SUPREME COURT OF FLORIDA
CASE NO. SC06-993

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.

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

Respondent.
_____/

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

REPLY BRIEF OF PETITIONERS FLORIDA HEMATOLOGY & ONCOLOGY SPECIALISTS, P.A., LAKE COUNTY ONCOLOGY & HEMATOLOGY, P.A., AND ROY AMBINDER, M.D.

H. GREGORY MCNEILL, ESQUIRE
Florida Bar No. 0511080
Lowndes, Drosdick, Doster, Kantor & Reed, P.A.
215 North Eola Drive
Post Office Box 2809
Orlando, Florida 32802
and
THOMAS M. ERVIN, JR., ESQUIRE
Florida Bar No. 0107788
Ervin, Kitchen & Ervin
223 South Gadsden Street
Tallahassee, Florida 32302
Attorneys for Petitioners

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ARGUMENT IN REPLY TO ANSWER BRIEF

Respondent begins his argument by questioning this Court's decision to accept the conflict jurisdiction, declaring that the Fifth District Court of Appeal's Opinion in Florida Hematology & Oncology Specialists, P.A., Lake County Oncology & Hematology, P.A. and Roy M. Ambinder, M.D. v. Rambabu Tummala, M.D., 927 So.2d 135 (Fla. 5th DCA 2006), is only in "apparent" conflict with Southernmost Foot and Ankle Specialist, P.A. v. Torregrosa, 891 So.2d 591 (Fla. 3d DCA 2004). It is difficult to imagine how the conflict could be more "actual": the Southernmost court affirmed a trial court's finding that "referral doctors" were a legitimate business interest for purposes of Florida Statute 542.335. On the other hand, the Fifth District Court of Appeals' Opinion expressly rejected referral doctors as a legitimate business interest.[1]

The thrust of Respondent's argument on the merits is that by protecting the referring relationship as a legitimate business interest under Florida Statute 542.335, the "unidentifiable prospective patient" with whom the First District was concerned in University of Florida Board of Trustees v. Sanal, 837 So.2d 512 (Fla. 1st DCA 2003), would be "magically transformed into a legitimate business interest

[1] That Respondent continues to argue against conflict jurisdiction after this Court's decision accepting jurisdiction may be some indication of Respondent's desire to avoid the merits of the substantive issue.

by being referred by a physician." Answer Brief, at p. 9. Respondent's argument ignores the evidence below.

Unlike the hospital/employer in Sanal, Petitioners did not seek injunctive relief premised upon protecting "unidentifiable prospective patients". Rather, because Petitioners' oncology practice is dependent upon its relationships with referring physicians, Petitioners sought protection of these relationships, not those with prospective patients.

Moreover, unlike the more typical relationships with "customers, patients and clients" referenced by Florida Statute 542.335(1)(b)(3), the specialty practice markets to and develops long-term relationships with referring physicians. Accordingly, Respondent's employment agreement with Petitioners required, as a condition of employment, his efforts to entertain, develop and maintain relationships with referring physicians. Despite the foregoing, Respondent would deny protection of these relationships with specific, identifiable referring physicians simply because doing so might result in some future, unidentified, prospective patient being referred to another specialist not practicing in violation of a restrictive covenant.

Respondent places great weight upon Sanal and argues that the trial court and the Fifth District's reliance upon Sanal was proper. But Respondent fails to

address Petitioners' argument: despite the Fifth District's emphasis upon Sanal, that decision simply cannot be read to preclude the finding of a legitimate business interest in referring physicians. This is true because the only issue with which the First District was concerned in Sanal was whether the hospital/employer's business interest in unidentified and unknown potential patients within a 50 mile radius of its place of business satisfied the express language of Florida Statute 542.335: "substantial relationships with specific prospective patients." (emphasis added) The Sanal court held only that potential relationships with unknown patients could not satisfy the statutory requirement that the identity of the prospective patient be "specific," that is, a "particular, identifiable individual." Sanal, 837 So.2d at 516.

To read Sanal more broadly than that (as the Fifth District has done and as Respondent urges) is to eliminate protection by restrictive covenant of relationships with any third parties who are the "gatekeepers" of customers, clients and patients. As noted in Petitioners' Initial Brief, the impact of such a holding would be substantial, widespread and certainly not limited to specialty medical practices.

Furthermore, in affirming the trial court's denial of injunctive relief against a physician, the First District listed the factors supporting the denial of injunctive relief. Among the factors listed: Dr. Sanal received no referrals from the same

referring physicians. Sanal, at p. 514. While Respondent declares Petitioners' interpretation of Sanal to be "meritless," Respondent offers no counter-explanation for the First District's specific conclusion of this factor in its opinion. Answer Brief, at pp. 11-12.

Furthermore, the long term and beneficial relationships with referring physicians is in part of the "goodwill" of the Petitioners' medical practice, an enumerated legitimate business interest under F.S. 542.335(b)(4). In Medtronic, Inc. v. Janss, 1029 F.2d 1395 (11th Cir. 1984), the 11th Circuit Court of Appeals affirmed a district court's injunction of a pacemaker salesman who by "his contacts with former customers [prescribing physicians]," he "plainly tried to trade upon Medtronic's [his former employer] goodwill." Medtronic, Inc., 1029 F.2d, at p. 1401. The Medtronic court affirmed the injunction despite the fact that the ultimate recipients/purchasers of the pacemakers were "prospective" patients of the prescribing physicians and not persons with whom the salesmen had any relationship. In so ruling, the Medtronic court noted the "special relationship between a sales/technical service representative and the prescribing physicians." Id. at p. 1401. The goodwill being protected by the Medtronic court was this "special relationship" between the salesmen and the prescribing physician. The unknown prospective patients of the prescribing physicians who were ultimately

the end-users of the pacemaker product were not the business interests being protected by injunction.[2]

Respondent next poses a hypothetical (with no relevance to the undisputed facts): suppose Respondent joined an existing practice and did not receive referrals directly, à la Sanal. He claims that the harm to the Petitioners would have been "identical," whether he was in solo practice or in a group. Answer Brief, at p. 12.

Aside from the fact that this hypothetical is detached from the underlying facts, it is directly contrary to Tummala's contention that referring doctors do not make referrals to practices, but to individual doctors. Answer Brief, at pp. 14-15. If that is so, Respondent's hypothetical has no foundation in actual practice: the harm to Petitioners would not be identical because Respondent would not be the recipient of the same referrals simply by virtue of being affiliated with a group practice. If anything, it highlights the need to protect medical practices who hire, promote, support and compensate a doctor who then usurps the very relationships he was contractually obligated to develop.

The irony of Respondent's position cannot be lost on this Court. The only reason Respondent is in a position to usurp referrals from Petitioners' established

[2] Petitioners recognize that the Medtronic decision preceded the statutory incorporation of "legitimate business interest" for purposes of injunctive relief. However, the analysis with regard to protecting the business interests of the employer is unaffected by the particular statutory scheme.

referral sources is because Petitioners hired him; promoted him in the medical community; contractually required him to maintain and develop referral relationships; and compensated him for his efforts. This is no different than a salesman who develops customers for an employer, leaves his employment and thereafter seeks to switch these customers to a competing business. That these customers may or may not choose to continue business with the former employer has never been recognized as a defense to the enforcement of restrictive covenant. Moreover, it is this very uncertainty which mandates the remedy of injunctive relief, given the difficulty of establishing damages beyond speculation.

In attempting to limit the implications of the decision in Open Magnetic Imaging, Inc. v. Nieves-Garcia, 826 So.2d 415 (Fla. 3d DCA 2002), Respondent claims that "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." Answer Brief, at p. 21. On the other hand, Respondent reasons that because a database (such as the one in Nieves-Garcia) is a "tangible asset," it is subject to the specific protections of Florida Statute 542.335. This argument fails for two reasons.

First, a "database" is nothing more than a method of compilation. Its status as a legitimate business interest for purposes of F.S. 542.335 is wholly dependent upon the information compiled therein. For example, a database which reflects the

name of every street in the city of Tallahassee, Florida reflects nothing more than publicly available information, not ordinarily protectable.

Rather, in the Nieves-Garcia, what the Third District "protected" was information about referring physicians, "the nature and idiosyncrasies of their practices as well as information as to their referral patterns and preference and which insurance they accepted." Nieves-Garcia, at p. 419. Again, if relationships with referring physicians cannot be a legitimate business interest pursuant to Florida Statute 542.335, surely by virtue of being compiled into a "database," information about these relationships do not gain a different status.

Second, that Respondent's "reputation" with referral sources is not a "tangible asset" is no impediment to its protection. F.S. 542.335 recognizes a number of protectable interest which are not "tangible:"

> "Substantial relationships:" F.S. 542.335(1)(b)(3);
>
> "Customer, patient or client goodwill:" F.S. 542.335(1)(b)(4);
>
> "Extraordinary or specialized training:" F.S. 542.335(1)(b)(5)

Moreover, prior to his employment with Petitioners, Respondent had no reputation in the area proscribed by the restrictive covenant. It was his first employment in private practice and first employment in Lake County, Florida. His

reputation was developed and nurtured over his eight (8) year relationship with the Petitioners who promoted, marketed and compensated Respondent in his efforts to become established.

Respondent also argues that "physician to physician referrals" are somehow a "unique situation" among the various types of gatekeeper relationships. Answer Brief, at pp. 29-30. In support thereof, Respondent suggests that a salesperson who establishes a relationship with those who can help identify other users of their product is somehow organically different than a relationship established with a referring physician because the "reputation" of the physician is what attracts the referral, not the product.

First, Respondent's analysis is contrary to the Eleventh Circuit's reasoning in Medtronic, supra. Second, Respondent again misses the point. It is the established relationship with referring physicians which Petitioners seek to protect. Respondent's reputation (whatever it may be) is entirely irrelevant to whether there is a protectable interest. Whether a referring physician chooses to continue to refer to a practice after a physician departs; whether a hospital buyer continues to purchase surgical scrubs from a manufacturer after its salesman departs; or whether an orthopaedic surgeon continues to prescribe a certain brand of knee brace after the manufacturer's representative departs are all irrelevant to the analysis. The

issue simply is may the medical specialist, the salesman and the manufacturer's representative continue trading upon the established relationships with the referring physician, the hospital buyer and the orthopaedic surgeon, respectively, despite restrictive covenants to the contrary. Certainly the "reputation" of the person bound by the restrictive covenant has never been recognized under Florida law to be a defense to an otherwise enforceable restrictive covenant. Nor should it be here.

In "Issue II" of Respondent's Answer Brief, Respondent suggests that if this Court determines that referral relationships constitute protectable legitimate business interest for purposes of Florida Statute 542.335, the matter should be remanded to the trial court for consideration of Respondent's defenses to the restrictive covenant.

The remand for consideration of Respondent's "defenses" would be procedurally improper. As noted in the briefs filed with the Fifth District, the trial court granted partial relief upon the Petitioners' Motion for Injunctive Relief, enjoining Respondent from rendering medical services to the Petitioners' patients for two years. Despite Respondent's claim at the two days of evidentiary hearings that Petitioners were in breach of his employment agreement and therefore not entitled to enforce its restrictive covenant, the trial court correctly concluded that

Respondent's claims and defenses were insufficient to preclude injunctive relief. As this Court is aware, this factual conclusion is clothed with the presumption of correctness and may not be disturbed absent an abuse of discretion. See Johnson v. Roberts, 79 So.2d 425, 425 (Fla. 1955).

The evidence to the trial court as reflected in the record below was clear and unambiguous. Respondent admitted to receiving referrals from at least eighteen (18) referring physicians with whom he had established relationships while employed by Petitioners. Further, Petitioners presented unrebutted evidence that the volume of referrals from those same referring physicians had declined between 50% and 60% in the first six (6) months since Respondent set up his competing practice.

If this Court determines that the relationship with referring physicians is a legitimate business interest properly protectable pursuant to F.S. 542.335, there is procedurally nothing left to do except to remand the case for entry of injunctive relief to protect those relationships and enforcing Petitioners' restrictive covenant.

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 Respondent sufficient to protect the Petitioners' legitimate business interest in its demonstrated relationships with referral physicians and their practices.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to Christopher V. Carlyle, La Plaza Grande Professional Center, 20 La Grande Boulevard, The Villages, Florida 32159, this __ day of December, 2006.

_____

H. GREGORY MCNEILL, ESQUIRE
Florida Bar No. 0511080
Lowndes, Drosdick, Doster, Kantor
& Reed, P.A.
215 North Eola Drive
Post Office Box 2809
Orlando, Florida 32802
Telephone: (407) 843-4600
Attorneys for Petitioners

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Reply Brief complies with the font requirements set forth in Rule 9.210 of the Florida Rules of Appellate Procedure.

H. GREGORY MCNEILL, ESQUIRE
Florida Bar No. 0511080
Lowndes, Drosdick, Doster, Kantor
& Reed, P.A.
215 North Eola Drive
Post Office Box 2809
Orlando, Florida 32802
Telephone: (407) 843-4600
Attorneys for Petitioners

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