather noted the appearance of a conflict. Further, the Fifth District Court of Appeal did not certify the alleged conflict, nor did the Petitioners seek such certification.

SUMMARY OF THE ARGUMENT

This Court has discretionary jurisdiction to review District Court of Appeal decisions that expressly and directly conflict with the decisions of another District Court of Appeal. In this case, the Petitioners claim that the Opinion below conflicts with three other District Court of Appeal decisions. However, the alleged conflicts are not express and direct, and therefore this Court lacks jurisdiction.

Even if this Court finds that is has jurisdiction, it should nevertheless decline to exercise such jurisdiction. in this matter. The Opinion in this case, as well as the First District Court of Appeal's Opinion in University of Florida Board of Trustees v. Sanal, 837 So. 2d 512 (Fla. 1st DCA 2003) recognized that the relevant statute requires that prospective

patients be "specific." Because the referring physicians cannot specifically identify patients that they might refer in the future, the relationships with the referring doctors does not constitute a legitimate business interest under the statute. The clear holdings of the Opinion in this matter as well as Sanal do not require additional clarification to distinguish them from the dicta cited by the Petitioners.

ARGUMENT

I. THIS COURT LACKS JURISDICTION BECAUSE NO EXPRESS AND DIRECT CONFLICT EXISTS.

The Florida Supreme Court has discretionary jurisdiction to review district court of appeal decisions that "expressly and directly conflict[] with the decision of another district court of appeal or the supreme court on the same question of law." Art. V, § 3(b)(3), Fla. Const. (1980); see also Fla. R. App. P. 9.030(a)(2)(iv)(emphasis added). The words "express and direct" must be given meaning, and it is not enough to suggest that a potential conflict exists. To be "express", the conflict must be present "in an express manner." Jenkins v. State, 385 So. 2d 1356, 1359 (Fla. 1980). As Judge Padavano states, "it is not enough to show that the district court decision is effectively in conflict with other appellate decisions. By definition, the term 'expressly' requires some written representation or

expression of the legal ground supporting the decision under review." Philip J. Padavano, Florida Appellate Practice, § 3.10 (2006 ed.)(citing Jenkins v. State, 385 So. 2d 1356 (Fla. 1980); Times Publishing Co. v. Russell, 615 So. 2d 158 (Fla.), cert. denied, 510 U.S. 943, (U.S. 1993)).

The Petitioners cite three opinions which they contend are in express and direct conflict with the Fifth District Court of Appeal's decision in this case. However, a review of those cases demonstrates that no express and direct conflict exists, and therefore this Court lacks jurisdiction.

The first case the Petitioners rely upon is Southernmost Foot and Ankle Specialists, P.A. v. Torregrosa, 891 So. 2d 591 (Fla. 3d DCA 2004), rev. dismissed, 901 So. 2d 121 (Fla. 2005). The claimed conflict with Southernmost consists of two words. The Southernmost court found that the physician group seeking to enforce a restrictive covenant had established five separate legitimate business interests, including "referral doctors." Id. at 594. The opinion does not explain why it found this to be so, and indeed there is no analysis whatsoever concerning this purported legitimate business interest. Id. It is clear that if those two words, "referral doctors," were absent from the opinion, then no potential basis for conflict would exist. The inclusion of those two words, without any other explanation

whatsoever, cannot be said to create a conflict "in an express manner" as Jenkins requires.

The Fifth District's opinion in this matter did include a brief reference in a footnote to Southernmost where the court recognized that the opinion, as well as the opinion of the First District in University of Florida Board of Trustees v. Sanal, 837 So. 2d 512 (Fla. 1st DCA 2003) "appear" to conflict with Southernmost. Opinion, at 6, n.4. However, it would also appear that the Fifth District did not believe the conflict rose to the level of being express and direct because the court did not certify conflict. Further, the Petitioners did not request the Fifth District to certify conflict with Southernmost. While the opinion might arguably "appear" to conflict, it by no means rises to the level of an express and direct conflict necessary for this Court's jurisdiction to vest.

Next, the Petitioners cite Open Magnetic Imaging, Inc. v. Nieves-Garcia, 826 So. 2d 415 (Fla. 3d DCA 2002).[1] In Nieves-Garcia, a marketing director (not a physician) for a group of magnetic resonance imagining (MRI) centers left the business to work for a competitor. However, at the prior job, the employee was

[1]Nieves-Garcia was not mentioned by the Fifth District Court of Appeal in this case.

> expected to compile a database on these physicians which contained the nature and idiosyncrasies of their practices, as well as information as to their referral patterns and preferences and which insurance they accepted. There was evidence that OMI had created this database system as part of its confidential strategic marketing plan.

Id. at 419 (emphasis added). While the Petitioners cite this language in their jurisdictional brief as creating a basis for jurisdiction, they neglect to provide the citations which immediately follow this quote. The Third District cited four cases,[2] all of which concerned a purported legitimate business interest in customer lists which were claimed to be trade secrets. See Id. at 419. Thus, it is clear that the database materials created by the marketing representative in Nieves-Garcia were found by the Third District to be trade secrets that rose to the level of legitimate business interests. In the present case, the Petitioners did not plead any legitimate business interest concerning trade secrets, and therefore Nieves-Garcia does not expressly and directly conflict with the opinion in this matter.

Finally, the Petitioners claim that the opinion conflicts with University of Florida Board of Trustees v. Sanal, 837 So.

[2]East v. Aqua Gaming, Inc., 805 So. 2d 932 (Fla. 2d DCA 2001); Sethscot Collection, Inc., v. Drbul, 669 So. 2d 1076 (Fla. 3d DCA 1996); Unistar Corp. v. Child, 415 So. 2d 733 (Fla. 3d DCA 1982); Erik Elec. Co., Inc. v. Elliott, 375 So. 2d 1136 (Fla. 3d DCA 1979).

2d 512 (Fla. 1st DCA 2003), a case extensively cited by the Fifth District as support for its decision. Once again, a review of the Petitioners' argument concerning this case reveals that in no way could any possible conflict be "express and direct." The Sanal opinion does not mention referring physicians, and therefore there can be no express or direct conflict. Despite this, the Petitioners argue it is "obvious" that "if the Sanal court had believed that referral sources did not qualify for protection under Florida Statute 542.335, then there would have been no reason to address the lack of evidence of such referrals in this decision." Petitioners' Brief, at 8 (emphasis in original). The Petitioners are therefore asking this Court not to examine the language found in Sanal, but rather to divine the First District Court of Appeal's intention and infer why it chose to write the opinion in the manner that it did. This is not express and direct conflict, and therefore jurisdiction is lacking.

II. THIS COURT SHOULD DECLINE TO EXERCISE JURISDICTION BECAUSE THE CONTROLLING STATUTE IS CLEAR.

Even if this Court believes it may exercise jurisdiction, it should decline to do so. The lengthy and well-reasoned opinions in Sanal and this case reach the same conclusion concerning the specific issue involved: Florida Statutes

section 542.335(1)(b)(3) requires that a legitimate business interest may only arise concerning "specific prospective patients." Sanal, 837 So. 2d 515-16. As the Fifth District stated in this case, relying on Sanal, "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." Opinion, at 5. Quite simply, as the Fifth District stated:

> 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.

Opinion, at 5.

The detailed opinion in Sanal and this case rely on the clear language of the statute, and are in agreement. The language of section 542.335(1)(b)(3) cannot be ignored by inserting a "middleman" into the equation, that being the doctors who might, possibly, refer certain unknown patients in the future. Should the Legislature see this issue differently, it is its prerogative to modify the statute. See Dutch v. Palm Beach Bridge Dist., 84 Fla. 504, 94 So. 155 (Fla. 1922)(it is

not the function of the courts to encroach on the legislature by addition to, subtracting from, or amplifying unambiguous statute). The statute needs no further clarification beyond that which appears in Sanal and this case. The dicta which appears in the cases cited by the Petitioners in no way require clarification in light of the clear reasoning found in Sanal and this case.

CONCLUSION

WHEREFORE, for all the foregoing reasons, this Court should find that it lacks jurisdiction because there is not an express and direct conflict; alternatively, this Court should decline to exercise jurisdiction because the controlling statute is clear.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been sent via ? U.S. regular Mail and/or ? facsimile to: **H. Gregory McNeill, Esquire**, Lowndes, Drosdick, Doster, Kantor & Reed, P.A., Post Office Box 2809, Orlando, Florida 32801 (Appellate Counsel for Petitioners); via U.S. regular mail this ____ day of June, 2006.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief conforms to the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2) in that it was computer generated utilizing Courier Regular 12 point type.

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