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Florida Hematology & Oncology Specialists v. Rambabu Tummala

SC06-993

ALL RISE.

HEAR YE, HEAR YE, HEAR YE.

THE SUPREME COURT OF FLORIDA
IS NOW IN SESSION.

ALL WHO HAVE BUSINESS BEFORE
THIS COURSE, DRAW NEAR, GIVE
ATTENTION AND YOU SHALL BE
HEARD.

GOD SAVE THESE UNITED STATES,
THE GREAT STATE OF FLORIDA
AND THIS HONORABLE COURT.

>> GOOD MORNING.

>> GOOD MORNING.

LADIES AND GENTLEMEN, THE
FLORIDA SUPREME COURT.

PLEASE BE SEATED.

>> GOOD MORNING AND WELCOME
TO THE FLORIDA SUPREME
COURT.

FOR OUR ORAL ARGUMENT
CALENDAR FOR WEDNESDAY APRIL
18th.

THE FIRST CASE ON OUR
CALENDAR IS THE FLORIDA
HEMATOLOGY AND ONCOLOGY
SPECIALIST CASE.

MR. McTPHAOEPL, ARE YOU
READY TO PROCEED.

>> YES, YOUR HONOR.

>> MAY IT PLEASE THE COURT

I'M GREG McNEILL HERE ON
BEHALF OF THE PETITIONER.

IT'S THE PETITIONER'S
POSITION IN THIS PARTICULAR
CASE THAT THE FIFTH DISTRICT
COURT OF APPEAL ERRED WHEN
IT CONSTRUED FLORIDA STATUE
542.335 TO EXCLUDE THE
ABILITY OF A MEDICAL
PRACTICE TO PROTECT ITS
RELATIONSHIPS WITH REFERRAL
PHYSICIANS.

>> HOW DO WE HAVE
JURISDICTION OVER THIS CASE?

>> YOUR HONOR YOU HAVE JURISDICTION PURSUANT TO THE CONFLICT BETWEEN THE FIFTH DISTRICT COURT OF APPEAL'S OPINION AND THE CASE AT BAR AND THE THIRD DISTRICT COURT OF APPEAL AND THE SOUTHERN MOST FOOT CASE AS WELL AS THE THIRD DISTRICT COURT OF APPEAL'S OPINION IN OPEN MAGNETIC IMAGING. IN THE SOUTHERN FOOT CASE, WAS REFERRING PHYSICIAN A PART OF THE DECISION IN HOLDING IN THAT CASE? I SEE IT REALLY SPEAKS AS TO TIME LIMITATION DUE TO GRAPHIC CONSTRAINTS AND THAT PRIVILEGE IS. I DON'T SEE ANYTHING OTHER THAN REFERENCING THE TRIAL COURTS ORDER THAT THERE'S A SPECIFIC HOLDING REGARDING -- REFER PHYSICIANS?

>> YOUR HONOR, THERE WAS NO PARTICULAR ANALYSIS DONE OF THE ISSUE OF REFERRAL PHYSICIAN COULD BE A LEGITIMATE BUSINESS INTEREST UNDER THE STATUTE. THE THIRD DCA AFFIRMED THE TRIAL COURT WHO FOUND BUSINESS INTEREST AND REFERRAL PHYSICIAN. HAS ANYONE -- DID ANYONE MAKE AN ARGUMENT IN THIS CASE THAT RESTRICTION SUCH AS THIS IN THE MEDICAL PROFESSION HAVE SIGNIFICANT PUBLIC POLICY IMPLICATIONS THAT WOULD DIFFERENT FROM IF YOU USED ANALOGY OF RELATIONSHIPS OF DIFFERENT DOCTORS AND I SEE THAT IT'S WORLDS APART. YOU KNOW, LAWYERS CONDUCT AND HAVING SUCH. HAS THAN BEEN RAISED, THOSE ISSUES?

>> YOU'RE HONOR I DON'T THINK THAT ISSUE IS DIRECTLY IN FRONT OF THE COURT. HOWEVER, YOU ARE CORRECT IN

MANY OPINIONS IN THIS STATE
THAT WITH CUFFNANCE AGAINST
RESTRICTION THE PUBLIC
POLICY ARGUMENT IS OFTEN
RAISED.

IS IT AGAINST THE PUBLIC
INTEREST?

TO MY KNOWLEDGE, THERE HAS
OBVIOUSLY BEEN ONE CASE FROM
1976 THAT INVOLVED THE
RESTRICTIONS ON A SURGEON IN
THE FLORIDA KEYS WHERE THE
COURT EXPRESSLY FOUND THAT
TO ENJOIN THAT SURGEON WOULD
BE AGAINST THE PUBLIC
INTEREST BECAUSE OF THE
SCARCITY OF THAT --

>> THAT WOULD ONLY COME UP
AFTER THE DETERMINATION IS
MADE AS TO WHETHER THERE'S A
LEGITIMATE BUSINESS
INTEREST.

>> PRESUMABLY, YES.

>> THAT'S -- THAT'S WHAT
WE'RE REALLY HERE ON THIS
THRESHOLD ISSUE.

IS IT YOUR POSITION THAT
THIS IS A MATTER OF
STATUTORY CONSTRUCTION?

>> E YES, IT IS AND HERE ON
DE NOVO REVIEW.

SO IN -- WHAT DID THE FIFTH
DISTRICT GET IT WRONG AS FAR
AS THEIR ANALYSIS?

>> I BELIEVE THE FIFTH
DISTRICT COURT OF APPEALS
IT'S A PETITIONER'S POSITION
THAT THEY CONSIDERED THE
OPINION OF THE FIRST DCA AND
EVEN THOUGH THE FACTS OF
SANAL WERE SIGNIFICANTLY
DIFFERENT WHAT THE FIFTH
CONCLUDED BECAUSE SAL CAN'T
HAVE UNEFFECTED PATIENTS WE
DON'T KNOW HOW TO PROTECT
REFERRAL PHYSICIANS BECAUSE
AT THE END OF THE DAY THAT'S
WHAT A REFERRAL PHYSICIAN IS
GIVING THE PRACTICE.

>> LET ME ASK YOU ABOUT THIS
REFERRAL PHYSICIANS.
AND IT FOES BACK ARE REALLY
TO THE PUBLIC POLICY
QUESTION THAT WAS ASKED

EARLYER.

BUT WAS THERE ANY ARGUMENT
MADE CONCERNING WHETHER OR
NOT BECAUSE THESE REFERRING
PHYSICIANS ARE NOT A PART OF
THE COVENANT THAT THE OTHER
PHYSICIANS ENTERED INTO.

H WE SOMEHOW -- IS THERE
SOME PUBLIC POLICY QUESTION
ABOUT WHETHER OR NOT WE
WOULD BE RESTRICTING
ACTUALLY -- THE REFERRING
PHYSICIANS ABILITY TO
PRACTICE?

>> THE ARGUMENT THAT WASN'T
EXPRESSLY MADE.

HOWEVER, I DON'T KNOW THAT
THERE'S A CON SEPIAL
DIFFERENCE BETWEEN A TPEFRING
PHYSICIAN AND A CUSTOMER FOR
EXAMPLE IN ANOTHER
NONCOMPETE SITUATION.

CLEARLY THE CUSTOM MANIER IS
NOT BOUND BY THE RESTRICTED
COVENANT.

HOWEVER THE COURTS HAVE
UNIFORMLY ENFORCED
RESTRICTIVE CUFFNANCE TO
PRECLUDES THE SALES PERSON
FOR EXAMPLE FROM CALLING ON
ACCEPTING BUSINESS FROM A
CUSTOMER IN THEIR FORMER
TERRITORY EVEN THOUGH
THAT --

>> DON'T YOU SORT OF SEE
THIS REALLY IN A DIFFERENT
LIGHT WHEN YOU'RE TALKING
ABOUT THE MEDICAL PROFESSION
AND A PATIENT AND THE
REFERRING PHYSICIANS.

IT SEEMS VERY INTERESTING TO
ME YOU CAN ENTER INTO THESE
KINDS OF AGREEMENTS AND A
PATIENT, EVEN THE PATIENT
WHICH IS NOT REALLY AN ISSUE
HERE DOESN'T HAVE THE RIGHT
TO GO TO THE PHYSICIAN THAT
HE OR SHE MAY WANT TO GO.

>> YOUR HONOR, I UNDERSTAND
THE POSITION.

THERE'S ONLY ONE APPELLANT
COURT CASE THAT I'M AWARE OF
WHERE A TRIAL COURT REFUSED
TO ENTER AN INJUNCTION

AGAINST A DOCTOR BASED
SOLELY ON PATIENT SELECTION.
BASICALLY SELECTION DECISION
ABOUT WHAT DOCTOR THEY
WANTED TO CHOOSE.
AND I APOLOGIZE.
THE CASES ESCAPES ME.
THE TRIAL COURT WAS REVERSED
FIND PAIN -- PATIENT'S RIGHT
TO CHOOSE WAS BASIS TO
DENIAL FOR INJUNCTIVE
RELIEF.
YOU WERE IN THE MIDDLE OF
EXPLAIN HOW THE FIFTH DCA
GOT IT WRONGED AS SHE
PHRASED IF QUESTION.
IT'S OUR POSITION THAT
BECAUSE SANAL INVOLVED ONLY
WHETHER OR NOT A MEDICAL IN
THIS CASE, THE UNIVERSITY
HOSPITAL IN JACKSONVILLE
WHETHER IT HAD A LEGITIMATE
BUSINESS INTEREST IN UNKNOWN
PERSPECTIVE PATIENTS.
IN THIS CASE IT WAS A
50-MILE GEOGRAPHICAL RADIUS
AND THE FIRST DCA AND
AFFIRMING THE TRIAL COURT'S
DENIAL OF INJUNCTIVE RELIEF
SAID YOU CAN'T HAVE A
LEGITIMATE BUSINESS INTEREST
IN UNKNOWN PERSPECTIVE
PATIENTS ANYWHERE IN THE
50-MILE RADIUS FOR TWO
YEARS.
WHAT OUR POSITION IS THAT
YOU CAN ADDRESS THE CONCERNS
OF SANAL IN OUR CASE AND
STILL PROTECT LEGITIMATE
BUSINESS INTERESTS OF THE
PRACTICE.
>> IN SANAL THERE WASN'T AN
ISSUE WITH REGARD TO
REFERRING PHYSICIANS AT ALL.
>> AT ALL.
>> LOOK AT THAT DECISION AND
THEY WERE TALKING IN TERMS
OF JUST BORROWING
COMPETITION WITH ANYONE.
THAT DECISION CAN STILL
STAND WITHIN YOUR ARGUMENT.
THEY DIDN'T ADDRESS IT AT
ALL THE SAME.
>> ABSOLUTELY YOUR HONOR.

IN SANAL THERE WAS NO EVIDENCE THERE WAS A DECLINE IN THE ONCOLOGY PRESENCE AND NO EVIDENCE THAT DR. SA IN AL SOLICITED REFERRALS FROM ANY PRIORITY SOURCES.

>> THE FIRST DCA INCLUDED THOSE FACT IN THE PARTNERSHIP.

>> SO THE RELIANCE IN SANAL IS MISPLACED.

LET'S GET BACK TO THE STATUTORY CONSTRUCTION QUESTION.

IS IT YOUR POSITION THAT THE WHERE WE HAVE TO LOOK TO SEE WHETHER THERE'S A LEGITIMATE BUSINESS INTEREST IS UNDER 11:00 SECTION 3 WHICH HAS TO DO WITH SUBSTANTIAL RELATIONSHIPS WITH SPECIFIC PERSPECTIVE OR SPECIFIC CUSTOMERS PATIENTS OR CLIENTS.

>> NO, YOUR HONOR.

BECAUSE THE STATUTE IS WORDED AS "AS INCLUDES BUT NOT LIMITED TO."

>> THEN WE WOULD HAVE TO EXTRAPOLATE FROM THE LIST OF WHAT IS THERE TO SAY THAT A REFERRAL RELATIONSHIP IS IN THE SAME CATEGORY AS THAT BUT YOU STILL HAVE TO SHOW THAT IT'S A SUBSTANTIAL RELATIONSHIP WITH A SPECIFIC PERSPECTIVE OR EXISTING REFERRAL DOCTOR.

IN OTHER WORDS, OR IS IT YOU CAN JUST BAN REFERRAL RELATIONSHIP HERE.

DO YOU UNDERSTAND WHAT I'M SAYING?

>> I TO.

>> IF YOU DON'T GO ON THREE, DO YOU JUST REFERRAL RELATIONSHIPS ARE LIKE TRADE SECRETS.

WE'RE JUST GOING TO PROTECT THEM OR DO YOU STILL HAVE TO USE A SUBSTANTIAL RELATIONSHIP LANGUAGE AND HOW DO YOU -- I'M TRYING TO THINK OF THE STATUTORY

CONSTRUCTION PRINCIPLE THAT
ALLOWS YOU TO PICK AND
CHOOSE WHAT TERMS YOU USE?
>> I WOULD SUGGEST THAT THE
COURT IS NOT CONSTRAINED BY
THE LANGUAGE OF THE STATUTE
IN THE PREDICATE IS THAT
LEGITIMATE BUSINESS INTEREST
INCLUDE BUT ARE NOT LIMITED
TO AND THEN IN THE
LEGISLATURE DOES SET FORTH
SEVERAL CATEGORIES OF
EXAMPLES.

IF -- CERTAINLY THERE ARE
SIMILAR LATENTITIES BETWEEN
THE REFERRAL PHYSICIAN
RELATIONSHIP WHICH IS A
KNOWN SPECIFIC IDENTIFIABLE
RELATIONSHIP.

AND SPECIFIC CLIENTS
CUSTOMER AND PATIENT.

THERE'S NO QUESTION THERE.

I DON'T BELIEVE BECAUSE THE
LANGUAGE OF THE STATUTE YOU
ARE LIMITED TO TRYING TO
FIND ONE OF THOSE CUBBIE
HOLES IF YOU WILL TO MAKE
YOUR INTEREST FIT INTO.

KIND OF WHAT BOTHERS ME
ABOUT THIS STATUTE IS THAT
HISTORICALLY MY RECOLLECTION
IS THAT IN FLORIDA THE
COVENANCE NOT TO COMPETE OR
TO BE CONSTRUED NARROWLY
BECAUSE THEY WERE IN
RESTRAINT OF TRADE.

THE STATUTE SPECIFICALLY
DICTATES A METHOD OF
CONSTRUCTION IN THIS STATUTE
THAT AWAY WITH THAT
REASON -- WITH THAT LINE OF
CASES.

I WONDER HOW FAR THIS COURT
CAN GO WITHOUT RUNNING INTO
A CONSTITUTIONAL PROBLEM IF
IT IS CONSTRUES THIS STATUTE
SO BROADLY THAT, IN FACT, IT
DOES RESTRAIN TRADE IN
VIOLATION OF THE
CONSTITUTION.

HOW FAR CAN WE GO?

>> YOUR HONOR I THINK WHAT
THE LEGISLATURE INTENDED BY
THE LANGUAGE OF THE STATUTE

IS THAT IF A PROPONENT OF A RESTRAINING TRADE CAN PLEAD AND PROVE A LEGITIMATE BUSINESS INTEREST WHATEVER THAT'S DEFINED TO MEAN THEN A RESTRICTIVE COVENANT SO LONG AS IT IS REASONABLE FOLLOWING THE CASE LAW THAT DEFINES REASONABLENESS WAS AVAILABLE TO RESTRAIN COMPETITION.

I THINK THE BURDEN IS ON THE -- IN MY CASE THE PETITIONER HERE TO PLEAD AND PROVE THE LEGITIMATE BUSINESS INTEREST THAT REQUIRES TO BE PROTECTED. I DON'T BELIEVE THAT AND IT'S CLEAR IN THE LANGUAGE OF THE --

>> THAT'S A LEGITIMATE BUSINESS INTEREST OTHER THAN WHAT IS SPECIFIED IN THE STATUTE?

>> YES, YOUR HONOR. SIMPLY BECAUSE THE LEGISLATURE CHOSE TO LEAD -- LEAVE THE STATUTE OPEN ENDED AS TO LEGITIMATE BUSINESS INTEREST WHICH MIGHT BE ABLE TO BE SUGGESTED, PLED, PROVED TO THE SATISFACTION OF THE TRIAL COURT.

>> IN DECIDING WHAT IS A LEGITIMATE BUSINESS INTEREST IN THIS CONTEXT AND BALANCING THE EMPLOYERS LEGITIMATE BUSINESS INTEREST AGAINST THE DOCTORS ABILITY TO PRACTICE THIS TRADE, WHY ISN'T IT APPROPRIATE TO MAKE A DISTINCTION BETWEEN REFERRAL PHYSICIANS WHO WERE ALREADY REFERRING PATIENTS TO THE EMPLOYER AT THE TIME THAT DR. TUMMALA BEGAN HIS EMPLOYMENT AND THOSE THAT REFERRED TO THE EMPLOYER BECAUSE DR. TUMMALA ARRIVED THERE AND WERE DOING IT AFTER HIS ARRIVAL SPECIFICALLY DR. TUMMALA. WHY ISN'T YOUR LEGITIMATE

BUSINESS INTEREST LIMITED TO THOSE REFERRAL PHYSICIANS THAT WERE REFERRING BEFORE TUMMALA'S ARRIVAL.

>> WELL IN, THIS PARTICULAR CASE, YOUR HONOR, DR. TUMMALA HAD NEVER LIVED, WORKED OR PRACTICED MEDICINE IN LAKE COUNTY, FLORIDA WHICH IS THE OFFICE THAT HE JOINED OF THE PRACTICE WHEN HIS STARTED.

IT WAS HIS FIRST PRIVATE PRACTICE.

HE HAD NO RELATIONSHIPS WITH ANY REFERRAL PHYSICIANS PRIOR TO JOINING THE PRACTICE AND UNDER HIS EMPLOYMENT AGREEMENT HE WAS REQUIRED TO DEVELOP TORE THE BENEFIT OF THE PRACTICE THOSE REFERRAL RELATIONSHIPS AND DID SO FOR EIGHT YEARS WHILE HE WAS COMPENSATED AND ENCOURAGED AND REIMBURSED FOR THOSE ACTIVITIES.

THAT WAS THE EVIDENCE THAT THE TRIAL COURT BELOW.

SO AFTER EIGHT YEARS OF PRIVATE PRACTICE WITH THIS PARTICULAR PRACTICE HE THEN STARTS HIS OWN IN THE SAME TOWN AND IMMEDIATELY BEGINS UTILIZING THOSE REFERRAL SOURCES THAT HE HAS DEVELOPED BANKLY ON THE EMPLOYER'S NICKEL FOR EIGHT YEARS.

THOSE ARE THE FACTS THAT OUR CASE.

I UNDERSTAND THE ARGUMENT BUT WHAT ABOUT A DOCTOR WHO HAD BEEN PRACTICING FOR 25 YEARS IN AN AREA AND THEN JOINS A PRACTICE.

WHAT ABOUT THE RELATIONSHIPS THAT MIGHT BE PREEXISTING THERE?

>> YOU'RE LOOKING AT IT FROM THE POINT OF VIEW OF THE DOCTOR.

I'M LOOKING AT IT REALLY FROM THE POINT OF THE VIEW OF THE EMPLOYER AND THE

EMPLOYER'S LEGITIMATE
BUSINESS INTEREST.

I CAN SEE HOW YOU WOULD SAY
WE HAD 50 REFERRING
PHYSICIANS BEFORE HE GOT
HERE AND HE TOOK THEM ALL.
AND WE HAD DEVELOPED A
RELATIONSHIP WITH THOSE
PHYSICIANS AND WE
ESSENTIALLY GAY HIM THOSE
PHYSICIANS TO MANAGE WHILE
HE WAS HERE AND HE TOOK
THEM.

THAT'S NOT FAIR.

AS OPPOSED TO PHYSICIANS
THAT HE DEVELOPED WITH HIS
OWN SWEAT, OWN ABILITIES AND
MARKETING AFTER HE ARRIVED
THERE WHEN YOU'RE
DETERMINING WHAT A
LEGITIMATE BUSINESS INTEREST
IS AND LOOKING AT THE OTHER
EXAMPLES IN THE STATUTE, WHY
ISN'T THAT DISTINCTION
APPROPRIATE TO MAKE?

>> BECAUSE I DON'T THINK THE
STATUTE ANYWHERE DELINEATES
TEMPORARILY DELINEATES
BETWEEN EXISTING
RELATIONSHIPS PRIOR TO
EMPLOYMENT AND RELATIONSHIPS
DEVELOPED DURING EMPLOYMENT.

>> BUT I UNDERSTAND WHAT YOU
ARE SAYING.

IT SAYS SUBSTANTIAL
RELATIONSHIP WITH SPECIFIC
PERSPECTIVE OR EXISTING
CUSTOMERS PATIENTS OR
CLIENTS, SO IF WE AFALL
GUISE TO THAT AND
UNDERSTANDING THAT THIS IS
AN INCLUSIVE IT'S NOT
EXCLUSIVE LIST WHEN YOU TALK
ABOUT SUBSTANTIAL
RELATIONSHIPS, WHAT'S
SUBSTANTIAL RELATIONSHIPS DO
YOU HAVE WITH REFERRING
PHYSICIANS AND WHY ISN'T IT
LIMITED TO THOSE REFERRING
PHYSICIANS THAT YOU HAD
BEFORE HE BEGAN HIS
EMPLOYMENT THERE?

>> I WOULD ANSWER THE
QUESTION FROM THIS CASE IS

THAT THE RELATIONSHIPS WITH REFERRAL PHYSICIANS THAT WERE DEVELOPED BY DR. TUMMALA WHILE AN EMPLOYEE ARE REALLY CONCEPTUALLY NO DIFFERENT THAN A SALES PERSON WHO GOES INTO A TERRITORY AND BEGINS DEVELOPING CLIENTS AND CUSTOMERS FOR THE EMPLOYER. I'M NOT AWARE OF ANY CASE IN FLORIDA WHERE THAT DISTINCTION HAS BEEN USED TO SAY, WELL THE SALESMEN RELATIONSHIPS THAT HE DEVELOPED WHILE WORKING FOR THE EMPLOYER THOSE CAN'T BE THE BASIS OF THE RESTRICTIVE COVENANT.

IT'S ONLY THE RELATIONSHIPS THAT THE EMPLOYER HAD PRIOR TO HIRING THE SALESMAN THAT CAN BE PROVIDED.

>> AREN'T YOU OVERLOOKING, THOUGH THE DIFFERENCES IN BUSINESSES AND PROFESSIONS AND SOME THINGS THAT MIGHT BE UNIQUE, FOR INSTANCE, TO LAWYERS OR PHYSICIANS OR WHATEVER YOU KNOW FOR THE ORDINARY BUSINESS THAT'S MANUFACTURING WIGITS AND THAT EVERYBODY GOES TO THAT BUSINESS BECAUSE THEY LIKE THEIR WIGIT AND THE SALESMAN -- WHAT YOU DESCRIBED MAY BE A PERFECTLY APPLICABLE AND NOBODY WOULD CONTROVERT THAT.

NOW WE'RE TALKING ABOUT SOMETHING THAT IS REALLY HIGHLY REFINED IN TERMS OF THE SELECTION OF A SPECIALIST OR A PHYSICIAN AND LOTS OF OTHER THINGS GO INTO A DECISION ABOUT SELECTING A TREATING PHYSICIAN, ESPECIALLY IN THE ONCOLOGY FIELD.

WOULD YOU NOT?

>> YES, YOUR HONOR. I WOULD.

IN FACT THERE'S SO MANY DIFFERENT FACTORS WHICH DO

COME INTO PLAY, ONE OF THOSE FACTORS FOR GOOD OR FOR BAD IS THE INSURANCE COMPANY. AND WHO THEY WILL PAY FOR AND WHO THEY WILL NOT. THAT OBVIOUSLY HAS NOTHING TO DO WITH THE REFERRAL PHYSICIAN, BUT THAT'S THE FACT OF LIFE AND THE PRACTICE OF MEDICINE IN FLORIDA IN THE SPECIALTY PRACTICE.

SO WHILE THERE ARE CERTAINLY SOME DIFFERENCES BETWEEN THE RELATIONSHIP BETWEEN A PATIENT AND THE DOCTOR I THINK THERE ARE SOME BUSINESS PRINCIPLES WHICH HAVE NOTHING TO DO WITH THAT RELATIONSHIP.

AND IN YOUR RESEARCH AND I REALIZE YOU'RE INTO YOUR REBUTTAL TIME SO I WANT YOU TO HIT THIS A WHACK.

HAVE YOU FOUND ANY CASE LAW FROM OTHER JURISDICTIONS THAT TREAT THIS UNIQUE REURP THAT PHYSICIANS HAVE AND REFERRING PHYSICIANS AND THIS IN ANY CONTEXT.

IN OTHER WORDS YOU FOUND ANY CASE LAW THAT WOULD SHED SOME LIGHT ON WHAT WE'RE TPWRAP LING WITH INsofar AS TREATING THIS PROBABLY A LITTLE BIT DIFFERENT THAN WE WOULD TREAT THE BUSINESS OF MAKING WIGIT IS.

WE HAVE CITED CASES THAT RECOGNIZE -- I DON'T KNOW THEY USE THE TERM LEGITIMATE BUSINESS INTEREST IN THE STATE OF HO -- HIO AND VISITS WITH FOR EXAMPLE, THAT HAVE A FIRM INJUNCTION THAT PROTECT THE REFERRAL RELATIONSHIPS.

>> HOW ABOUT CASES ON THE OTHER SIDE.

>> THERE'S A CASE CITED BY DR. TUMMALA'S ATTORNEYS FROM OKLAHOMA WHICH IN THAT PARTICULAR -- STATUTORY SCHEME IS DIFFERENT.

BUT IN THAT PARTICULAR CASE
THEY BELIEVE THAT THE
RELATIONSHIP BETWEEN A
DOCTOR AND PATIENT WAS
SOMEHOW DIFFERENT ORGANICALLY
THAN OTHER TYPES OF
RELATIONSHIPS.

>> THAT'S THE ONLY CASE THAT
YOU'RE AWARE OF.

>> THAT'S THE ONLY CASE I'M
AWARE OF.

MY COUNSEL MAY HAVE OTHERS.
THAT'S THE ONLY CASE I'M
AWARE OF.

>> THE ONLY WAY TO DEAL WITH
CARVE OUT ISSUE FOR THIS
PROFESSION.

THAT'S THE ONLY WAY TO DEAL
WITH IT.

WE CAN'T APPLY THAT TO OTHER
PROFESSIONS IN.

THE SAME PRINCIPLE IS THERE.

>> IS THERE -- THERE ANY WAY
SHORT OF DOING THAT THIS CAN
BE ACCOMMODATED.

>> OUR POSITION IS THAT I
DON'T KNOW THERE IS.

IN A DOCTOR IS ALLOWED TO
TAKE ADVANTAGE OF THE
REFERRAL RELATIONSHIPS HE
DEVELOPS WHILE WORKING WITH
THE EMPLOYER THE ONLY WAY TO
PREVENT IS THAT PRECLUDE HIM
FROM TAKING REFERRALS BUT
NOT PRECLUDE THE DOCTOR FROM
TREATING UNKNOWN PERSPECTIVE
PATIENTS SLOW -- SO LONG AS
THEY DO COME BY WAY OF
PROHIBITED REFERRALS.

>> I HAVE TO ASK THE
QUESTION.

I KNOW HOW LAWYER REFERRALS
WORK.

WHEN A DOCTOR REFERS THE
PATIENT, DO THEY THEN GET
MONEY FROM THE DOCTOR FOR
THE REFERRAL?

>> NO.

>> SO THE IDEA THAT AND THE
REFERRAL IS BASED ON WHETHER
THE DOCTOR WINS AND DINES
THE OTHER DOCTOR AS OPPOSED
TO -- WE'RE TALKING ABOUT
SOMEBODY THAT MIGHT HAVE

BREAST CANCER AND I WILL
FIND THE BEST PERSON IN THIS
AREA WHO HAS HAD THE BEST
TRAINING TO TREAT YOU.
THIS IS LIFE AND DEATH.
ARE YOU SANG -- SAYING THE
REFERRAL DOCTOR NOW CANNOT
TELL THE PATIENT WHO THE
BEST DOCTOR IN THE AREA IS
FOR TREATING THAT PARTICULAR
TYPE OF CANCER IF IT'S
SOMEBODY THAT WAS IN THIS
RESTRICTIVE RELATIONSHIP?
>> THAT WOULD BE THE EFFECT
OF ENFORCING THE RESTRICT
TOUGH COVENANT.
82 YOU DON'T SEE THAT AS I
GUESS WE WILL HAVE TOW AS
BEING A SIGNIFICANT PUBLIC
POLICY ISSUE AS FAR AS
PATIENT HEALTH AND IT'S IN
THEIR BEST INTEREST?
>> YOUR HONOR, IF THERE WAS
A LIMITATION IN, IN THE CASE
BELOW THERE WERE 60
ONCOLOGIST WHO WERE
IDENTIFIED AT TRIAL COURSE
AS PRACTICING IN THIS AREA
WITHIN THIS TKPAOEO
PHOTOGRAPHIC AREA.
IT WASN'T LIKE THERE WAS A
LIMITATIONAL NUMBER OF
QUALIFIED DOCTORS IN THE
AREA.
BUT STRICTLY SPEAKING IT
WOULD PRECLUDE THAT
REFERRAL.
>> THANK YOU FOR YOUR TIME.
>> THANK YOU.
>> MAY IT PLEASE THE COURT
I'M CHRIS CARLYLE.
>> I'M HERE WITH SHANNON
CARLYLE ON BEHALF OF THE
RESPONDENT DR. TUMMALA.
>> CAN YOU ADRESS FIRST THE
ISSUE THAT JUSTICE BELL
RAISED WHICH IS THE ISSUE IN
READING OVER THIS THE ONLY
REFERENCE THAT I SEE TO
REFERRAL DOCTORS IS A NOTE
ON WHAT THE TRIAL COURT
FOUND.
THERE WAS NO EVEN FINDING IN
THE APPELLANT COURT ABOUT

REFERRAL DOCTORS.

IT WAS A COMPLETELY
DIFFERENT ISSUE.

>> I AGREE.

I POINT OUT IN OUR ANSWER
BRIEF THAT FUR -- YOU'RE
LOOKING AT JURISDICTION THIS
CASE IS ABOUT AS THIN AS YOU
WILL EVER HAVE A CASE
PRESENTED TO THIS COURT.
IF NOT TO THE INCLUSION OF
TWO WORDS IN THAT OPINION
WITHOUT ANY ANALYSIS
WHATSOEVER.

WITHOUT BITING ISSUE.

WE DON'T KNOW WHY THOSE
WORDS ARE IN THERE BUT THEY
UNDENIABLY ARE.

DO YOU SUGGEST THAT CASE
CAN'T BE CITED THAT THOSE
REFERRAL RELATIONSHIPS CAN
BE PROTECTED IN THAT
OPINION?

>> NO, YOUR HONEST HONOR.
AGAIN, IT'S THE QUESTION OF
A PARENT CONFLICT.

THIS COURT HAS I WOULD ADMIT
DISCRETION.

AN APPARENT CONFLICT CASE
LIKE THIS.

>> CAN SOMEONE POINT TO THAT
AND SAY THIS CASE AFFIRMS
THIS LANGUAGE.

AND THAT'S NOT A PRINCIPLE
OF LAW.

COULD YOU NOT CITE THAT IN
GOOD FAITH TO A COURT.

>> YES, YOUR HONOR.

AND, AGAIN, I WAS ASKED TO
ADDRESS THE ISSUE OF THE
CONFLICT HERE.

THIS COURT HAS DISCRETION TO
ACCEPT JURISDICTION IN CASES
OF THIS TYPE.

IT DOES SO OR HAS TO THIS
POINT IN THIS CASE, IT MUST
BE AWARE OF THAT.

THIS IS REMARKABLY THIN AS
FAR AS JURISDICTION GOES FOR
THIS COURT HOWEVER THE COURT
DOES HAVE THE ABILITY TO DO
THAT.

>> THIS CASE SEEMS TO
PRESENT THAT HEAD-ON

CONFLICT THAT OCCURS IN A PARAGRAPH -- PRACTICE OF PROFESSIONS BETWEEN THE ECONOMIC REALITY AND THE TRUE PROFESSION.

I'VE THINK YOU'VE HEARD FROM THE BENCH CONCERN FROM VARIOUS MEMBERS ABOUT THIS IMPACT -- IMPACTS PROFESSIONAL JUDGMENT AND TREATMENT IN A VERY, VERY LIFE THREATENING KIND OF AREA.

IS IT POSSIBLE IN THIS CASE TO SEPARATE IN ANY WAY THIS CONCEPT OF PROFESSION FROM JUST PURE RAW ECONOMICS?

>> BELIEVE SO YOUR HONOR.

>> HOW WOULD THAT BE DONE?

>> I THINK THAT THE BENCH AND THE VARIETY OF QUESTIONS ABOUT THE UNIQUE RELATIONSHIP WE'RE TALKING ABOUT HERE AND I THEIR WE HAVE TO RECOGNIZE THAT.

THERE'S AN ENORMOUS DIFFERENT BETWEEN THE MEDICAL PROFESSION AND SALES OF A CERTAIN PRODUCT.

>> BUT THERE'S NOT FOR EXAMPLE -- YOU REPRESENT YOURSELF AS AN APPELLANT LAW FIRM.

MOST OF YOUR CASES FROM -- COME FROM OTHER LAWYERS; DO THEY NOT?

>> CORRECT.

>> WE'VE PROHIBITED THAT FOR LAWYERS.

BUT I DID AN APPELLANT PRACTICE.

I -- MY MOST IMPORTANT CLIENTS WERE THE TRIAL LAWYERS.

>> SURE.

I THINK THE KEY TO THE CASE AND WHAT WE HE'D TO LOOK AT IS THE STATUTE ITSELF IS WHAT WE'RE CONSTRAINED BY. THE JUSTIFICATION AND THE HISTORY AS TO WHY THE STATUTE EXISTS.

IT'S NOT ENOUGH TO SAY YES THIS IS IMPORTANT.

WE NEED TO TAKE IT TO THE
LEVEL AND ANALYZE IT IN THE
CASE OF LEGITIMATE BUSINESS
INTEREST.

AND THE STATUTE IS CLEAR.

TO SUGGEST THAT THE
RELATIONSHIP WITH THE
REFERRING PHYSICIAN IS
SOMEHOW DIVORCED OR
SEPARATED FROM -- FROM THAT
PHYSICIAN PROVIDE MEANING
THE PATIENTS, IS SIMPLY
DOESN'T MAKE SENSE.

IF IT'S A SOCIAL
RELATIONSHIP YOU MAINTAIN
THAT IT'S NOT A BUSINESS
INTEREST.

THAT'S NOT WHAT WE ARE
TALKING ABOUT.

THE STATUTE IS CLEAR THAT
IF -- IF WHAT THEY PROVIDE
THOSE BE SPECIFIC
SUBSTANTIAL RELATIONSHIP
IDENTIFIABLE.

>> DO YOU AGREE THE STATUTE
THE RESSE IS TANION ARE NOT
EXCLUSIVE.

>> THE STATUTE SAYS
INCLUDING BUT NOT LIMITED
TO.

HOWEVER, IT'S OUR POSITION
THAT TO ACCEPT THE
PETITIONER'S POSITION IS TO
TAKE THAT PROVISION AND
ACCEPT THE OPPOSITE OF IT.
IF THE STATUTE HAS SOMETHING
SPECIFICALLY LISTED IN THE
STATUTE, YOU CAN'T THEN
ACCEPT SOMETHING NOT
LITT -- LISTED THAT CON TO
VACCINES.

>> IF THERE WAS NO OF YOUR
ARGUMENT I ASSUME IF THERE'S
NOT A SUBSTANTIAL
RELATIONSHIP THEN IT'S NOT A
LEGITIMATE BUSINESS
INTEREST.

>> THE ANSWER OR THE
ARGUMENT IS BASED ON THE
FIFTH DCA'S OPINION AND
SANAL WHICH SAID THE STATUTE
IS CLEAR.

AND THE RELATIONSHIP MUST BE
SUBSTANTIAL AND

IDENTIFIABLE.

>> THAT'S NOT WHO THE CASE IS ABOUT, NOT PERSPECTIVE CLIENTS OR PATIENT.

IT'S ABOUT THE REFERRAL.

>> AGAIN, YOUR HONOR.

>> TO ME THE FIRST DCA DIDN'T TOUCH ON THAT AT ALL.

>> ABSOLUTELY.

>> LET'S GO BACK TO THE OTHER QUESTION.

YOU AN -- YOU AS AN APPELLANT LAWYER ARE YOU ARGUING THAT YOUR REFUSAL BASE ARE NOT IN THE POSITION OF CLIENTS VIEW?

>> THE WAY THIS IS DEFINED IT THE STATUTE IS A PATIENT -- A -- THE WORD "PATIENT."

>> IT DOESN'T SAY CUSTOMER SWRAOS RESPECTIVE CLIENTS.

>> CLIENTS I ASK YOU A SIMPLE QUESTION.

YOU CAN CERTAINLY EXPLAIN IT AWAY.

DO YOU NOT AS AN APPELLANT SPECIALIST CONSIDER YOUR REFERRAL ATTORNEYS WHO SEND YOU THE ACTUAL CASES.

THOSE PEOPLE DON'T KNOW YOU AT ALL.

YOUR REFERRAL ATTORNEYS SEND YOU THOSE CASES.

THOSE -- YOU DON'T CONSIDER THEM TO BE YOUR CLIENTS.

>> WELL, YOU UR HONOR AT THE TOEFPBD DAY THE CLIENT IS THE PERSON YOU.

>> THE PERSON YOU THINK ARE ARE YOU HRAOEUPBTS.

>> WE UNDERSTAND YOU REPRESENTATIVE YOU WILL TREAT A PATIENT.

I THINK ANY WAY THAT'S YOUR POSITION.

>> THE IS DEFINED IN STATUTE.

TO USE GENERIC TERM CLIENTS WE SERVE CLIENTS.

WE'VE TALKED TO REFERRING ATTORNEYS TO GET THIS.

THE -- AT THE OWNED OF THE DAY THE CLIENT IS PERSON WE

HAVE A CONTRACTUAL
RELATIONSHIP WITH.
REFERRAL ATTORNEY IS NOT?
>> WE DON'T HAVE A
CONTRACTUAL RELATIONSHIP.
>> MAYBE THAT'S THE ANSWER
THE CONTRACTUAL
RELATIONSHIP.

I THINK, EN, WE NEED TO LOOK
AT THE CONTEXT OF WHAT WE'RE
TALKING ABOUT HERE.
AND WE'RE TALKING ABOUT
PHYSICIANS AND WE NEED TO
ALSO -- I THINK IT'S
IMPORTANT TO LOOK AT THE
LEGISLATIVE HISTORY OF THE
STATUTE AND I CITED AN
ARTICLE FLORIDA BAR JOURNAL
FROM 1996 ADDRESSING JUSTICE
WELLS QUESTION EARLIER IT'S
IMPORTANT OVER THE EVOLUTION
OF THE HISTORY OF THIS
THROUGHOUT THE STATE.
YOU WENT FROM THE UNFAIR
COMPETITION ANALYSIS AT ONE
POINT MORE OF CONTRACTUAL
ANALYSIS AND LEGISLATURE
CAME BACK IN 1996 AND CITED
WITH THE IDEA OF UNFAIR
COMPETITION BEING SORT OF
THE GUIDEPSE.
LET ME DIRECT YOUR
ATTENTION THAT.
BECAUSE I WOULD LIKE TO
UNDERSTAND WHAT YOUR
POSITION IS AND WHAT
PROVISION FOR THE STATUTE
MEANS WHEN IT SAYS "SHALL
CONSIDER THE EFFECT OF
ENFORCEMENT OF PUBLIC HEALTH
SAFETY AND WELFARE, A COURT
SHALL CONSTRUE A RESTRICTED
COVENANT IN FAVOR OF
PROVIDING REASONABLE
PROTECTION TO ALL LEGITIMATE
BUSINESS INTEREST.
A COURT SHALL NOT EMPLOY ANY
RULE OF CONSTRUCTION THAT
REQUIRES A COURT TO CONSTRUE
A RESTRICTIVE COVENANT
NARROWLY AGAINST RESTRAINT
OR AGAINST THE DRAFT OR
OTHER CONTRACT."
THAT'S RATHER UNUSUAL.

BUT IT'S EXPRESS LANGUAGE AS TO HOW THIS IS CONSTRUED.

YES, I THINK -- I THINK THERE'S A BIT OF CONFUSION MAYBE IN THE PREVIOUS QUESTIONING ABOUT TWO DIFFERENT ISSUES INVOLVING PUBLIC INTEREST.

AND ONE ISSUE IS SET FORTH IN THE STATUTE BEING IF I'M SEEKING TO ENFORCE THIS THE ISSUE OF PUBLIC INTEREST ABOUT ENFORCEMENT OF THIS RESTRICTIVE COVENANT COMES TO PLAY.

THAT ISSUE WAS PLED AND BROUGHT FORTH AT THE TRIAL COURT.

BUT THE TRIAL COURT NEVER GOT TO THAT POINT.

I THINK THAT'S RECOGNIZED IN THE OPINION.

THE BROADER QUESTION ABOUT PUBLIC INTEREST OR PUBLIC POLICY, I THINK, WAS BROUGHT UP BY JUSTICE PARIENTE AND JUSTICE QUINCE IS THERE NOT A PUBLIC POLICY ISSUE TO SEEK OUT A CERTAIN DOCTOR.

I THINK THAT GOES TWAOBG WHAT WE TALK ABOUT HERE THE ISSUE OF UNFAIR COMPETITION. I WOULD TEND TO AGREE WITH JUSTICE CONVINCED IF I HAVE CANCER I WOULD LIKE TO SEE ANY DOCTOR I WOULD NOT LIKE TO -- LIKE TO BE CONSTRAINED BY CONTRACT.

BE THE STATUTE WE'RE DEALING WITH SAYS EXISTING PATIENTS OF A MEDICAL PRACTICE ARE LEGITIMATE BUSINESS INTEREST IN -- AND CAN'T BE SEEN.

DR. TUMMALA DIDN'T SEE ANY EXISTING PATIENT AND WENT TO GREAT LENGTHS TO DO THAT. ON THAT ONE.

I WANT TO MAKE SURE.

YOU'RE NO -- ARE NOT CONTESTING.

SOMEONE IS BEING ACTIVELY TREATED IN THIS CASE FOR CANCER.

THE DOCTOR IS THE EXPERT ON

THE --

[INAUDIBLE]

>> THAT'S DR. LEE 12346789

THE PATIENT IS PROHIBITED
UNDER THIS STATUTE FOR
CONTINUING -- TO SEEK
CONTINUING TREATMENT WITH
THAT DOCTOR.

>> I BELIEVE THAT'S THE
CASE.

>> NOBODY SAID THAT, THAT'S
AGAINST PUBLIC POLICY OR THE
PUBLIC INTEREST?
EVER?

>> I BELIEVE THE CLEAR
WORDING OF IT AND SANAL
TALKS ABOUT EXISTING
PATIENT.

THINK THE STATUTE IS CLEAR.
THAT'S NOT TO SAY SOMEONE
CAN'T POTENTIALLY ARGUE
THERE'S A PUBLIC POLICY
ARGUMENT THAT COULD OVERRIDE
THAT.

I'M CHAGRIN THAT NOBODY IS
RAISING THAT.

IT SEEMS WE ARE, AGAIN TO
COMPARE THIS TO SOMEBODY WHO
IS A SALES REP FOR A DRUG
COMPANY YOU KNOW AND I DON'T
KNOW WHETHER DR. TUMMALA IS
THE BEST, THE WORST, BUT WE
ALL KNOW THAT DOCTORS -- I
MEAN WOULD I WOULD HOPE THAT
DOCTORS AREN'T REFUSING
PATIENT TO DOCTORS BASED ON
WHO HAS GIVEN THE BEST
DINNER LAST WEEK.

AND I GUESS THAT'S GOING
BACK TO THIS ISSUE OF YOUR
PHYSICIAN -- LET ME ASK IS
THAT A SUBSTANTIAL
RELATIONSHIP, WHATEVER THAT
IS SUPPOSED TO MEAN REALLY
CAN'T BE DEVELOPED IN TERMS
OF A DOCTOR TO

DOCTOR -- BECAUSE DOCTORS
ARE REFERRING TO ALL SORTS
OF PEOPLE ALL THE TIME.

AND THAT'S JUST -- THAT
REFERRAL RELATIONSHIP ISN'T
WHAT IS INTENDED IS A
LEGITIMATE BUSINESS
INTEREST.

THAT'S ESSENTIALLY YOUR.
>> ESSENTIALLY TWO POINTS
AGAIN THE STATUTE SAYS
SPECIFIC IDENTIFIABLE
PATIENT AND AS THE FIFTH SET
FORTH IN THIS CASE WHAT THE
REFERRING PHYSICIANS PROVIDE
IS STREAM OF UNIDENTIFIED
PATIENT SOMEWHERE.
>> IF THEY SAY I GO BACK TO
WHAT JUSTICE LEWIS IS SAYING.
IF IT'S NOT EXCLUSIVE, AND
IF SOMEBODY CAN LOOK AT WHAT
THIS RELATIONSHIP WAS AND
SAY THAT, IN FACT, THIS
WAS -- YOU KNOW THEY BOTH
WENT TO COLLEGE TOGETHER.
THEY BOTH WENT HERE
TOGETHER.
THEY ARE JOINED AT THE HIP.
AND THAT HAS BEEN -- THEY GO
FISHING TOGETHER -- AND
THAT'S WHY THEY REFER.
IS THAT A BUSINESS -- OR IS
THAT A SUBSTANTIAL
RELATIONSHIP?
SO IT SEEMS LIKE IT'S ALMOST
A FACT-INTENSIVE SITUATION.
I GUESS HERE WE'RE SAYING
IT'S AN ALL OR NOTHING.
EITHER THESE REFERRAL
RELATIONSHIPS QUALIFY A
SUBSTANTIAL RELATIONSHIPS OR
THEY DON'T.
IF THEY COULD, MAYBE THERE'S
STILL A BURDEN TO PROVE THAT
THE PARTICULAR RELATIONSHIP
IN THAT CASE IS THE TYPE
THAT'S CONTEMPLATED AND THAT
GOES BACK.
>> I AGREE WITH YOU IN SOME
SENSE.
YOU WERE PRESENTED WITH THE
HYPOTHETICAL LEGAL QUESTION
WITHOUT ANY FACTS ATTACHED
TO IT.
MEANING CAN THEY BE A
LEGITIMATE BUSINESS
INTEREST.
HOWEVER, THAT.
>> AND JURISDICTION THAT
THEY CAN NEVER BE; IS
THAT --
>> OUR POSITION IS THAT WE

AGREE WITH THE FIFTH DCA IN THE CONTEXT OF PHYSICIANS THAT WE'RE DISCUSSING HERE THEY ARE NOT BECAUSE THE STATUTE SAYS THEY ARE NOT -- NOT.

WHAT THEY PROVIDE IS STREAM OF PATIENT THAT WILL BE COMING TO SOMEONE IN THE FUTURE THAT ARE NOT IDENTIFIED.

THIS SEEMS TO IGNORE THE FACT THAT THE LIST IN THE STATUTE ISS NO -- NOT EXCLUSIVE.

THEY DON'T SEEM TO RECOGNIZE THAT.

THEY SEEM TO INTERPRET THAT AS IF IT IS NOT ON THE LIST, IT'S NOT A LEGITIMATE BUSINESS INTEREST.

WELL, RESPECTFULLY, I DISAGREE.

YOU CAN HAVE A BUSINESS INTEREST THAT ARE NOT ON THE LIST.

BUT DOES THE FIFTH DCA RECOGNIZE THAT?

>> BELIEVE SO YOUR HONOR.

I BELIEVE WHAT WE ARE TALKING ABOUT -- AGAIN, IF SOMETHING -- YOU CAN'T HAVE SOMETHING THAT CONTRIBUTES THE ONE THAT IS.

IF THE THING IS IN THE STATUTE FOR A REASON THEY CHOSE TO PUT THE WORDING IN ABOUT SUBSTANTIAL RELATIONSHIP FOR SPECIFIC IDENTIFIABLE PATIENT.

AGREE TO HAVE A LEGITIMATE BUSINESS INTEREST AND REFERRING PHYSICIANS UNDER THE STATUTE THERE HAS TO BE A SUBSTANTIAL RELATIONSHIP WITH SPECIFIC REFERRING PHYSICIANS.

BUT WHAT IF THERE IS ONE? WHAT IF BAR MR. TUM GOT THERE THEY HAD SUBSTANTIAL RELATIONSHIP WITH SEVERAL REFERRING PHYSICIANS THAT HAD BEEN REFERRING FOR 20 YEARS PATIENTS AND THEN THEY

HAD SAID WE WANT YOU TO HANDLE SOME OF THE PATIENT THAT DR. LEWIS JUST REFERRED TO US.

AND THEN AFTER HE LEAVES HE DEVELOPED A RELATIONSHIP WITH DR. LEWIS.

ISN'T THAT A LEGITIMATE INTEREST FOR THE EMPLOYER?

>> I DON'T THINK SO YOU UR HONOR.

HERE'S WHY.

AGAIN, I YOU DON'T ELIMINATE THE WORDING OF YOUR STATUTE BY THE INSERTION OF THIS REFERRAL DR. INTO THE EQUATION.

SECONDLY WHEN WE TALK ABOUT THE UNFAIR COMPETITION ANALYSIS THAT YOU HAVE TO VIEW THE STATUTE UNDER IF THE BUSINESS ITSELF AND THE PREVIOUS DOCTORS THERE WERE SUCH A LEVEL THEN THE REFERRALS WILL CONTINUE TO COME REGARDLESS OF WHO WAS PLOYED THERE.

THAT'S NOT PART OF WHETHER YOU ARE GOOD OR BAD BUSINESS PERSON OR SHOE SALES PERSON. THAT'S NOT PART OF THE EQUATION.

>> BUT YOUR HONOR --

>> IF YOU HAVE A GOOD REASON FOR NOT GOING TO ENFORCE IT.

>> WHAT YOU ARE SAYING YOU CAN ONLY ENFORCE THE COVENANT IF YOU DON'T HAVE TO.

>> I'M SORRY.

>> YOU'RE SAYING YOU CAN ONLY ENFORCE THE KOF TPHUPBT IF YOU DON'T HAVE TO BECAUSE THE REFERRING PHYSICIAN --

>> I THINK THERE WAS A QUESTION ASKED ABOUT CASES FROM OTHER JURISDICTION.

I CITED A COUPLE IN THE BRIEF INCLUDING ONE FROM OHIO THAT SAID IT'S A MATTER OF COMMON SENSE THAT REFERRALS ARE MADE TO PHYSICIANS AND THAT PRACTICE CAN SUFFER NO LOSS OF

REFERRAL BASE BECAUSE THEY
HAVE NO REFERRAL BASE AS A
CORPORATION.

>> I DON'T BYE THAT ONE
BECAUSE THE SAME THING HAS
TO DO WITH PATIENTS?
THE PATIENT COMES TO A
DOCTOR, NOT A PRARBGS.
MAYBE SOMETIMES THEY DO MOST
OF THE TIME THEY COME
BECAUSE THAT DOCTOR IS
THERE.

SO I THINK THAT THIS THING
I'M GETTING MORE AND MORE
CONCERNED ABOUT IS WHETHER
RELATIONSHIP BETWEEN
REFERRAL DOCTORS ACTUALLY
CAN BE BUSINESS RELATIONSHIP
AND, THEREFORE LEGITIMATE
BUSINESS INTEREST.

JUST LEWIS USED IN THE
APPELLANT ANALOGY, OBVIOUSLY,
AGAIN, THIS ISN'T SOMETHING
THAT IS ANALOGIZED TO LAWYER,
BUT LAWYERS HAVE REFERRAL
RELATIONSHIPS THERE'S NEVER
LIKE THEY COULD BE REFERRING
TO DIFFERENT PEOPLE.

BUT THEN WHEN THEY HAVE THAT
RELATIONSHIP THERE'S THAT
BUSINESS RELATIONSHIP.
THEY BOTH HAVE TO CONTRIBUTE
TO JUST THAT CLIENT.

HERE IF I UNDERSTAND THIS
THE REFUSAL IS MADE, THERE'S
NO MONEY THAT IS EXCHANGED.
THERE IS -- I DON'T KNOW IF
UNDER ETHIC CODE TEARS OTHER
THINGS THAT THEY CAN DO FOR
THE DOCTOR, BUT WHERE IS IN
THE RECORD THE EXPLANATION
OF WHAT IS THE BUSINESS OF
THE REFERRAL DOCTOR.
WHAT IS THAT BUSINESS
RELATIONSHIP?

>> AGAIN, I THINK.

>> IT SEEMS THAT THIS IS A
FAILURE OF PROOF IT CAN BE
ONE THIS, THIS CASE.

>>, I THINK, AGAIN IN THE
POSITION THAT WE'RE
EXPRESSING IS AND I THINK
YOU'RE EXACTLY RIGHT.
WHAT IS THE RELATIONSHIP

BETWEEN THE PHYSICIAN AND
THE REFERRAL PHYSICIAN --
>> THE REFERRING PHYSICIAN
IN THESE CASES IS GENERAL
PRACTITIONER WHO 'TIS
COVERED CANCER, THEN THERE'S
NO LONGER INVOLVED IN THE
TREATMENT OF THAT PATIENT.
IS THAT WHAT YOURY SANG,
THEN IT'S A CONTINUING
RELATIONSHIP BUT IF NOT, I'M
SORRY.

I'M MISSING THE WHOLE POINT
OF THAT ARGUMENT.

>> IT SEEMS TO ME AN
ONCOLOGIST YOU ARE DOING
TREATMENT ON CANCER PATIENT.
IS THAT A FAIR STATEMENT?

>> I BELIEVE SO YES.

>> THE ONLY WAY THE PATIENT
DON'T WALK INTO THAT OFFICE
THEY COME BECAUSE SOMEONE IS
DIAGNOSED A CONDITION FOR
WHICH THAT PROFESSION, THAT
PROFESSIONAL TREATS.

>> THE FIRST PERSON DOESN'T
JUST AND THEM AND LEAVE THEM
DO THEY?

>> NO.

>> THERE'S CONTINUING WORK
WITH THAT PERSON.

>> THERE'S A CONTINUING
RELATIONSHIP BETWEEN THE
DOCTOR ANDTY -- THE PATIENT
AND PERHAPS SOME SPWRARBGS
BETWEEN THE TWO DOCTORS
INVOLVED.

>> I WOULD HOE SO.

I THINK WHAT A DIFFICULTY
HERE IS WHAT DOES A REFERRAL
PHYSICIAN PROVIDE TO THE
DOCTOR?

HE PROVIDES UNIDENTIFIED
STREAM OF PATIENTS.

THE STATUTE SAYS THOSE ARE
TO BE SPECIFIC AND IDENTIFY
TOABLE WITHIN A BUSINESS
INTEREST.

THEY ARE NOT.

THAT'S WHAT SANAL SAID.

THAT'S WHAT THE FIFTH DCA
SAID.

IS IT A BUSINESS

RELATIONSHIP WITHOUT THOSE

PATIENTS BEING REFERRED?

NO.

IF IT'S A SOCIAL
RELATIONSHIP, IF IT'S
SOMETHING ELSE, THEN IT
DOESN'T MATTER AND DOESN'T
REQUIRE PROTECTION UNDER THE
STATUTE.

>> THINK YOUR ARGUMENT IS
THERE'S SOMETHING UNIQUE
ABOUT MEDICINE.

>> ABSOLUTELY.

RATHER THAN ECONOMIC
ARGUMENT BECAUSE THE
ECONOMICS THIS IS WHERE THEY
COLLIDE.

>> ECONOMICS COLLIDE HERE.

LET ME ASK YOU A QUESTION.

DO YOU AGREE THAT REFERRAL
PHYSICIANS ARE NOT CUSTOMER'S
PATIENTS OR CLIENTS?

>> THAT'S OUR POSITION THEY
ARE NOT.

IF THE PATIENTS ARE WHAT THE
DOCTOR ULTIMATELY IS SEEING.

THE REFERRAL PHYSICIAN IS
NOT DEFINED BY THE STATUTE.

>> AND IF MY CONCERN IS IF

WE LIMIT OR INCLUDE THE

BROAD TERM REFERRAL

PHYSICIAN AS A BUSINESS

INTEREST OUTSIDE THE

EXCLUSIVE LIST HERE THEN

DOESN'T THAT DO AWAY WITH

NARROWNESS OF THE DEFINITION

OF CUSTOMERS, CLIENTS AND

PATIENTS THAT THEY BE

SUBSTANTIAL RELATIONSHIPS

WITH SPECIFIC PERSPECTIVE

CLIENTS.

DO YOU UNDERSTAND MY

QUESTION SKWRAOPL I'M TRYING

TO UNDERSTAND YOUR QUESTION.

WE -- IF WE ACCEPT THE

ARGUMENT OF YOUR OPPONENT

WHICH REFERRAL POSITIONS

WHICH IS THE SOLE BASIS,

BASICALLY OF SUBSPECIALIST

LIKE YOUR CLIENTS OF

RECEIVING PATIENTS, THEN

AREN'T WE JUST TOTALLY

EVISцерATING THE LIMITATION

OF THIS?

>> I BELIEVE SO.

>> I THINK SO.

AND I THINK THAT AGAIN THE COURT HAS FOCUSED AND TALKED ABOUT THE NATURE OF THE PHYSICIAN RELATIONSHIP AND I THINK THAT IS PART OF THIS. AND I THINK THE WORDING OF THE STATUTE IS CLEAR ON THIS POINT, ALSO.

>> WILL THERE BE ANY DIFFERENCE IF YOUR CLIENT HAD ACTUALLY GUN OUT AND DID WHAT HE DID AT -- GONE OUT AND DID WHAT HE DID AT THE CORPORATION AND COURTED THE REFERRING PHYSICIANS IN THE SAME MANNER THAT HE DID AT THE CORPORATION.

IS THAT DIFFERENT FROM THESE REFERRING PHYSICIANS SIMPLY GIVING -- IF REFERING THE PATIENT WITHOUT HIM GOING THROUGH THE STEP OF TRYING TO ENTERTAIN THEM AND GET THEM FOR THE CLIENT.

>> I DON'T BELIEVE SO AND HERE'S WHY.

THE TERM LEGITIMATE BUSINESS INTEREST AND THAT ARTICLE I SIGNED TALKS ABOUT IT BEING AN ASSET THAT IF MISAPPROPRIATED WOULD GIVE ITS NEW OWNER UNFAIR COMPETITIVE SRABG OVER THE FORMER OWNER.

THE RELATIONSHIP THAT DOCTOR HAS OR HIS REPRESENTATION IS NOT AN ASSET OF THE PREVIOUS EMPLOYER.

IT'S SOMETHING THAT IS UNIQUE TO THAT DOCTOR AND ONCE HE LEAVES I SEE MY TIME IS UP.

CAN I FINISH ANSWERING THIS QUESTION, PLEASE.

>> ONCE HE LEAVES, FEHN YOU CAN'T FORCE THOSE DOCTORS WHO REFERRED TO HIM HERE TO CONTINUE REFERRING TO THE FORMER BUSINESS.

HIS REPRESENTATION THAT HE DEVELOPED AND THAT'S WHY HE GETS REFERRALLED GOES WITH HIM WHEREVER AND YOU CAN'T

SAY GIVE THAT REPRESENTATION
BACK FORMER EMPLOYER.
WE WILL PROTECT THAT.
IT'S NOT THEIR ASSET.
IT'S A UNIQUE SITUATION
INVOLVING A DOCTOR WHERE HIS
REPRESENTATION IS WHAT GAINS
THE REFERRALS AND ONCE HE
LEAVES IT'S FAIR COMPETITION
TO SAY THAT THOSE DOCTORS
CAN CHOOSE TO REFER TO THE
PREVIOUS EMPLOYER.

>> THANK YOU VERY MUCH.

>> QUESTIONS WERE BEING ASK
INSTEAD.

LET ME BE THE FIRST TO TAKE
UP YOUR 35 SECONDS.

>> THE HE REALLY MEANS IT.

>> UNLESS WE HAVE MENTAL
TELEPATHY GOING ON.

IN THE PREPARATORY LANGUAGE
OF THIS STATUTE IN THE VERY
OPENING PARAGRAPH, THE
LEGISLATURE TALKS ABOUT
AUTHORIZING RESTRICTIVE
COVENANTS THEN THEY HAVE
QUALIFYING LANGUAGE SO
WRONG AS SUCH CONTRACTS ARE
REASONABLE AND THEY TALK
ABOUT IN TIME AREA BUT THEY
ALSO SAY IN LINE OF
BUSINESS.

AND SO ISN'T THAT A SIGNAL
THAT THE LEGISLATURE WANTS
BOTH PEOPLE IN PROFESSIONS
OR BUSINESSES OR WHATEVER
AND ALSO WANTS COURTS.

>> OKAY.

>> TO LOOK AT THE LINE OF
BUSINESS THAT IS BEING
AFFECTED.

AND I ASK THAT WITH
REFERENCE TO THE QUESTION
THAT HAVE BEEN ASKED OF YOU
HERE WITH REFERENCE TO THIS
UNIQUE RELATIONSHIP OF
PHYSICIAN IN PATIENT AND
WHAT WE HAD THE IMAGE OF IS
A PATIENT WHO IS
UNFORTUNATELY STRICKEN WITH
A SERIOUS CANCER, A DISAND
NOW THE PHYSICIAN THAT HAS
BEEN TAKEN CARE OF HER AND
LEAVES THE TKPWRAOEP -- GROUP

AND SHE HAS FORMED THIS VERY SPECIAL AND IT'S AS MUCH AN EMOTIONAL RELATIONSHIP AS THE CONFIDENCE IN THE PHYSICIAN AND ALL THAT AS IT IS ANYTHING ELSE AND WE HAD THE SPECTER UNDER A PROVISION LIKE THIS THAT, THAT PATIENT CAN'T CONTINUE TO GO TO THAT DOCTOR ONCE THAT DOCTOR LEAVES THAT GROUP.

AND I'M REALLY ASKING YOU ISN'T THIS WHAT THE LEGISLATURE MEANT WHEN IT ASKED THAT WE CONSIDER THE LINE OF BUSINESS TO CONSIDER FACTORS LIKE THAT AND THE WAY THAT WE INTERPRET THESE STATUTORY PROVISIONS.

>> I GUESS MY RESPONSE WOULD BE THE LEGISLATURE USED WORD "EXISTING PATIENTS" AS A LEGITIMATE BUSINESS INTEREST SPECIFICALLY IN THE STATUTE.

AND THE WORD PATIENT TYPICALLY MEANS PATIENT WITH REGARD TO A PATIENT/DOCTOR RELATIONSHIP AND THEY CLEARLY INTENDED TO PROJECT THE RELATIONSHIP WITH EXISTING PATIENTS.

>> HOW COULD IT BE REASONABLE?

IF YOU HAVE A PATIENT WHO HAS THIS RELATIONSHIP WITH THE PHYSICIAN AND THEY ARE TOLD THEY CANNOT GO TO THIS DOCTOR.

TELL ME HOW THAT COULD POSSIBLY BE REASONABLE?

>> YOUR HONOR OUR RESPONSE WOULD BE ONLY THAT -- NONCOMPETE CASES WHICH HAVE CONSTRUED THE STATUTE THAT FOCUS OF REASONABILITY AS ALWAYS BEEN ON GEOGRAPHIC SCOPE, THE NONCOMPETE AND WHETHER OR NOT IT IS A LEGITIMATE BUSINESS INTEREST WHICH CAN BE PROTECTED UNDER THE STATUTE.

I DON'T BELIEVE THERE'S EVER

BEEN A CASE WHICH IS
ADDRESSED DIRECTLY OR HEAD
ON.

IS IT REASONABLE FOR -- FOR
AN EXISTING PATIENT TO NO
LONGER BE ABLE TO SEE A
DOCTOR WHO THEY PREVIOUSLY
HAVE BEEN SEEING BECAUSE THE
DOCTOR --

>> IS THAT A VALID
CONSIDERATION?

>> IT CERTAINLY VALID
CONSIDERATION AND
FURTHERANCE TO ONE OF
JUSTICE LEWIS COMMENTS TO ME
EARLIER IS UNLESS THIS COURT
IS PREPARED TO MAKE A
DISTINCTION BETWEEN THE
MEDICAL PROFESSION AND ANY
OTHER PROFESSION IN BUSINESS,
IN THE WAY THAT INTERPRETS
THIS STATUTE BECAUSE, AGAIN
THE FIFTH CAN'T MAKE THIS
DISTINCTION.

THE FIFTH SIMPLY INTERPRETED
THE STATUTE TO SAY YOU CAN'T
PROTECT REFERRAL
RELATIONSHIPS AND THE
CONCERN THAT PETITIONERS
HAVE BEYOND JUST THIS
PARTICULAR AREA IS THIS
LOGIC WOULD EFFECT ANY
GATEKEEPER RELATIONSHIP.
UNLESS THIS COURT IS
PREPARED TO INTERPRET THE
STATUTE TO MAKE A
DISTINCTION FOR DOCTORS
RATHER THAN.

>> YOU'RE OUT OF TIME.

ONE LAST QUESTION.

WHY HAS PRESIDENT STATUTE
MADE THAT DISTINCTION?
WHERE IT SAYS IN DETERMINING
THE ENFORCEABILITY OF A
RESTRICTED COVENANT A COURT
SHALL CONSIDER THE EFFECTIVE
ENFORCEMENT UPON THE PUBLIC
HEALTH SAFETY AND WELFARE?
SO IT SEEMS -- WHY ISN'T
THAT A CARVING OUT OF
A -- THIS TYPE OF SITUATION
WHEN YOU TALK ABOUT
PATIENTS.

>> I THINK IT IS JUSTICE

WELLS.

I THINK IT'S ON A
CASE-BY-CASE BASE -- BASIS.
IN THIS CASE THE TESTIMONY
WAS THAT THERE WERE 60
ONCOLOGIST ON THIS
GEOGRAPHIC AREA WHO WERE
BOARD CERTIFIED IN THE AREAS
OF HEMATOLOGY AND ONCOLOGY.
DR. TUMMALA WAS NOT THE ONE
RARE PHYSICIANS FROM THE
1976 CASE.

THAT'S ABSOLUTELY CORRECT.
A TRIAL COURT IS SUPPOSED TO
LOOK AT THOSE ISSUES AND
MAKING THAT DECISION.

I AM ONLY AWARE OF ONE TIME
IN ALL THE JURISPRUDENCE OF
THE STATE OF FLORIDA WHERE
THAT HAS BEEN SUFFICIENT TO
OVERRIDE THE RESTRICTED
COVENANT.

>> WE THANK YOU FOR THE
ARGUMENTS ON A VERY
IMPORTANT CASE AND
APPRECIATE YOU HELPING US
RESOLVE THIS.

AND WE WILL TAKE IT UNDER
ADVICE.

THE COURT WOULD LIKE TO
ACKNOWLEDGE THE PRESENCE
THIS MORNING FROM ONE OF OUR
FINE LOCAL UNIVERSITIES
FLORIDA A&M UNIVERSITY THE
LEGAL ENVIRONMENTAL BUSINESS
LAW CLASS AND DR. RICHARD
WRIGHT HERE THIS MORNING FOR
ARGUMENT WE'RE GLAD YOU ARE
HERE AND WE HOPE YOU FIND
THEM INFORMATIVE.