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.
_____/

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

RESPONDENT'S ANSWER BRIEF

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INTRODUCTION

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

Citations to the Appendix accompanying the Appellant's Initial Brief will be referred to as (App. __). Citations to the Appendix accompanying this Answer Brief will be referred to as (Supp. App. __ at __) with the appropriate tab and page number inserted. The Fifth District Court of Appeal's opinion *Florida Hematology & Oncology v. Tummala*, 927 So. 2d 135 (Fla. 5th DCA 2006) shall be referred to as the "Opinion."

SUPPLEMENTAL STATEMENT OF CASE AND FACTS

Tummala relies on and incorporates the facts set forth in the Opinion, because, as the Opinion notes, "[t]he material facts in this matter are not in dispute." *Tummala*, 927 So. 2d at 136. Nevertheless, Tummala notes that three points set forth in the Petitioners' Statement of the Case and Facts require clarification.

First, the Petitioners fail to note the reason Tummala desired to leave the practice in late 2003. Initial Brief, at 5. As the Opinion notes, Tummala was concerned with some of the Petitioner Corporations' billing practices, voiced those concerns, and they were not resolved to his satisfaction. *Tummala*, 927 So. 2d at 137 (App. 341-44). Subsequently, the Petitioner Corporations terminated Tummala without cause. *Tummala*, 927 So. 2d at 137 (App. 335, 820).

Secondly, the Petitioners suggest that they presented "uncontradicted evidence" that business from certain referral sources declined after Tummala's departure. Initial Brief, at 7. 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.[1] *Tummala*, 927 So. 2d at 139. The Opinion then notes:

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[1]Three physicians testified at the hearing below that referrals are not made to a practice, but to a physician (App. 115, 159, 188).

> 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 no longer refer their patients to the Appellants' office even if Dr. Tummala no longer practiced anywhere in Central Florida.

Tummala, 927 So. 2d at 139 (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.

Tummala, 927 So. 2d at 137, 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." Initial Brief, at 8. However, the Fifth District actually 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). *Tummala*, 927 So. 2d at 139, n.4. Additionally, the Fifth District Court of Appeal chose not to certify the apparent conflict. *Tummala*, 927 So. 2d 135 (Fla. 5th DCA 2006).

SUMMARY OF THE ARGUMENT

This case presents a narrow issue of law concerning whether a referring physician may be a "legitimate business interest" of a medical practice. In the Opinion, the Fifth District Court of Appeal relied on the plain language of Florida Statutes section 542.335 and the reasoning in *University of Florida Board of Trustees v. Sanal*, 837 So. 2d 512 (Fla. 1st DCA 2003) to correctly conclude that referring physicians may not be a legitimate business interest under the statute.

The Fifth District's holding is supported by the legislative intent behind section 542.335. The statute is designed to protect "legitimate business interests" which are identifiable business assets subject to misappropriation. Physicians refer patients to other physicians based on the reputation of that particular physician in the medical community, and do not refer patients to a practice or a corporation. Moreover, referring physicians cannot be made to refer patients to a given practice. Referrals are made based on a physician's reputation, and that reputation is not an identifiable business asset of a practice subject to misappropriation.

The Petitioners claim that two Florida cases recognize that referring physicians may constitute a legitimate business interest. However, review of those cases demonstrates that is not the case, and they are of no relevance to this matter.

The Petitioners claim that their position is supported by authority from other jurisdictions. However, the cases cited by the Petitioners are all distinguishable, and more relevant support from other jurisdictions supports Tummala's position.

The Petitioners also argue that the contract should be enforced and Tummala should be enjoined, though they ignore the "unfair competition" analysis which must be undertaken in considering the validity of a claimed legitimate business interest. The "contract approach" the Petitioners advocate is no longer the prevailing approach taken by Florida law.

Finally, it is clear that even if this Court agrees with the Respondent concerning the question of law presented, it should nevertheless remand the matter to the trial court for resolution. Even if referring physicians can conceivably be a legitimate business interest under Florida Statutes section 542.335, the Petitioners will be required to pled and prove that enforcing of the restrictive covenant is necessary to protect their interest in that legitimate business interest.

ARGUMENT

This case presents a narrow issue of law,[2] specifically the question of whether referring physicians may be deemed a "legitimate business interest" as defined by the Florida Statutes. The trial court and the Fifth District Court of Appeal, relying on the plain language of Florida Statutes section 542.335 and *University of Florida Board of Trustees v. Sanal*, 837 So. 2d 512 (Fla. 1st DCA 2003), correctly determined that referring physicians may not constitute a legitimate business interest of a medical practice. *Tummala*, 927 So. 2d at 139 (App. 937). These holdings are clear and well-reasoned, and should not be disturbed by this Court.

One threshold point deserves mention. The jurisdiction of this Court is premised on apparent conflict[3] with *Southernmost Foot and Ankle Specialists, P.A. v. Torregrosa*, 891 So. 2d 591 (Fla. 3d DCA 2004).[4] In reality, the apparent

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[2]To the extent that this Court limits its review to the narrow legal issue of whether referring physicians may be a legitimate business interest under Florida Statutes section 542.335, Tummala agrees that the standard of review is *de novo*. *See, e.g., State v. Burris*, 875 So. 2d 408 410 (Fla. 2004) (noting that the question of statutory construction is subject to *de novo* review).

[3]The Opinion stated it and *Sanal* "appear" to conflict with *Southernmost*. *Tummala*, 927 So. 2d at 139, n.4.

[4]In their Jurisdictional Brief, the Petitioners also suggested to this Court that *Open Magnetic Imaging, Inc. v. Neives-Garcia*, 826 So. 2d 415 (Fla. 3d DCA 2002) directly and expressly conflicted with *Tummala* (Supp. App. B at 5-8), though, as addressed below, that is clearly not the case. In a bit of a surprise, the

conflict arises from two words ("referral doctors") in that opinion which appear without any legal or factual analysis as to why they might have constituted a legitimate business interest. *Id.* at 594. As will be demonstrated, if not for the inclusion of those two unelaborated words in *Southernmost*, this Court would have no basis for accepting jurisdiction.

Further, *Southernmost* was of so little consequence in this matter prior to its inclusion in footnote 4 of the Opinion that the Petitioners did not even mention the case in their Initial Brief to the Fifth District (Supp. App. A). In fact, far from arguing that *Southernmost* was on point and controlled this matter, the Petitioners stated in their Initial Brief to the Fifth District that "[p]erhaps because the legitimate business interest in referral physicians is so obvious it cannot be gainsaid, no Florida appellate court has yet found it necessary to address specifically" (Supp. App. A at 17-18) (emphasis added). Although this Court has the ability to accept jurisdiction on the basis of apparent conflict,[5] it should

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Petitioners also took the position that *Sanal*, which the Opinion extensively relied upon in reaching its holding, is actually in express and direct conflict with the Opinion. That position will also be addressed below.

[5] *See* Harry Lee Anstead, Gerald Kogan, Thomas D. Hall and Robert Craig Waters, *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 Nova L. Rev. 431, 520-21 (Spring, 2005) (discussing "apparent conflict" and noting that while the Supreme Court of Florida may accept jurisdiction in such situations, a strict reading of the Florida Constitution may suggest that accepting discretionary jurisdiction in such instances may be impermissible).

nevertheless be aware that jurisdiction in this matter hangs by the thinnest of threads.

ISSUE I. REFERRING PHYSICIANS ARE NOT A "LEGITIMATE BUSINESS INTEREST" UNDER FLORIDA STATUTES SECTION 542.335.

The Fifth District Court of Appeal correctly determined that referring physicians are not a "legitimate business interest" under Florida Statutes section 542.335. The statute states in pertinent part that an individual "seeking enforcement of a restrictive covenant shall plead and prove the existence of one or more legitimate business interests justifying the restrictive covenant." Fla. Stat. § 542.335(1)(b)(2004). The statute goes on to note that the "term 'legitimate business interest' includes, but is not limited to . . . substantial relationships with specific prospective or existing customers, patients, or clients." Fla. Stat. § 542.335(1)(b)(3)(1994) (emphasis added).

This clear statutory language mandated that the Fifth District reach the conclusion that it did. As the Opinion states:

> 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.

Tummala, 927 So. 2d at 139 (emphasis added). Thus, the Opinion determined that the legislature had specifically addressed the issue, and had done so in plain, unambiguous language. The Opinion is correct in this regard, and the language cannot be ignored to permit recognition of a business interest that the legislature specifically chose to exclude.

In reaching this conclusion, the Opinion relied extensively on *University of Florida Board of Trustees v. Sanal,* 837 So. 2d 512 (Fla. 1st DCA 2003). In *Sanal,* the First District affirmed a trial court's denial of injunctive relief sought against an oncologist who left the University of Florida Health Science Center Jacksonville and began practicing contrary to the terms of a restrictive covenant. The court found that Dr. Sanal was not treating any of his former employer's patients, and that the employer had not demonstrated that it had a legitimate business interest concerning any specific, identifiable, prospective patients that Dr. Sanal might treat. As the court stated, the employer's position seemed to be that its "prospective patient base" included all persons within the geographic limitations of the restrictive covenant. *Id.* at 514. The court rejected this assertion because the statute clearly requires relationships with prospective patients to be only with particular, identifiable individuals.[6] *Id.* at 516.

[6] *Sanal* correctly found that section 542.335 was unambiguous. *Sanal,* 837 So. 2d at 516. The court stated that it was "relatively clear that the adjective

The Opinion recognized *Sanal's* application to this matter, as did the trial court. (App. 936-37). The Opinion states:

> The trial court correctly found that: "[A]s stated in *Sanal*, to qualify as a 'legitimate business interest,' 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." *Sanal*, 837 So. 2d 515-16.

Tummala, 927 So. 2d at 139 (App. 937). Thus, the Opinion recognized that an unidentifiable prospective patient, explicitly excluded from constituting a legitimate business interest under the statute, could not be magically transformed into a legitimate business interest by being referred by a physician. Put another way, the inclusion of a "middleman" in the equation does not change the legal conclusion.

The Petitioners argue that the Opinion misapprehended *Sanal*, and go so far as to suggest that the Opinion "conflicts with *Sanal*, despite the court's reliance upon it." Initial Brief, at 17. The Petitioners are incorrect.

The Petitioners first argue that *Sanal* is distinguishable because, as noted *supra*, it dealt with prospective patients, and not referring physicians. Initial Brief,

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'specific' used to modify 'prospective patients' was intended to have its plain or ordinary meaning of 'particular.'" *Id.* Thus, a relationship with a prospective patient must be with a "particular, identifiable, individual" to constitute a legitimate business interest. *Id.*

at 16-17. The Petitioners claim the interest they sought to protect was referring physicians, that they "never sought to claim or attempt to protect prospective patients as a legitimate business interest,"[7] and they have "no quarrel with the holding in *Sanal* regarding prospective patients." Initial Brief, at 17.

As noted above, and as recognized by the Opinion, this is a distinction that has no bearing on the current case. As *Sanal* held, for a "relationship" with a "prospective patient" to be a legitimate business interest under the statute, the "relationship" must be "substantial" and be with a "particular, identifiable individual." *Sanal*, 837 So. 2d at 516. The Opinion recognized that this statutory requirement could not be "circumvented" by virtue of adding a referring physician into the mix. *Tummala*, 927 So. 2d at 139. As stated in the Opinion, "[w]hat referring physicians supply is a stream of unidentified prospective patients with whom Appellants had no prior relationship." *Id*. (emphasis added). If referring physicians were accepted as a legitimate business interest, the "clear statutory directive" would be undermined. *Id.* The Petitioners do not attempt to address this reasoning in the Opinion, and merely argue that it was "incorrectly premised" on prospective patients as opposed to referring doctors. Initial Brief, at 16-17.

[7]This assertion is contradicted by the statement in the Petitioners' Initial Brief to the Fifth District which stated that it was "undeniable that the Practice's existing and prospective patients constitute a legitimate business interest properly protectable by the enforcement of a restrictive covenant." (Supp. App. A at 14) (emphasis added).

The Petitioners next argue that *Sanal* "conflicts" with the Opinion. The alleged conflict arises out of a statement in *Sanal*'s factual recitations that Dr. Sanal only saw established patients of his new group or patients referred to the group "under the name of a senior member of the group." *Sanal*, 837 So. 2d at 514. The Petitioners argue that, despite the fact that "referring physicians" are not specifically mentioned in *Sanal*, the statement that patients were referred to a "senior member of the group" is an "obvious" recognition that referring physicians are to be recognized as a legitimate business interest. Initial Brief, at 18. The Petitioners' argument is meritless.

First, it is clear that *Sanal* in no way conflicts with the Opinion, and certainly not in a manner that is "express and direct."[8] Although *Sanal* does not mention referring physicians, 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 as one of the reasons for its decision." Initial Brief, at 18 (emphasis in original). The Petitioners make the argument based not on *Sanal's*

[8]The Petitioners argued in their Jurisdictional Brief that *Sanal* provided a basis for invoking this Court's jurisdiction. (Supp. App. B at 8-9). However, even a cursory reading of the case demonstrates that it in no way conflicts with *Tummala* (*Sanal* does not address referring physicians in any manner), and indeed supports the Opinion's reasoning as the Opinion expressly acknowledged. *Tummala*, 927 So. 2d at 139.

language, but rather on what the Petitioners believe the First District Court of Appeal intended by including that particular sentence in the opinion. In reality, the statement that the Petitioners rely on merely sets forth one of several factual findings in the case, and it cannot be read as the Petitioners suggest.

Second, the logical extension of the Petitioners' argument is that if Tummala joined an established practice in Lake County that drew patients from the same pool of physicians that referred patients to the Petitioner Corporations, no violation of the restrictive covenant would occur so long as patients came to the new practice "in the name of a senior member of the group," as they did in *Sanal*. Thus, had Tummala joined a group practice, he would presumably have been free to treat patients from the same referring physicians that the Petitioners claim as a legitimate business interest, so long as a "middleman" in the form of a senior member of the group accepted the patients in his or her name. However, because Tummala started a new, solo practice, somehow a legitimate business interest has been violated by seeing patients referred from the same sources. Though the alleged harm to the Petitioner Corporations would be identical in either scenario, their reading of *Sanal* suggests that one situation (sole practice) would harm their legitimate business interest, while the other (group practice) would not. This

position, based on one sentence in the rendition of facts in *Sanal*, lacks any basis in law or logic.

As demonstrated above, *Sanal* is relevant to this case only because it explicitly recognized the statutory mandate that prospective patients must be specific and identifiable to qualify as a legitimate business interest. *Sanal*, 837 So. 2d at 516. The Opinion recognized this statutory requirement and concluded that it may not be ignored simply because the unidentified prospective patient was referred by a physician. *Tummala*, 927 So. 2d at 139. The Petitioners' attempts to distinguish *Sanal*, and their claims that it somehow conflicts with the Opinion, are meritless.

Although the Opinion was correct in holding that referring physicians may not be a legitimate business interest of a medical practice under the relevant statute's clear wording regarding "prospective patients," it is respectfully submitted that the Opinion was incorrect in suggesting that referring physicians might be a legitimate business interest in the absence of such statutory bar. *Tummala*, 927 So. 2d at 138. To the contrary, the legislative intent behind section 542.335 requires that referring physicians may not be a legitimate business interest of a medical practice.

Sanal recognized that the principal senate sponsor and the Florida Bar's principal drafter of section 542.335 wrote an article in the *Florida Bar Journal* shortly after that statute was adopted. *Sanal*, 837 So. 2d at 516. In the article, the authors identified the "guiding principal" behind the new statute, and noted that the statute rejected the "contract approach" to enforcement of restrictive covenants in favor of protection of legitimate business interests. 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. 53, 54 (Nov. 1996). A "legitimate business interest" under the statute

> is an identifiable business asset that constitutes or represents an investment by the proponent of the restriction such that, if that asset were misappropriated by a competitor (i.e., taken without compensation), its use in competition against its former owner would be 'unfair competition.' Put another way, a 'legitimate business interest' is a business asset that, if misappropriated, would give its new owner an unfair competitive advantage over its former owner.

Id. at 54. Thus, the intent behind section 542.335 was not to allow employers to inhibit competition through the use of restrictive covenants; rather, it was to allow restrictive covenants to be enforced to prohibit a party from gaining an unfair competitive advantage.

While the doctors within a specialized physician practice certainly receive referrals from other doctors, it is clear that the practice itself does not have a

legitimate business interest in those referrals. As the Opinion states, the witnesses in this case "all testified that they make their referrals based upon their assessment of the individual doctor to whom they direct their patients. They do not refer to a 'business' or a 'practice.'" *Tummala*, 927 So. 2d at 139 (App. 115, 159, 188). Other courts have reached the same conclusion.

In *Cardiovascular Surgical Specialists, Corp. v. Mammana*, 61 P.3d 210 (Okla. 2003), the Supreme Court of Oklahoma considered the validity of a non-compete provision a corporation sought to enforce against a former employee, a cardiovascular surgeon. *Id.* at 211. The court noted that, as in Florida, the issue of "'unfair competition' on the part of a former employee is the legitimate focus of a covenant not to compete." *Id.* at 213. The court considered the enforceability of a contract that (unlike the contract in this case) specifically forbade the physician from soliciting, diverting or accepting referrals from any source that referred to the former employer. *Id.* at 214.

The Supreme Court of Oklahoma held that the contractual provision amounted to unfair competition. *Id.* at 214. It went on to find that "[d]octors refer patients to surgeons for cardiovascular surgery, not to corporations. Thus, referrals made to [the physician] were based on factors other than his status as an employee of [the former practice] or his later status as an independent practitioner." *Id.* at

214, n.3. Additionally, the Court noted that the evidence, like the evidence in this case, "demonstrated the personal nature of reputation-dependent referrals" to specialized physicians. *Id.* at 214. Finally, the court concluded that "one surgeon has no legitimate business interest in another surgeon's referral base regardless of a past employer-employee relationship." *Id.* *See also Pratt v. Grunenwald*, 1994 WL 313050, *4 (Ohio Ct. App. 1994) (noting that it is a "matter of common sense" that referrals are made to physicians and that a practice can suffer no loss of a referral base because a practice has "no referral base as a corporation").

The logic demonstrated in the Opinion, and in the cases cited above, is clear. A physician, regardless of where he or she practices, obtains referrals because of that physician's reputation in the medical community. That reputation is not a tangible asset of the employer practice subject to misappropriation; rather, it is an intangible asset inextricably tied to the individual.[9] If physicians remaining in a practice share the same positive reputation as a physician who is no longer there, then they will continue to obtain referrals. If they do not have a positive reputation, they will not get the referrals, and banishing the former doctor to a distant location will have no effect on this outcome. Further, those referral sources

[9]The statute gives examples of the type of tangible assets which may be misappropriated, such as trade secrets or other valuable, confidential business information. *See* § 542.335(1)(b)(1), Fla. Stat. (2004).

cannot be made to refer a patient to the practice after a physician leaves (or is fired) from a practice. Once the doctor has left, the competitive nature of the marketplace will dictate where referring physicians send patients. Simply put, a physician who leaves a practice does not unfairly compete with that practice simply because he or she has a positive reputation in the medical community, and that doctor cannot be said to have "misappropriated" his or her reputation from the former practice.[10]

If the reputation of the practice and not the individual doctor were paramount in obtaining referrals from other physicians, then there would be no need to protect such interests because physicians would continue to refer to that practice regardless of which doctors practiced there. Obviously, as common sense indicates,[11] that is not the case.

In conclusion, the Opinion correctly held that section 542.335 prohibited referring physicians from being a legitimate business interest of a medical practice.

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[10]The trial court correctly applied the principles of misappropriation and unfair competition to its consideration of this matter and concluded that the Petitioners "did not prove that Dr. Tummala has misappropriated any specific business asset that would give him an unfair competitive advantage" over the Petitioners. (App. 936).

[11]*Pratt v. Grunenwald*, 1994 WL 313050, *4 (Ohio Ct. App. 1994) (noting that it is a "matter of common sense" that referrals are made to physicians and that a practice can suffer no loss of a referral base because a practice has "no referral base as a corporation").

In addition to the statutory prohibition, the underlying statutory principle of preventing "unfair competition" likewise supports the holding that referring physicians may not constitute legitimate business interests of the practice subject to misappropriation.

A. The Florida Decisions Cited By The Petitioners Have No Relevance To This Matter.

The Petitioners cite two cases which they claim recognize a legitimate business interest in referring physicians. Initial Brief, at 19-22. The cases the Petitioners rely upon are *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), and *Open Magnetic Imaging, Inc. v. Nieves-Garcia*, 826 So. 2d 415 (Fla. 3d DCA 2002). Neither case supports the Petitioners' position.

As noted *supra*, *Southernmost* contains the words "referral doctors," and thus creates an apparent conflict with the Opinion. *See supra* at 4-5. However, *Southernmost* contains no citation, analysis or reasoning which in any way explains why the Third District included those two words in the opinion. Thus, the Petitioners are left to merely quote the portion of *Southernmost* where those two words appear, and they offer no explanation as to why that case has any bearing on the facts of this matter since such reasoning is completely absent from *Southernmost*. Initial Brief, at 20. While the words "referral doctors" appear in

Southernmost, the opinion offers no guidance applicable to the question of law presented in this case.

The next case that the Petitioners claim "recognized a legitimate business relationship in referral sources" is *Open Magnetic Imaging, Inc. v. Nieves-Garcia*, 826 So. 2d 415 (Fla. 3d DCA 2002).[12] 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

> 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 Initial Brief as supporting their position, they neglect to provide the citations in *Nieves-Garcia* which immediately follow that quote.

[12] *Nieves-Garcia* was not mentioned, cited nor relied upon by the Petitioners in their Initial Brief to the Fifth District (Supp. App. A), and it is not cited in the Opinion.

The Third District cited four cases,[13] all of which concerned a purported legitimate business interest in customer lists which were claimed to be trade secrets. *Id.* at 419. Thus, it is clear that the Third District found that the database materials the marketing representative created in *Nieves-Garcia* were trade secrets that rose to the level of legitimate business interests. In this case, the Petitioners did not plead any legitimate business interest concerning trade secrets, and therefore *Nieves-Garcia* has no bearing on this matter.

The Petitioners anticipate this argument and claim that "it cannot be argued that what the Third District was protecting was simply the confidential 'database system' reflecting compiled information about referral sources. . . . [since] [i]f the referral sources themselves do not justify protection by a restrictive covenant, it stands to reason that information regarding those referral patterns are even less worthy of protection." Initial Brief, at 22 n.6.

In making this argument, the Petitioners miss the point. A database established as part of a "confidential strategic marketing plan" of all doctors who refer to a MRI office is a tangible asset subject to misappropriation. This identifiable business asset "represents an investment by the proponent of the

[13] *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).

restriction such that, if the asset were misappropriated by a competitor (i.e., taken without compensation), its use . . . would be 'unfair competition.'" 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. 53, 54 (Nov. 1996). In contrast, the reputation of a physician in a medical community that leads other physicians to refer to him or her is a vastly different situation, and is not an identifiable asset such as a database. A physician's reputation is created by that physician, belongs to him or her, and is not an asset of the employer that may be misappropriated.

B. Other Jurisdictions Have Recognized That Referring Physicians Are Not A Legitimate Business Interest.

As noted *supra*, authority in other jurisdictions supports the Opinion's conclusion that referring physicians are not a legitimate business interest. *See Cardiovascular Surgical Specialists, Corp. v. Mammana*, 61 P.3d 210, 214 (Okla. 2003) (holding that a practice had no legitimate business interest in referral physicians because doctors refer patients to other doctors not to corporations); *Pratt v. Grunenwald*, 1994 WL 313050, *4 (Ohio Ct. App. 1994) (noting that it is a "matter of common sense" that referrals are made to physicians and that a practice can suffer no loss of a referral base because a practice has "no referral base as a corporation"). There is a wide divergence among jurisdictions

concerning the wording and application of non-compete statutes, and thus the applicability of a given case must be analyzed not only on a factual level, but on a statutory level as well. None of the cases cited by the Petitioners are particularly relevant to this matter.

The Petitioners first cite *Ruhl v. J.E. Hanger Company, Inc.*, 1992 WL 223738 (Ohio Ct. App. 1992).[14] *Ruhl* did not involve a doctor leaving a medical practice and the critical issue of referring physicians. Rather, it involved a salesman of medical products who took advantage of the former businesses' "established clients." *Id.* at 3; Initial Brief, at 22. Thus, *Ruhl* stands for the unremarkable proposition that a restrictive covenant should be enforced to prevent former employees from soliciting and benefiting from relationships with the former employer's existing clients. The injunction in this case prohibits Tummala from doing just that, and Tummala has conceded this point. (App. 937-38). Therefore, *Ruhl* is of no application to the Petitioners' position.

The next case cited is *Fields Foundation, Ltd. v. Christensen*, 309 N.W. 2d 125 (Wis. Ct. App. 1981). As an initial matter, Wisconsin's restrictive covenant statute varies greatly from the statute at issue in this case, and there is no mention in the Wisconsin statute about "legitimate business interests," the key inquiry in this matter. *Id.*; *see also* Wis. Stat. § 103.465. Nevertheless, *Christensen* did not

[14]The *Ruhl* opinion is not reported in the Northeast Second Reporter.

involve referral doctors as a legitimate business interest, but rather involved a medical director of an abortion clinic who left the practice. Prior to his departure, he "photocopied the [referral] lists in 1979 to provide himself with a 'base' from which to compete with the center and made some contacts with referral agencies and physicians with respect to opening his own clinic." *Id.* at 129. The court held that it would be unfair to allow the defendant to use these lists, a tangible asset, to take away plaintiffs' business. *Id.* at 130. *Christensen* has no bearing on this case.

The Petitioners next cite *Bruce D. Graham, M.D., P.A. v. Cirocco, M.D.*, 69 P.3d 194 (Kan. Ct. App. 2003), which they claim has facts "remarkably similar to the case at bar." Initial Brief, at 23. In reality, *Cirocco's* facts are dramatically different. The most glaring distinction involves the terms of the restrictive covenant at issue in that case. Among other provisions, it provided that once the employee doctor left, patients were to be notified of that fact, and given the address of the departing doctor's new office. *Id.* at 196. The restrictive covenant further provided that "notwithstanding the terms of this non-competition agreement, Cirocco shall be allowed, without violating the terms [of this] agreement, to accept patients, whether they are former or present patients of [Graham], at request, in writing the services of [Cirocco]." *Id.* at 197. Thus, the doctor was not prohibited

from seeing any existing patients, or patients referred to him in the future, so long as the patient specifically requested to see that physician.

In considering the argument that referral physicians were a legitimate business interest, the *Cirocco* court specifically took note of that provision in the restrictive covenant. The court stated:

> The covenant's attempt to prevent predatory behavior at or near the time of Cirocco's exit from Graham's practice while permitting patients and referring doctors to continue to exercise their own choices struck an acceptable balance among the interests of the two parties, the patients, and the referring doctors. It also preserved the efficient and effective operation of the overall healthcare delivery system.

Id. at 199 (emphasis added). There is no way to speculate on how the case would have been determined if the restrictive covenant did not contain this provision. In any event, the case is remarkably different from the present matter, which contained no such provision to allow existing or prospective patients to continue to see Tummala if they wished. It is respectfully submitted that if the restrictive covenant in this matter contained such a provision, it is likely that this entire lawsuit would never have happened.

The fourth case the Petitioners cite is *Medical Associates of Menomonee Falls, Ltd. v. Baldwin*, 451 N.W. 2d 804 (Wis. Ct. App. 1989).[15] The Petitioners fail to note that the opinion is unpublished, and under the Wisconsin Rules of Civil Procedure, the opinion has no precedential value.[16] Indeed, the Wisconsin Statutes state that unpublished opinions are forbidden to be used in any court of that state as authority. Wis. Stat. § 809.23(3)(2004). Quite simply, *Baldwin* is factually inapplicable to the present case, and even if it were similar, it would not be legitimate authority in Wisconsin, let alone Florida.

Finally, the Petitioners cite *Battenkill Veterinary Equine P.C. v. Cangelosi*, 1 A.D. 3d 856 (N.Y. App. Div. 2003). In *Battenkill*, and contrary to the present case, the defendant was "admittedly servicing clients she serviced while employed by the plaintiff." *Id.* at 857. The case also focused primarily on the equities involved in the case since New York law (unlike the Florida statute) requires a "balancing of the equities" in making a determination whether or not to enforce a

[15]The *Baldwin* opinion also involved the Wisconsin statute concerning restrictive covenants which does not have any mention of the term "legitimate business interest."

[16]Wis. Stat. § 809.23(3) (2004). That statute states: "An unpublished opinion is of no precedential value and for this reason may not be cited in any court of this state as precedent or authority, except to support a claim of claim preclusion, issue preclusion, or the law of the case." *Id.*

restrictive covenant. *Id.* at 857. No such balancing is mandated in Florida, and therefore the case is factually distinguishable.

C. The Fifth District's Interpretation of Florida Statute Section 542.335 Is Mandated By The Statute.

The Petitioners argue that the "enumerated list of statutory legitimate business interests is not exclusive." Initial Brief, at 24. This is undoubtedly true, though it has no bearing on this matter. The Legislature chose to specifically note that in order for a relationship with a prospective patient to qualify as a legitimate business interest, the relationship with that patient must be substantial, and the relationship must be with a specific prospective patient. § 542.335(1)(b)3, Fla. Stat. As discussed extensively *supra*, and as found in *Sanal*, this language is unambiguous and requires that a relationship with a prospective patient be with a "particular, identifiable, individual." *Sanal*, 837 So. 2d at 516.

In spite of this, the Petitioners argue that the list of legitimate business interests identified in the statute is not exhaustive. Initial Brief, at 25. However, if this Court were to recognize the legitimate business interest the Petitioners advocate, such interest would be directly contrary to the statute. While the statute is not exhaustive concerning legitimate business interests, it clearly cannot be said that proposed interests which clearly contradict the plain wording of the statute may be recognized.

The Petitioners then argue that the statutory statement that substantial relationships with prospective or existing customers, patients or clients may actually encompass relationships with referring physicians. Initial Brief, at 28. The Petitioners argue that the referring physicians are tantamount to existing customers or clients. Initial Brief, at 28. Quite simply, the Petitioners are incorrect. Referring physicians are not "customers or clients," they are a means by which a doctor comes into contact with a patient. As the Opinion stated, "[w]hat referring physicians supply is a stream of unidentified prospective patients with whom the Appellants had no prior relationship." *Tummala*, 927 So. 2d at 139. To suggest that the referring physicians are "customers or clients" under the statute is to ignore the plain meaning of those terms.

The Petitioners then make an argument concerning a medical practices' goodwill. Specifically, they argue that because the statute at issue "expressly includes 'customer, patient or client goodwill associated with . . . a specific geographic location . . . or . . . a specific marketing or trade area,'" the goodwill of referral physicians constitutes a legitimate business interest. Initial Brief, at 28.[17]

[17]In this section, the Petitioners also state that the Petitioner Corporations have "the exclusive right to staff the cancer clinics of Florida Hospital Waterman and Clermont Hospital." Initial Brief, at 28. However, as the Opinion stated, the evidence that the Petitioners presented on this issue was "confusing and contradictory," and it was "almost impossible to understand" the interest that the Petitioners claimed regarding their contracts with hospitals. *Tummala*, 927 So. 2d

As discussed extensively above, if the goodwill built over 20 years based on the practices' "outstanding and preeminent reputation" were as strong as the Petitioners claim, there would be no need to protect that interest, for referrals would surely be bountiful. The goodwill at issue in this case, to the extent it is an issue, concerns the reputation of the individual doctors in the medical community since it is clear that other physicians refer not to a practice, but to a specific doctor.

Finally, the Petitioners make an argument concerning the "liberty of contracting," and argue that the contract should be enforced because it was executed among competent individuals and is not illegal. Initial Brief, at 29. The Petitioners' argument fails because contracts of this type are governed by the relevant provisions of the Florida statutes, specifically section 542.335. What the Petitioners essentially argue is that Tummala agreed that he would not practice within a certain area for certain time after he left, and he should be held to that bargain. In making this argument, the Petitioners seek to advance a "contract approach" to the enforcement of restrictive covenants, an approach that was specifically rejected by the Legislature in favor of an "unfair competition" approach embodied in section 542.335. *See* John A. Grant, Jr. & Thomas T. Steele, *Restrictive Covenants: Florida Returns to the Original "Unfair*

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at 138.. The Opinion found that the Petitioners did not meet their burden of establishing a legitimate business interest deserving protection arising out of those contracts. *Id.*

Competition" Approach for the 21st Century, 70 Fla. B.J. 53, 54 (Nov. 1996) (stating that by adopting section 542.335, "the 1996 Legislature expressly rejected a 'contract approach' to the enforcement of contractual restrictions on competition . . . [and declaring that] for a restriction to be enforceable, it must 'reasonably necessary' to protect one or more 'legitimate business interests'"). As the Opinion found, the operative question in this matter is on whether or not the Petitioners pled and proved a legitimate business interest. The law of this matter indicates that they did not.

Finally, the Petitioners make a policy argument, devoid of citation, which attempts to address the Opinion's widespread impact. The Petitioners first argue that medical practices will somehow face a "Hobson's Choice" concerning hiring physicians. Initial Brief, at 31. In reality, they will face no such choice. Medical practices that are successful will continue to hire new physicians as the needs of the practice warrant. The other doctors in a practice can protect their interest in referring physicians by maintaining the positive reputation in the medical community, and by maintaining their own relationships with these physicians.

The Petitioners also argue that the Opinion will impact other businesses within the medical profession such as pharmaceutical and medical supply companies. Petitioners' argument fails in that it ignores the unique situation

concerning physician to physician referrals. As has been discussed extensively in this Brief, those referrals are the result of the reputation of the physician in the community. The Petitioners argue that a sales representative who markets pharmaceuticals or medical supplies to a given physician is somehow analogous to the situation involving referral physicians, though that is obviously not the case. A salesperson establishes relationships with those who use their product or can help identify other users of their product, and they sell the product itself, not their own professional reputations. The arguments put forth by the Petitioners in no way address the unique situation presented in this case.

ISSUE II. **EVEN ASSUMING *ARGUENDO* THAT REFERRING PHYSICIANS MAY BE "LEGITIMATE BUSINESS INTERESTS" UNDER FLORIDA STATUTES SECTION 542.335, THE PETITIONERS MUST PROVE THAT THE RESTRICTION WAS NECESSARY TO PROTECT THAT INTEREST.**

As Issue I demonstrates, the Opinion correctly held that referring physicians may not be a legitimate business interest under section 542.335, and this Court should affirm the decision below. However, assuming *arguendo* that this Court disagrees with that point of law, it is important to recognize that such a holding does not end the inquiry in a given restrictive covenant case, and certainly not in this case.

As noted above, this Court is called upon to resolve a question of law; specifically, can referring physicians constitute a legitimate business interest of a medical practice. If this Court agrees with the Opinion and rules that such relationships cannot, as a matter of law, be legitimate business interests, then the factual implications are clear for future litigants who will then not attempt to plead such interests. However, assuming *arguendo* that this Court finds that such relationships may be a legitimate business interest, it still must make clear that a party claiming such interest will be required to plead and prove the interest as required by the statute, and must plead and prove that "the contractually specified restraint is reasonably necessary to protect the legitimate business interest or

interests justifying the restriction." Fla. Stat. § 542.335(1)(c)(2004). Put another way, "[e]ven if an employer pleads and proves the existence of a legitimate business interest, the employer still must demonstrate a sufficient relationship between the interest proven and the relief sought." E. John Wagner, *Striking a Balance? The Florida Legislature Adopts an Unfair Competition Approach to Restrictive Covenants*, 49 U. Fla. L. Rev. 81, 104 (1997) (emphasis added).

This distinction is critical in this case, because even if this Court disagrees with the Tummala's position, the matter will not be resolved as the Petitioners suggest.[18] Rather, as the Opinion correctly notes, the trial court did not reach the issue of Tummala's defenses since it, like the Opinion, reached the "threshold legal conclusion" that referring physicians are not a legitimate business interest under section 542.335. Thus, the Fifth District stated:

> it is not clear that Appellants could establish the reasonable necessity of enforcing the restrictive covenant even if referring physicians were found to be a legitimate business interest. The referring physicians called as witnesses at the hearing all testified that they make their referrals based upon their assessment of the individual doctor to whom they direct their patients. They do not refer to a 'business' or a 'practice.' Accordingly, they previously sent patients to Appellants' office only because that is where Dr. Tummala practiced. Now that

[18]The Petitioners improperly ask this Court to remand the case "with instructions to require injunctive relief be entered against Tummala sufficient to protect the Petitioners' legitimate business interest in its demonstrated relationships with referral physicians and their practices." Initial Brief, at 34.

> he is gone, they testified that they would no longer refer their patients to Appellants' office even if Dr. Tummala no longer practiced anywhere in Central Florida.

Tummala, 927 So. 2d at 139 (emphasis in original).

If this Court disagrees with the Opinion regarding the question of law presented, it should nevertheless clarify that the statute requires the Petitioners to plead and prove that the enforcement of the restrictive covenant is necessary to protect the legitimate business interest involved. Though, as the Opinion states, it is apparent from the evidence below that the Petitioners will not be able to carry this burden, it should nevertheless be sent to the trial court for resolution of the issue.

CONCLUSION

WHEREFORE, for all the foregoing reasons, Respondent, RAMBABU TUMMALA, M.D., respectfully requests that this Court AFFIRM the Opinion of the Fifth District Court of Appeal in this matter.

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 and **Thomas M. Ervin, Jr., Esquire**, Ervin, Kitchen & Ervin, 223 South Gadsden Street, Tallahassee, Florida 32302 (Appellate Counsel for Petitioners); this ____ day of December, 2006.

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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 Times New Roman 14 point type.

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