**SUPREME COURT OF FLORIDA**
**CASE NO.: SC06-993**

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

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

Respondent.
_____/

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

# INITIAL BRIEF OF PETITIONERS 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.,

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## STATEMENT OF THE CASE AND FACTS

Defendants/Appellants Florida Hematology & Oncology Specialists, P.A. ("Florida Hematology") and Lake County Oncology & Hematology, P.A. ("Lake County Oncology") (sometimes collectively referred to as the "Practice") invoked the discretionary jurisdiction of this Court to review the decision of the Fifth District Court of Appeal, which affirmed an Order granting in part and denying in part a Motion for Temporary Injunction to prevent Rambabu Tummala, M.D. from violating certain valid restrictive covenants contained in his Employment Agreement with Florida Hematology and Lake County Oncology. (A-934); Florida Hematology & Oncology v. Tummala, 927 So.2d 135 (Fla. 5th DCA 2006).

Roy M. Ambinder, M.D. ("Ambinder") is a medical doctor board certified in the specialties of oncology and hematology. (A-50; lines 11-12) In the early 1980s, Ambinder started Florida Hematology and Lake County Oncology, servicing the areas of oncology and hematology. (A-50; lines 16-23)

From the outset, Florida Hematology and Lake County Oncology operated medical practices in Orange County, Florida and in Lake County, Florida, respectively. (A-51; lines 2-5) Over time, the Practice flourished and multiple office locations were opened in both Orange and Lake Counties. As the Practice grew, Ambinder found it necessary to hire additional doctors. (A-51; lines 9-12)

In 1996, the Practice hired Plaintiff Rambabu Tummala, M.D. ("Tummala").[1] (A-51; lines 19-21) Tummala is a physician specializing in oncology and hematology and his employment with the Practice was his first in private practice. (A-51; line 25; A-52; lines 1-3) Ambinder assigned Tummala to the Lake County Oncology's office in Tavares, Florida. (A-52; lines 4-7) Tummala had neither lived nor worked previously in Lake County, Florida. Tummala had no relationships with any patients, hospitals, primary care physicians or referring physicians in Lake County, Florida prior to his employment with the Practice. (A-427; lines 4-23)

The Practice supported Tummala in his efforts to become an established physician in Lake County, Florida. (A-52; lines 14-25; A-53; lines 1-8) Tummala received introductions to referring physicians in the area; Tummala obtained privileges in the major hospitals of Lake County, Florida; the Practice advertised Tummala's association with Florida Hematology and Lake County Oncology; the Practice paid Tummala's malpractice premiums, paid all expenses associated with his continuing medical education, paid his hospital staff fees and otherwise supported him in the effort to become an established physician in Lake County. (A-54; lines 9-25; A-55; lines 1-3)

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1 Tummala executed an employment agreement which contained a restrictive covenant when he was hired. However, the original employment agreement was superseded and is not the subject of this litigation.

In 1999, Ambinder offered Tummala and another doctor, Ralph Gousse, the opportunity to become equal shareholders in the Practice. (A-55; lines 1-25) In connection therewith, Tummala, Gousse and Ambinder each executed new employment agreements and shareholders' agreements with Florida Hematology and Lake County Oncology. As a result, Drs. Tummala, Gousse and Ambinder were each now 33 1/3% shareholders of the two corporations and equal partners in the Practice.

Each doctor's respective employment agreement with the Practice contains restrictive covenants pursuant to which Tummala, Gousse and Ambinder agreed to not practice medicine within a 15 mile radius of any office of Florida Hematology or Lake County Oncology for two years after termination of employment. Specifically, Tummala's Employment Agreement with Florida Hematology and Lake County Oncology contained the following restrictive covenant:

> 14. Covenant Not to Compete: Employee shall not, during the Employee's employment with the Corporation [the Practice] 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 acknowledge that the above area constitutes the geographic service area 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 . . .

The Practice continued to expand and by 2004, Florida Hematology and Lake County Oncology had a total of seven offices at the following addresses:

1. 110 North Boulevard East
   Leesburg, Florida 34748

2. 1400 U.S. Highway 441/27 North
   Building 500, Suite 537
   The Villages, Florida 32159

3. 1120 Citrus Tower Boulevard
   Clermont, Florida 34711

4. 2501 North Orange Avenue, Suite 201
   Orlando, Florida 32804

5. 4106 Lake Mary Boulevard
   Suite 110
   Lake Mary, Florida 32746

6. 616 E. Altamonte Drive, Suite 100
   Altamonte Springs, Florida 32701

7. 4100 Waterman Way
   Tavares, Florida 32778

By 2004, Tummala was spending 100% of his time divided between three of the Practice's offices in Lake County: Tavares, Leesburg and The Villages. (A-79; lines 1-4) During his eight years with the Practice, Tummala received referrals of

oncology patients from at least 18 referral physicians and their practices.[2] In late 2003/early 2004, Tummala attempted to convince Gousse to leave the Practice and to join him in starting a new practice in Lake County, Florida. (A-327; lines 15-25; A-328; lines 1-7) When Gousse declined, Tummala declared his intention to leave the Practice notwithstanding. (A-328; lines 4-10) Given Tummala's pending departure, the Practice desired to hire additional doctors. However, Tummala refused to agree to the hiring of additional physicians.[3] (A-96; lines 17-25)

Tummala then asked to be relieved of the obligations of his restrictive covenant. The Practice declined Tummala's request. (A-329; lines 4-19; A-432; lines 8-23) On April 8, 2004, Tummala was provided with the required 90 days' written notice of termination without cause. (A-335; lines 15-19; A-820)

Tummala immediately began making arrangements to practice in Leesburg, Florida. Approximately 75 days before his termination became effective, Tummala formed a new entity for the purpose of practicing oncology and

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[2] 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 [Florida Hematology and Lake County Oncology's] most crucial business interests." Florida Hematology, at page 138.

[3] Pursuant to the Shareholders' Agreement, the hiring of an additional physician requires consent of all shareholders; if one shareholder dissents and refuses to approve a new hire, the Practice is unable to hire new physicians until the dissenting shareholder's employment is terminated.

hematology: "Cancer Centers of Central Florida, P.A." (A-335; lines 20-25; A-336; line 1; A-821) Further, while still an employee of the Practice, Tummala located new office space in Leesburg, Florida and began negotiations to lease the space from its owner. (A-336; line 6-25)

Tummala's last day of employment with the Practice was July 8, 2004. In August 2004, Tummala initiated this litigation. Tummala admitted that notwithstanding his restrictive covenant with Florida Hematology and Lake County Oncology, he opened an office in Leesburg, Florida, at 9826 U.S. Highway 441, Suite 101, Leesburg, Florida, well within a 15 mile radius of the Practice's Leesburg office and is actively practicing oncology and hematology. (A-416; lines 8-17) Further, Tummala has admitted to seeking and obtaining referrals of patients from at least 18 referral physicians and their practices with whom he established referral relationships while an employee of the Practice. (A-337; lines 22-25; A-338; lines 1-9; A-434; A-435; A-436; A-437; lines 1-15)

The Honorable William G. Law, Jr. of the Circuit Court of the Fifth Judicial Circuit for Lake County, Florida presided over a two-part evidentiary hearing upon the Practice's Motion for Temporary Injunction conducted on March 8, 2005 and on April 8, 2005. The Practice presented evidence of Tummala's violation of the restrictive covenant and of at least three (3) "legitimate business interests" justifying the restrictive covenant:

1. Relationships with existing patients;

2. Its exclusive oncology practice agreement with Florida Hospital Waterman in Tavares, Florida; and

3. Its referral relationships with area physicians.[4]

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

Nevertheless, the trial court relied upon 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) in refusing to enter injunctive relief premised upon protecting the Practice's legitimate business interests in its referral relationships with area physicians. The injunction entered by the trial court prohibited Tummala only from rendering medical services to existing patients of the Practice but did not otherwise enjoin him from competing within the fifteen (15) mile radius.

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

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 referral physicians and their practices.

In its Opinion filed April 21, 2006, the Fifth District Court of Appeal affirmed the trial court. Florida Hematology & Oncology v. Tummala, 927 So.2d 135 (Fla. 5th DCA 2006). In affirming the trial court's denial of injunctive relief to protect the referral relationships, the Fifth District recognized that its Opinion conflicted with the Third District Court of Appeal's holding on the same issue. Id., at Footnote 4.

On May 18, 2006, the Practice filed a Notice to Invoke Discretionary Jurisdiction of the Supreme Court to review the decision of the Fifth District Court of Appeal rendered on April 21, 2006 on the grounds that the decision expressly and directly conflicts with a decision of another District Court of Appeal. On September 11, 2006, this Court accepted jurisdiction.

## SUMMARY OF ARGUMENT

Pursuant to Florida Statute §542.335, a contract may contain a restrictive covenant if the restrictive covenant is reasonable in time, area and line of business. Moreover, the restrictive covenant must be reasonably necessary to protect one or more "legitimate business interests" of the party seeking enforcement. See Fla.

Stat. §542.335(1)(b). The trial court *sub judice* partially denied the Practice's Motion for Temporary Injunction, and refused to enforce the restrictive covenant as written or to otherwise fashion injunctive relief to protect the Practice's legitimate business interest in its referral relationships. Accordingly, the trial court refused to enjoin Tummala from rendering medical services within a 15 mile radius of the Practice's offices for two years, as required by the restrictive covenant in his employment agreement. The District Court of Appeal for the Fifth District affirmed.

In affirming, the Fifth District stated that the relationships with referral physicians were "perhaps [the Practice's] most crucial business interest." Id., at p. 138. The Fifth District had no difficulty reaching this conclusion because in the court below, the Practice provided unrebutted evidence of a 50 to 60 percent loss of referrals from the same referral physicians and a corresponding loss of patients, occasioned by Tummala's violation of his restrictive covenants. Significantly, Tummala admitted to receiving referrals from at least 18 referral physicians and their practices based on relationships that, with the Practice's financial support, he developed over the eight (8) years he was employed by Florida Hematology and Lake County Oncology.

Although the announced basis for the trial court's decision not to enjoin Tummala was its reliance upon Sanal, supra., that reliance was misplaced. Unlike

the unrebutted facts in the case at bar, Dr. Sanal did not receive any referrals from referring physicians with whom he had previously worked. Furthermore, the Plaintiff in Sanal did not demonstrate any significant decrease in its hematology/oncology patient load. Sanal, at p. 514.

The Fifth District Court of Appeal also relied in part on Sanal and held that it saw "no way to recognize referring physicians as a legitimate business interest and still give effect to the plain language of the statute." Florida Hematology, at p. 139. However, the plain language of the Statute does not prohibit courts from recognizing referral relationships as a legitimate business interest. Moreover, courts in other jurisdictions have recognized that the referral relationship constitutes a legitimate business interest worthy of protection. See e.g. Ruhl v. J.E. Hanger Co., Inc., 1992 WL 223738 (Ohio Ct. App. 1992); Fields Foundation, Ltd. v. Christiensen, 103 Wis.2d 465 (Wis. Ct. App. 1981); Bruce D. Graham v. Cirocco, 31 Kan. App.2d 563 (Kan. Ct. App. 2003); Medical Associates of Menomonee v. Baldwin, 153 Wis. 2d 397 (Wis. Ct. App. 1989); Battenkill Veterinary Equine v. Cangelosi, 1 A.D.3d 856 (NY. Sup. Ct. 2003).

As observed by the Fifth District, referral relationships are of the utmost importance in certain businesses, such as medical specialists. Those relationships must be protectable by restrictive covenant. Additionally, by refusing to enforce the restrictive covenant to protect the referral relationship, the courts are interfering

with the parties' right to contract. Because it is a fundamental right of competent parties to be able to negotiate and execute contracts without interference by the courts, the holdings below abridge that freedom by allowing Tummala to avoid his contractual obligations even though the obligations are not statutorily or constitutionally prohibited. It is clear that courts should not interfere with a contract unless the contract is illegal or violates the Federal or State Constitutions or state statutes. The restrictive covenant at issue here does none of those things.

Finally, the impact of this 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 to meet patient needs because practices will be unable to protect their "most crucial business interests." Moreover, referral relationships are not just crucial business interests for medical specialists but any business or occupation which expends effort, money and energy to cultivate referral relationships. In short, these businesses will be adversely affected if it is decided that referral relationships are not a legitimate business interest that can be protected by a restrictive covenant.

## ARGUMENT

### Standard of Review

The conflict between the Fifth District Court of Appeal and the First and Third District Courts of Appeals is based upon the Fifth District's interpretation of Florida Statute §542.335 and is an issue of statutory construction. On appeal, the issue of statutory construction is subject to *de novo* review. See Waste Management, Inc. v. Mora, 2006 WL 288 3208, *2 (Fla. 2006).

The Fifth District erred in Florida Hematology's Oncology v. Tummala, supra., by its interpretation of Florida Statute §548.335 to preclude protection of Petitioners' legitimate business interests in referring physician relationships:

a) Florida Statute §542.335 does not limit legitimate business interests to the statutory examples;

b) Other Florida appeals courts have recognized and protected legitimate business interests in referral relationships;

c) Other jurisdictions have recognized and protected legitimate business interests in referral relationships; and

d) The plain language of the Statute contemplates and allows referral relationships to be protected as a legitimate business interest.

Restrictive covenants entered into on or after July 1, 1996 are authorized by and governed in accordance with Florida Statute §542.335. Florida Statute §542.335, in pertinent part, provides as follows:

> (1) Notwithstanding s. 542.18 and subsection (2), enforcement of contracts that restrict or prohibit competition during or after the term of restrictive covenants, so long as such contracts are

reasonable in time, area, and line of business, is not prohibited. In any action concerning enforcement of a restrictive covenant:

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(b) The person seeking enforcement of a restrictive covenant shall plead and prove the existence of one or more legitimate business interests justifying the restrictive covenant. The term "legitimate business interest" includes, but is not limited to:

1. Trade secrets, as defined in s. 688.002(4).

2. Valuable confidential business or professional information that otherwise does not qualify as trade secrets.

3. Substantial relationships with specific prospective or existing customers, patients, or clients.

4. Customer, patient, or client goodwill associated with:

   a. An ongoing business or professional practice, by way of trade name, trademark, service mark, or "trade dress";

   b. A specific geographic location; or

   c. A specific marketing or trade area.

5. Extraordinary or specialized training.

Thus, in enforcing a restrictive covenant, a trial court is first required to determine that the geographic scope and term of the restrictive covenant are reasonable. Thereafter, the trial court is required to determine that the restrictive

covenant is reasonably necessary to protect the one or more legitimate business interests of the party seeking enforcement.

Neither the term nor the geographic scope of the restrictive covenant are issues in this case. By enjoining Tummala at least as to current patients of the Practice, the trial court acknowledged the reasonableness in time and scope of the restrictive covenant and determined that Tummala's "defenses" to the enforcement thereof were not sufficient to preclude at least partial injunctive relief.

**The Referral Relationship is a Legitimate Business Interest.**

Referring physicians are the area doctors who refer their patients to Florida Hematology and Lake County Oncology for medical services related only to oncology and hematology. It is unrebutted that the vast majority of patients seen by Florida Hematology and Lake County Oncology are the direct result of referrals from referring physicians and their practices. As an oncologist, Tummala concedes that 80% of his patients come from referring physicians and their practices. (A-338; lines 10-20)

The development and maintenance of relationships with referring physicians is so important to the Practice that it is an actual obligation of employment. (A-62; line 25; A-63; lines 1-25; A-64; lines 1-18) Tummala's employment agreement, at Paragraph 5(e), provides:

> "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." (emphasis added)

Further, Tummala has admitted that since leaving Florida Hematology and Lake County Oncology, he has received referrals from at least 18 referring physicians and their practices, all of whom he met and developed professional relationships with while an employee of Florida Hematology and Lake County Oncology. (A-434; A-435; A-436; A-437; lines 1-15) The unrebutted evidence at the injunction hearing is that the Practice has experienced a dramatic decline in the number of referrals from those same referring physicians and their practices since Tummala began competing. For example, at Florida Hospital Waterman Cancer Center, Dr. Ambinder testified that the loss of patients and associated referrals was between 50 to 60 percent. (A-99; lines 22-25; A-100; lines 1-7) The volume of referrals from the Practice's 10 best referral physicians was down 87 percent in the six month period after Tummala opened his competing practice. (A-916) Each of those physicians are now referring to Tummala (A-337; lines 22-25; A-338; lines 1-9; A-434; A-435; A-437; lines 1-15).

As the Fifth District noted, these relationships are perhaps the Practice's "most crucial business interest." Florida Hematology, at p. 138. The relationships

between Florida Hematology and Lake County Oncology and referring physicians and their practices are critical to its success.

**University of Florida Board of Trustee v. Sanal, 837 So.2d 512 (Fla. 1st DCA 2003) Does Not Preclude Recognition of Referring Relationships.**

Notwithstanding this most crucial business interest, the Fifth District held that it could not recognize referring relationships as a legitimate business interest *and* still give effect to the plain language of the Statute. Id., at p. 139. Because the majority in Sanal observed that "to qualify as a 'legitimate business interest,' a 'relationship' with a 'prospective patient' must be substantial and one with a specific, identifiable individual, [the Fifth District reasoned that] 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." Id., at p. 139. First, this reasoning is incorrectly premised upon whether "prospective patients" can be recognized as legitimate business interests, which is not the interest the Practice sought to protect *sub judice*. Second, the Fifth District construes Sanal in a manner inconsistent with the facts of Sanal itself. Third, the Fifth District ignores other cases which have expressly protected referral relationships. Finally, this overly narrow interpretation of Florida Statute 542.335 ignores the plain language of the Statute.

The Fifth District's statement that the lack of a specific, indentifiable relationship with a prospective patient "does not become a legitimate business interest simply by virtue of being referred by a physician" appears to be the basis

for affirming the trial court. But as the record below demonstrates, the Practice has never sought to claim or attempt to protect prospective patients as a legitimate business interest under Florida Statute §542.335. Indeed, Petitioners have no quarrel with the holding in Sanal regarding prospective patients.

Rather, it is the "specific, identifiable" relationships with "specific, indentifiable" referring physicians which the Practice must be able to protect. As the Fifth District noted:

> . . . the evidence was clear that Appellants (and most other medical specialists) received the significant share of their new patients from referring physician. They expend effort, money and energy to cultivate referral relationships. And, it was a requirement of Tummala's employment that he develop these referral relationships for the benefit of his employer. Because referring physicians are the major source of new business for a specialist's medical practice, they are perhaps Appellants' most crucial "business interest." Therefore, Appellants make a compelling argument that the law should recognize them as a "legitimate business interest." (Id., at p. 138)

Second, 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 as one of the reasons for 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.[5] 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 "specifically identifiable" in order to constitute a legitimate business interest. But that conclusion simply does not follow and as noted hereinabove, the Third District in Southernmost Foot and Ankle Specialists, P.A. v. Torregrosa, 891 So.2d 591 (Fla. 3d DCA 2004) and Open Magnetic Imaging, Inc. v. Nieves-Garcia, 826 So.2d 415 (Fla. 3d DCA 2002) has recognized the protectable interest of referral relationships.

In fact, enjoining Tummala from seeking and accepting referrals from the same referral sources would not have precluded him from providing oncology

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5 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 . . ."

services to the "unknown prospective patients" with which Sanal was concerned, so long as these patients were not the result of a prohibited referral. Such a result would have recognized and protected Florida Hematology and Lake County Oncology's legitimate business interests in its referral physicians and their practices while permitting Tummala to provide services to prospective patients.

**Other Florida Courts Have Recognized A Legitimate Business Interest in Referral Relationships.**

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 the conflict 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.

Although the Fifth District refused to follow the Third District's precedent in Southernmost, it recognized that the issue is "admittedly problematic" because these referral relationships are the Practice's "most crucial business interest." Florida Hematology, at p. 138.

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 [the Practice] 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 protection of these crucial referral relationships. 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.

Similarly, in Open Magnetic Imaging, Inc. vs. Nieves-Garcia, 826 So.2d 415 (Fla. 3d DCA 2002), the Third District reversed a trial court's failure to enjoin a

former employee who was marketing her new employer's competing MRI services to the same referral physicians she previously cultivated while employed by her former employer. The Third District recognized and protected referral relationships despite the fact that those relationships provided the MRI 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 that job 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 reasoned:

> 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.[6]

**Other Jurisdictions Have Recognized A Legitimate Business Interest in Referral Relationships.**

Other jurisdictions have also expressly recognized a business interest in referral physicians protectable by restrictive covenant.

In Ruhl v. J.E. Hanger Company, Inc., 1992 WL 223738 (Ohio Ct. App. 1992), the appellate court affirmed the trial court's enforcement of a restrictive covenant to protect an employer's legitimate business interest in referrals from physicians and therapists related to prosthetic and orthotic services provided by the employer. In doing so, the court stated:

> "An employer has a legitimate interest in limiting the ability of employees to take advantage of personal relationships

6 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 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.

> they develop while representing the employer to the employer's established clients."

In Fields Foundation, Ltd. v. Christiensen, 103 Wis. 2d. 465 (Wis. Ct. App. 1981), the appellate court affirmed the legitimate business interest of an employer in enforcing a restrictive covenant against its former medical director who utilized the same referral physicians in connection with opening his new practice. The appellate court noted that "…no rule precludes protection to an employer dependant on referrals, even if the employee had no contact with making the referrals." The court reasoned that "it would be unfair to permit [Defendant] to use [Plaintiff]'s own assets, its goodwill plus its referral sources to take away [Plaintiff] business…"

In Bruce D. Graham v. Cirocco, 31 Kan. App. 2d 563 (Kan. Ct. App. 2003); the appellate court affirmed the trial court's determination that an existing medical practice had a protectable interest in its contacts with referring physicians. On facts remarkably similar to the case at bar, the appellate court stated that while:

> "Cirocco [Defendant employee] might have set up shop by himself and developed a successful practice, the fact is he did not. Instead, he came to an entirely new area of the country, became board-certified while working for Graham [Plaintiff-employer] and, for six years, took advantage of Graham's established contacts in the community to make a name for himself."

In Medical Associates of Menomonee v. Baldwin, 153 Wis. 2d 397 (Wis. Ct. App. 1989), the appellate court affirmed a trial court's determination that a medical practice had a right to reasonably prevent competition by a former doctor employee based upon the Practice's referral base with other doctors in the area.

Finally, in Battenkill Veterinary Equine v. Cangelosi, 1 A.D. 3d 856 (N.Y. Sup. Ct. 2003), the appellate court noted that "loss of referral business usually garnered from clients" was evidence of the necessary irreparable injury for the enforcement of the non-compete provisions of the Defendant employee's restrictive covenant. In so holding, the court stated that:

> "[t]he equities balance in Plaintiff's favor. Plaintiffs spent over 20 years building its business, while Defendant had no contacts in the area except those developed through employment with Plaintiff. Defendant is not being deprived of a livelihood, as she is free to practice equine veterinary medicine outside the thirty-five mile area, or any other type of veterinary medicine in the location."

Tummala did not contend below that relationships with referral physicians were not crucial business interests. As a specialist whose practice is dependent on referrals for 80% of his patients, he likely recognized the folly of such a contention.

**The Plain Language of Florida Statute §542.335 Contemplates and Permits Recognition of Referral Relationships as a Legitimate Business Interest.**

Finally, the plain language of the Statute is clear that the enumerated list of statutory legitimate business interests is not exclusive. Nothing in Florida Statute

§ 542.335(b) precludes a specialty medical practice's relationship with its referral physicians from qualifying as a legitimate business interest which may be protected by a restrictive covenant. The language of Florida Statute § 542.335(b) provides that the statutory list of "legitimate business interests" is not exhaustive or exclusive:

> "The term "legitimate business interest" includes, but is not limited to…" (emphasis added).

In addition to the "is not limited to" language, the use of the term "includes" makes clear that the legislature did not intend the list to be limiting nor exhaustive. See Childers v. State, 936 So.2d 585, 597 (Fla. 1st DCA 2006) (holding that "because 'person' 'includes' the list of individuals and entities, … the legislature did not intend this list to be a limiting and exhaustive definition of the term… in standard usage, the use of the term 'include' does not indicate that a list of subjects is exhaustive."). "Includes" is a "non-limiting term" which proves that the list of legitimate business interests is "illustrative rather than exhaustive." Id.

A very basic and fundamental rule of statutory construction provides that the Legislature does not intend to enact useless provisions. See Beach v. Great Western Bank, 692 So. 2d 146, 152 (Fla. 1997); see also State v. Goode, 830 So. 2d 817, 824 (Fla. 2002). It is presumed that the Legislature intended every part of a statute for a particular purpose. See Alexander v. Booth, 56 So. 2d 716 (Fla. 1952). Effect must be given to each provision of a statute, and in construing a

statute or any part thereof it is important to consider both the statute and its language and give effect to every clause and every part in order to produce a consistent and harmonious whole that reflects the general policy sought by the legislature. See Ozark Corp. v. Pattishall, 135 Fla. 610 (1938); see Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998); *see* Levine v. Levine, 734 So. 2d 1191 (Fla. 2nd DCA 1999). Courts should stringently avoid interpreting statutes in such a way as would render any part of it meaningless, purposeless, or superfluous. See Gulfstream Park Racing Ass'n, Inc. v. Tampa Bay Downs, Inc., 2006 WL 2690152, *6 (Fla. 2006); see also Beach at 152; Goode at 824.

The Fifth District's construction of a legitimate business interest under Florida Statute §542.335(b) is overly narrow and renders part of the Statute meaningless. Because the Statute explicitly contemplates any number of legitimate business interests, the Fifth District's construction of the Statute eliminates protection of any legitimate business interest by restrictive covenant which may have the indirect consequence of affecting a related interest. In other words, just because the protection of referring physician relationships may have the collateral consequence of precluding the referral to Tummala of some unknown prospective patients, the Fifth District has precluded recognition of the most important business interest enjoyed by the Practice or any medical specialty practice.

Moreover, the Fifth District's construction of the Statute appears to be rooted in the concern that the Practice's protection of its relationships with referring physicians would have the effect of allowing the Practice to do indirectly what it cannot do directly in regard to prospective patients. But as noted, the Practice has never sought relief based upon relationships with prospective patients. More importantly, adopting the Fifth District's interpretation of the Statute reads into it a criterion which does not appear in its plain language: namely, that in order to constitute a legitimate business interest, the Plaintiff must also demonstrate that the protection of that interest will not have any effect upon any other related interest.

Despite the Fifth District's holding, the Statute can be construed in such a way as to protect the relationship with referring physicians and their practices while not doing violence to the holding in Sanal. Injunctive relief which orders that Tummala may not provide medical services to patients referred by the same referral sources he cultivated as a member of the Practice does not preclude services to prospective patients who are not the subject of a prohibited referral.

Furthermore, the Practice's substantial relationships with referral physicians and their practices are identical to those expressly contemplated by Florida Statute § 542.335(b)(3):

> "Substantial relationships with specific prospective or existing customers, patients or clients."

The relationship with referral physicians for a specialty medical practice is identical to the relationship with "existing customers or clients." Without these referral physician relationships, the specialty practice simply could not exist. (A-63; lines 8-16) It is the relationship between Florida Hematology and Lake County Oncology and the referring physician that is to be protected, and not the relationship with the unidentified patient who may ultimately be referred. Thus, those relationships with referral physicians and their practices are tantamount to the relationships expressly contemplated by Florida Statute § 542.335(b)(3).

Additionally, Florida Statute § 542.335(b)(4) expressly includes "customer, patient or client goodwill associated with:

> "(b) a specific geographic location; or
> (c) a specific marketing or trade area."

The testimony in the case was that the Practice has been in existence for twenty (20) years and has an outstanding and preeminent reputation, particularly in Lake County, Florida where, largely because of the goodwill it has created, it has the exclusive right to staff the cancer clinics of Florida Hospital Waterman and Clermont Hospitals. The success of Florida Hematology and Lake County Oncology has depended upon the goodwill not only of patients but, far more importantly, of the referral physicians, all of which goodwill constitutes legitimate business interests worthy of protection.

Thus, it is clear that a referral relationship can and should be viewed as a legitimate business interest that can be protected by a restrictive covenant pursuant to the plain language of the Statute.

Moreover, it is well established in this country that competent persons have the utmost liberty of contracting. See Wechsler v. Novak, 26 So.2d 884 (Fla. 1946). As long as the contracts are voluntarily made and executed, not the product of fraud or deception, and the contents thereof are legal in all respects, courts should uphold and enforce them. See id.; see also Fulton v. Ives, 167 So. 394 (Fla. 1936). In fact, it is a "matter of great public concern that freedom of contract be not lightly interfered with." Bituminous Cas. Corp. v. Williams, 17 So.2d 98, 101 (Fla. 1944).

In order for a court to interfere with a contract voluntarily negotiated and executed among competent persons, the contract must be illegal, or violate the Federal or State Constitutions or state statutes. See Wechsler, 26 So. 2d at 887. The restrictive covenant in Tummala's employment agreement is neither illegal nor does it violate the Federal or Florida Constitutions or Florida Statutes.

Contracts containing restrictive covenants are legal so long as the restriction is reasonable in time, area, and line of business, and supported by legitimate business interest. Compliance with the first three criteria was not disputed below. And, as has been established herein, the restrictive covenant at issue was supported

by a legitimate business interest. Thus the restrictive covenant should have been enforced.

Moreover, while a contract may not contain terms that violate statutes, the restrictive convent at issue *sub judice* is not violative of any statutes. See Wechsler, 26 So.2d at 887. As set forth above, Florida Statute §542.335 does not exclude referral relationships from being considered such an interest.

When Tummala first joined the Practice, he expressly agreed that he would not engage in the practice of medicine within fifteen (15) miles of any Florida Hematology and Lake County Oncology office for a period of two (2) years. Moreover, when he became a shareholder, Tummala once again executed an agreement with Florida Hematology and Lake County Oncology whereby he once again explicitly agreed and reaffirmed his restrictive covenant. Tummala voluntarily contracted for his right to practice medicine in that limited area in exchange for employment by Florida Hematology and Lake County Oncology and agreed to the terms of the restrictive covenant. The Practice, which fulfilled its contractual obligations, should not be denied that which it contracted for simply because the referral relationship is not one of the *enumerated* legitimate business interests in the Statute.

**The Impact of the Fifth District's Interpretation of Florida Statute §542.335 Will be Widespread and Will Undermine the Protections of the Statute.**

The impact of this 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. If an established medical practice is unable to protect its "most crucial business interest" of referral physicians, the practice is faced with the Hobson's Choice of either (1) not hiring new physicians to meet patient needs in order to protect the referral relationships regarding which the practice has expended "effort, money and energy to cultivate" or (2) hiring new specialists to meet patient needs but with no ability to protect the practice's most crucial business interest. Florida Hematology & Oncology, at p. 138. Moreover, referral relationships are not just crucial business interests for medical specialists, but they are also crucial for any business or occupation which expends effort, money and energy to cultivate referral relationships.[7] Despite this fact, the Fifth District will not protect those relationships by restrictive covenant.

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[7] In *dicta*, the Fifth District questions whether any referral physicians with whom Tummala worked would still refer to Florida Hematology and Lake County Oncology now that he is gone. Id., at page 139. The Fifth District must have overlooked the uncontroverted evidence presented to the trial court that while Florida Hematology and Lake County Oncology had suffered a 50-60% decline in referrals from 18 referral physicians, most of those physicians still referred some patients to Florida Hematology and Lake County Oncology despite Tummala's departure.

For example, pharmaceutical companies would be highly prejudiced by the refusal to recognize referral relationships as a legitimate business interest worthy of protection. Pharmaceutical companies hire representatives to go to medical offices and convince the doctors and nurses therein to prescribe their employers' medicine to their patients. In the process of doing this, and in order to be successful, the representatives must necessarily establish relationships with those doctors and nurses. This relationship is of the utmost importance to the pharmaceutical company, which financially enables and nurtures the relationship, because the "client" is not the end user of the prescription drug but the doctor who prescribes them.

If, however, the representative leaves the employment of the original company and begins representing a competing company, the original employer will be irreparably harmed if the representative is allowed to ignore his or her restrictive covenant and to call upon those same doctors and nurses to tout the competing medication. It is the relationship with the prescribing doctors and nurses, and not the end user, that is highly valuable to the pharmaceutical companies. Like the Practice, the pharmaceutical companies expend substantial resources to enable their representatives to develop relationships. It would be detrimental to those companies if, once those relationships are developed,

departing representatives could continue to utilize those relationships to benefit competing companies.

Medical supply companies would also be highly disadvantaged if referral relationships are deemed to not be legitimate business interests. Like pharmaceutical companies, medical supply companies hire salespeople to go to medical offices and persuade doctors to utilize or prescribe their supplies rather than those of a competitor. During this process, the salespeople necessarily develop relationships with the medical offices and it is that relationship which results in sales of the company's supplies. It would be detrimental to those companies if it could not ensure that the salespeople would not take the relationships that were created and utilize them for competitors.

In fact, this decision will affect all businesses which employ personnel to sell its products. If referral relationships are not considered to be legitimate business interests justifying restrictive covenants, many businesses would be unable to protect what is arguably their most important business interest. This effect would be devastating and render useless the right to restrict competition in many professions simply because an unknown "prospective" person of a prescription drug, medical device or other business product happens to be the end user of the product or service.

## CONCLUSION

Relationships with referral physicians are the most crucial business interest of a specialty medical practice. As such, these relationships are entitled to be recognized as a legitimate business interest protectable by restrictive covenant. This Court should reverse the Fifth District's decision in Florida Hematology & Oncology, supra., and should remand 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.


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## 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 October, 2006, to:

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