

IN THE FLORIDA SUPREME COURT

**FLORIDA HEMATOLOGY & ONCOLOGY,
SPECIALISTS, P.A., etc., et al.,**

Petitioners,

vs.

RAMBABU TUMMALA, M.D., et al.,

Respondent.

CASE NO: _____
Fifth District Court of Appeal
Case No. 5D05-1950
L.T. Case No.: 04 CA 2843

**PETITIONERS FLORIDA HEMATOLOGY & ONCOLOGY,
SPECIALISTS, P.A. AND LAKE COUNTY ONCOLOGY &
HEMATOLOGY, P.A.'S BRIEF IN SUPPORT OF NOTICE TO INVOKE
DISCRETIONARY JURISDICTION**

H. GREGORY MCNEILL, ESQUIRE

Florida Bar No. 0511080
Lowndes, Drosdick, Doster, Kantor
& Reed, P.A.
215 North Eola Drive
Post Office Box 2809
Orlando, Florida 32802

and

THOMAS M. ERVIN, JR., ESQUIRE

Florida Bar No. 0107788
Ervin, Kitchen, Chapman & Ervin
223 South Gadsden Street
Tallahassee, Florida 32302

Attorneys for Petitioners

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CITATIONS.....	iii
STATEMENT OF CASE AND OF THE FACTS	1
SUMMARY OF ARGUMENT	4
ARGUMENT	4
I. The opinion of the Fifth District Court of Appeal expressly and directly conflicts with decisions of the First and Third District Courts of Appeal on the issue of whether a medical practice’s relationships with the physicians who refer patients to the medical practice are “legitimate business interests” under F.S. §542.335(1)(b) for purposes of justifying a restrictive covenant with its physician employee.	4-10
CONCLUSION.....	10
CERTIFICATE OF SERVICE.....	iv
CERTIFICATE OF COMPLIANCE	iv
APPENDIX	

TABLE OF CITATIONS

	<u>Page</u>
<u>Open Magnetic Imaging, Inc. v. Nieves-Garcia</u> , 826 So.2d 415 (Fla. 3d DCA 2002)	4
<u>Southernmost Foot and Ankle Specialists, P.A. v. Torregrosa</u> , 891 So.2d 591 (Fla. 3d DCA 2004)	4
<u>University of Florida Board of Trustees v. Sanal</u> , 837 So.2d 512 (Fla. 1 st DCA 2003).....	3
 <u>Statutes</u>	
Florida Statute 542.335(1)(b)	4

STATEMENT OF CASE AND OF THE FACTS

Rambabu Tummala, an oncologist, was hired in 1996 by Florida Hematology & Oncology Specialists, P.A. and Lake County Oncology & Hematology, P.A. (collectively the “Practice”). Tummala’s Employment Agreement with the Practice contained a Restrictive Covenant as follows:

14. Covenant Not to Compete: Employee shall not, during the Employee’s employment with the Corporation and for an additional period of two (2) years from and after the termination of Employee’s employment with Corporation for any reasons engage, directly or indirectly, in the practice of medicine within an area comprised of a fifteen (15) mile radius [of] any office of the Corporation. The parties further acknowledge that the above restrictions with respect to duration and geographic limitations are reasonable, and that the Corporation would suffer irreparable injury as a result of the breach thereof by the Employee . . .

Tummala was assigned to the Practice’s Leesburg, Florida office. Because Tummala had never lived nor worked in Lake County, Florida, and had no personal or business related connections to the Lake County medical community, Tummala’s Employment Agreement required Tummala to develop and maintain the referral relationships the Practice enjoyed with physicians in the area:

5(e). In order to promote the practice of the Corporation and to enhance his professional standing in the community as an employee thereof, the Employee shall be expected to entertain referring and potentially referring physicians. Such practice-related entertainment is hereby required specifically as a condition of employment. The Corporation will reimburse Employee, upon the furnishing of proper receipts, for such reasonable expenses connected therewith, as it may determine. (emphasis added)

Over the next eight (8) years, Tummala worked for the Practice and received referrals of oncology patients from no fewer than 18 referral physicians.¹

In late 2003 and early 2004, Tummala became dissatisfied with the administration of the Practice. When he was unable to convince another partner to leave with him, he announced that he planned to resign. The Practice thereafter terminated Tummala in accordance with his Employment Agreement.

Upon termination, Tummala almost immediately opened a competing oncology practice in Leesburg, Florida well within the 15 mile proscribed radius. The underlying litigation immediately ensued.

The trial court conducted an evidentiary hearing upon the Practice's Motion for Temporary Injunction enforcing Tummala's Restrictive Covenant. The Practice presented evidence of Tummala's violation of the Restrictive Covenant and of at least 3 "legitimate business interests" justifying the Restrictive Covenant:

1. Relationships with existing patients;
2. Its exclusive oncology practice agreement with Florida Hospital Waterman; and
3. Its referral relationships with area physicians.²

¹ It was undisputed at the hearing for temporary injunction that an oncology practice, like most specialty practices, depends primarily upon referrals from other doctors for its patients. In its opinion, the Fifth District Court of Appeal described these referral relationships as "perhaps [the Practice's] most crucial business interests." See Opinion at page 5.

² The conflict addressed by this Brief relates only to Petitioners' legitimate business interests in referral relationships.

After setting up his competing practice, Tummala admitted that he had continued to seek and accept referrals from the same physicians with whom he had developed relationships during his eight (8) years with the Practice. The Practice presented uncontradicted evidence to the trial court that referrals to the Practice from these same referral sources declined between 50% and 60% since Tummala began competing with the Practice within the prohibited 15 mile geographic radius.

Nevertheless, the trial court relied upon the First District Court of Appeals' holding in University of Florida Board of Trustees vs. Sanal, 837 So.2d 512 (Fla. 1st DCA 2003) to refuse to enter injunctive relief protecting the Practice's referral relationships with area physicians; the injunction entered by the trial court only prohibited Tummala from rendering medical services to existing patients of the Practice but did not otherwise enjoin him from competing within the fifteen (15) mile radius.

The Practice took an appeal of the trial court's order primarily on the grounds that it had failed to enter injunctive relief to protect the Practice's legitimate business interest in its referral relationships with area physicians.

In its Opinion filed April 21, 2006, the Fifth District affirmed the trial court. In affirming the trial court's denial of injunctive relief to protect the referral relationships with area physicians, the court 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.

The Practice hereby files this Brief in support of the Notice to Invoke this Court's Discretionary Jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv).

SUMMARY OF ARGUMENT

The Fifth District Court of Appeal's decision, which refuses to recognize a medical practice's established referral relationships with referral physicians as a legitimate business interest justifying protection by restrictive covenant pursuant to Florida Statute 542.335(1)(b), directly and expressly conflicts with the decisions of the Third District Court of Appeal in Southernmost Foot and Ankle Specialists, P.A. v. Torregrosa, 891 So.2d 591 (Fla. 3d DCA 2004) and in Open Magnetic Imaging, Inc. v. Nieves-Garcia, 826 So.2d 415 (Fla. 3d DCA 2002); and directly and expressly conflicts with the decision of First District Court of Appeal in Sanal, supra.

ARGUMENT

In refusing to recognize the Practice's established referral relationships with area physicians as a "legitimate business interest" protectable by a restrictive covenant, the Fifth District expressly acknowledged that its holding conflicted with the Third District on the same issue:

We recognize that this holding and the First District's opinion in Sanal appear to conflict with Southernmost Foot and Ankle Specialists, P.A. vs. Torregrosa, 891 So.2d 591, 593 (Fla. 3d DCA 2004), in which the Third District upheld a trial judge's finding that Southernmost had legitimate business interests with regard to "its patient base, *referral doctors*, specific prospective

and existing patients, and patient goodwill.” (emphasis in the original) Id., at page 6.

Moreover, the Fifth District’s holding also conflicts with the Third District’s holding in Open Magnetic Imaging, Inc. vs. Nieves-Garcia, 826 So.2d 415 (Fla. 3d DCA 2002) where the Third District reversed a trial court’s failure to enjoin a former employee who is marketing her new employer’s competing MRI services to the same referral physicians she previously called upon.

Finally, the Fifth District’s holding conflicts with the First District Court of Appeal’s holding in University of Florida Board of Trustees vs. Sanal, 837 So.2d 512 (Fla. 1st DCA 2003) which affirmed a trial court’s denial of injunctive relief against an oncologist, in part, because there was no evidence that the oncologist had sought or received referrals from physicians with whom he had a prior referral relationship.

Although the Fifth District refused to follow the Third District’s precedent in Southernmost, it recognized that whether a referral relationship is a “legitimate business interest” pursuant to Florida Statute 542.335 is “admittedly problematic.” Opinion at page 5. This is the case because while the Fifth District refused to protect them, it agreed that these referral relationships are the “most crucial business interest” for a specialist’s medical practice. Id., at page 5.

Nevertheless, unlike the Third District in Southernmost, the Fifth District refused to recognize relationships with referral doctors as a legitimate business interest, apparently believing that doing so would do violence to another statutory business interest:

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 pages 5, 6.

By contrast, the Third District did not interpret Florida Statute 542.335 to preclude recognizing these crucial referral relationships as legitimate business interests. In Southernmost, the trial court entered an injunction in favor of a specialty medical practice (podiatry) based, in part, upon protecting that practice’s relationships with referral doctors:

In the instant case, Southernmost’s principals testified in detail about they developed their medical podiatry practice in the Keys over a period of 20 years. They also testified about how they hired Dr. Torregrosa when he had just finished his hospital training and how they put him into business. The trial court properly found that this testimony established a *prima facie* case that the restrictive covenant was reasonably necessary to protect Southernmost’s legitimate business interest in its patient base, referral doctors, specific prospective and existing patients, and patient goodwill. (emphasis added) *Id.*, at page 594.

The Fifth District’s decision also conflicts with the Third District’s holding in Open Magnetic Imaging, Inc., *supra*. In that case, the Third District recognized and protected referral relationships despite the fact that those relationships provide the business with “unidentified” prospective clients, customers or patients. Nieves-Garcia was employed by Open Magnetic Imaging, Inc. (“OMI”) and executed a restrictive covenant. Her job title was “Physician Relations

Representative,” responsible for marketing OMI’s MRI services to area physicians to induce the physicians to refer their patients to OMI.

Nieves-Garcia subsequently left and began working for a competitor of OMI’s and was “responsible for marketing MRI services to area physicians, including those who refer patients to OMI.” (emphasis added) *Id.*, at page 416.

In reversing the trial court’s failure to enjoin Nieves-Garcia, the Third District stated:

OMI’s marketing representatives, including Nieves-Garcia, were trained to market OMI’s services to area doctors, primarily orthopedics and neurologists. As part of their job, marketing representatives were 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. Contrary to the assertions made by Nieves-Garcia, we find this to be a legitimate business interest entitled to protection under Section 542.335. *Id.*, at page 419.

Thus, the Third District found that Nieves-Garcia had marketed OMI’s services to referral physicians, developing a database of the referral sources and their “referral patterns.” In her new position, she was again marketing to the same referral physicians. The Third District held that under these facts, OMI had “a legitimate business interest entitled to protection under Section 542.335.” *Id.*, at page 419.³

³ It cannot be argued that what the Third District was protecting was simply the confidential “database system” reflecting compiled information about referral sources. By definition, if the referral sources themselves are not a legitimate

Ironically, the Fifth District’s decision also conflicts with Sanal, despite the court’s reliance upon it. In Sanal, the First District, in affirming the trial court’s refusal to grant an injunction against Dr. Sanal, expressly noted that there was no evidence that he had sought or received referrals from Plaintiff’s referral sources:

In fact, it was undisputed that Dr. Sanal had treated only established patients of Jacksonville Oncology Group or new patients referred to the Group under the name of a senior member of the Group. (emphasis added) Id., at page 514.

Obviously, 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 its decision. Thus, while Sanal does stand for the proposition that a legitimate business interest in “prospective patients” must be with a “particular, identifiable, individual” in order to be recognized as a legitimate business interest, the holding in Sanal provides no support for the Fifth District’s conclusion that relationships with referral doctors cannot constitute legitimate business interests under the statute.⁴ The Fifth District’s logic appears to be that it is impossible to protect relationships with referral physicians and still follow Sanal’s holding that prospective patients be

business interest worthy of protection under Section 542.335, there is no corresponding reason to protect otherwise confidential information about these referral sources. If the referral sources themselves do not justify protection by a restrictive covenant, it stands to reason that information regarding those referral sources and their referral patterns are even less worthy of protection.

⁴ As this Court is aware, Florida Statute 542.335(b) expressly does not limit the legitimate business interests which may justify a restrictive covenant to only those enumerated in the Statute: “The term ‘legitimate business interest’ includes, but is not limited to . . .”

“specifically identifiable” in order to constitute a legitimate business interest. But as noted hereinabove, the Third District in Southernmost and Open Magnetic Imaging, Inc. have done exactly that.

In fact, enjoining Tummala from seeking and accepting referrals from the same referral sources would not have precluded him from providing oncology services to the “unknown prospective patients” Sanal was concerned with, so long as these patients were not the result of a prohibited referral. Such a result would have recognized and protected the Practice’s legitimate business interests while permitting Tummala to provide services to prospective patients.

The Fifth District’s overly narrow interpretation of Florida Statute 542.335 ignores the plain language of the Statute which, noted above, makes clear that the enumerated list of statutory legitimate business interests is not exclusive.

The impact of its ruling will be widespread. The inability of a medical specialty practice to protect its referral relationships will have a negative impact upon the recruitment and hiring of specialists. Moreover, referral relationships are not just crucial business interests for medical specialists. Any business or occupation which expends “effort, money and energy to cultivate referral relationships” cannot, under this holding, protect those relationships by restrictive covenant. Opinion at page 5.⁵

⁵ In *dicta*, the Fifth District questions whether any referral physicians with whom Tummala worked would still refer to the Practice now that he is gone. *Id.*, at page 6. The Fifth District must have overlooked the uncontroverted evidence presented to the trial court that while the Practice had suffered a 50-60% decline

CONCLUSION

Relationships with referral physicians are the most critical business interest of a specialty medical practice. Despite acknowledging that fact, the Fifth District refused to follow the Third District's rulings in Southernmost and Open Magnetic Imaging, Inc., and ignored the emphasis placed upon these relationships by the First District in Sanal.

This Court should accept jurisdiction and resolve this conflict among the District Courts of Appeal.

H. GREGORY MCNEILL, ESQUIRE

Florida Bar No. 0511080

Lowndes, Drosdick, Doster, Kantor &
Reed, P.A.

215 North Eola Drive

Post Office Box 2809

Orlando, Florida 32802

Telephone: (407) 843-4600

in referrals from 18 referral physicians, most of those physicians still referred some patients to the Practice despite Tummala's departure.

and

Thomas M. Ervin, Jr., Esquire
Florida Bar No. 0107788
Ervin, Kitchen, Chapman & Ervin
223 South Gadsden Street
Tallahassee, Florida 32302

Attorneys for Petitioners

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared using Times New Roman 14 in compliance with Florida Rules of Appellate Procedure 9.210(2).

H. Gregory McNeill

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing has been furnished by U.S. Mail, this ____ of May, 2006, to:

Christopher V. Carlyle, Esquire
La Plaza Grande Professional Center
20 La Grande Boulevard
The Villages, Florida 32159

H. Gregory McNeill

0047105\087263\949411\2