

>> ALL RISE.
HEAR YE, HEAR YE, HEAR YE, THE
SUPREME COURT OF FLORIDA'S NOW
IN SESSION.
ALL WHO HAVE CAUSE TO PLEA, DRAW
NEAR.
GIVE ATTENTION, YOU SHALL BE
HEARD.
GOD SAVE THESE UNITED STATES,
THE GREAT STATE OF FLORIDA AND
THIS HONORABLE COURT.
>> LADIES AND GENTLEMEN, THE
SUPREME COURT OF FLORIDA.
PLEASE BE SEATED.
>> GOOD MORNING.
WELCOME THE FLORIDA SUPREME
COURT.
BEFORE WE BEGIN, WE HAVE SOME
FOLKS HERE VISITING TODAY.
FIRST OF ALL, WE HAVE THE PAGES
FROM THE HOUSE OF
REPRESENTATIVES.
IF YOU WOULD STAND, PLEASE.
OKAY.
WELL, THANK YOU.
THANK YOU.
AND THEN WE HAVE THE DeLAND
SCHOOL OF GOVERNMENT.
IF YOU WOULD STAND.
OKAY.
AND THIS IS, LIKE, HIGH SCHOOL?
IT'S LIKE A CHARTER SCHOOL FOR
GOVERNMENT, OR HOW DOES THAT
WORK?
>> [INAUDIBLE]
>> OH, TERRIFIC.
AND YOU ARE--
>> [INAUDIBLE]
>> ONE OF THE TEACHERS OR--
>> [INAUDIBLE]
>> WELCOME TO THE COURT.
THANK YOU.
OKAY.
NOW, THE FIRST CASE ON OUR
DOCKET TODAY IS WHITE V. MEDERI
CARETENDERS.
>> MAY IT PLEASE THE COURT, MY
NAME IS REBECCA VARGAS.
I'M HERE ON WE HALF OF THE
PETITIONER, ELIZABETH WHITE.

WITH HE IS MY COCOUNSEL,
MARGARET COOPER, AND I'D LIKE TO
RESERVE FIVE MINUTES FOR
REBUTTAL.

REFERRAL SOURCES OF PATIENTS OF
A HOME HEALTH CARE AGENCY CANNOT
BE CONSIDERED A LEGITIMATE
BUSINESS INTEREST.

ELEVEN YEARS AGO, THE FIFTH
DISTRICT IN TAMALA HELD THAT A
DOCTOR'S REFERRAL SOURCES CANNOT
BE CONSIDERED A LEGITIMATE
BUSINESS INTEREST.

IN THE 11 YEARS SINCE THAT
DECISION ISSUED, THE LEGISLATURE
HAS NOT ACTED TO AD REFERRALS AS
A LEGITIMATE BUSINESS INTEREST,
AND FOR GOOD REASON.

STARTING WITH THE LANGUAGE OF
THE STATUTE, 42.335 PROVIDES IN
ORDER TO ENFORCE ANY TYPE OF
RESTRICTIVE COVENANT, THE PARTY
MUST PLEAD AND PROVE A
LEGITIMATE BUSINESS INTEREST,
AND THE STATUTE EXPRESSLY
PROVIDES WITHOUT THAT PROOF OF A
LEGITIMATE BUSINESS INTEREST THE
RESTRICTIVE COVENANT IS, QUOTE,
UNENFORCEABLE, QUOTE, VOID, AND
YOU JUST CAN'T ENFORCE IT.

>> IF THAT IS, IF THAT IS GOING
TO BE THE GUIDING PRINCIPLE, IT
SEEMS TO ME IS THAT WE VIRTUALLY
HAVE NO INTEREST TO BE PROTECTED
BECAUSE THAT'S OF A FLOWING
NATURE.

DOCTORS, OTHER
PROFESSIONALS, PEOPLE THAT
RECEIVE SOMETHING FROM OTHER
TOKES THAT DON'T DEAL
DIRECTLY-- FOLKS THAT DON'T
DEAL DIRECTLY WITH CONSUMERS PER
SE.

SO DOESN'T THAT REALLY LEAVE US
WITH THAT ENTIRE INDUSTRY OR
THAT ENTIRE BUSINESS MODEL
WITHOUT ANY TYPE OF PROTECTION
AS ALL?

BECAUSE I REALLY MUST SAY, I
JUST FIND IT FANCIFUL TO SUGGEST

THAT A BUSINESS THAT IS TOTALLY FEINT UPON GETTING-- DEPENDENT UPON GETTING PATIENTS FROM SOMEWHERE THAT, AND THAT UTILIZES A MODEL OF HAVING A MARKETING KIND OF POSITION THAT YOU CAN'T, THAT CAN'T BE PROTECTED.

I MEAN, IT'S LIKE YOU CAN TRAIN THEM, ASK I DON'T KNOW IF THIS IS THE CASE, BUT ONE OF THEM, THEY'RE DOWNLOADING ALL OF THE DOCUMENTS AND ALL OF THE INFORMATION--

>> WELL, THIS ISN'T A CASE WHERE THERE WAS ANY DOWNLOADING OF CONFIDENTIAL INFORMATION.

>> [INAUDIBLE]

>> JUST THE SHOW--

>> IF YOU COULD, MS. VARGAS. BECAUSE THIS STATUTE MUST MEAN SOMETHING.

>> RIGHT.

>> AND SO COULD YOU HELP ME, HELP ME WITH THAT?

INCREASE MY COMFORT LEVEL WITH THE PRINCIPLE THAT YOU JUST ANNOUNCED.

>> CERTAINLY, YOUR HONOR. AND I WOULD START WITH JUST THE LANGUAGE OF THE STATUTE. THE STATUTE DESCRIBES WHAT IS A LEGITIMATE BUSINESS INTEREST BY HAVING FIVE NONEXCLUSIVE TERMS.

>> WELL, THOSE ARE THE CATEGORIES--

>> THOSE ARE THE FIVE CATEGORIES.

>>-- INCLUDING BUT NOT LIMITED TO?

>> RIGHT.

THAT'S RIGHT, YOUR HONOR. INCLUDING BUT NOT LIMITED TO.

>> IF YOU READ IT THAT WAY, IT SEEMS TO ME YOU'RE READING THAT LIST AS AN EXCLUSIVE LIST.

>> NO, YOUR HONOR, I'M NOT REALIZING IT AS AN EXCLUSIVE LIST, BUT UNDER THE STANDARD CANNONS OF STATUTORY

CONSTRUCTION, WHEN THERE'S A SPECIFIC LANGUAGE FOLLOWED BY GENERAL LANGUAGE, YOU HAVE TO READ THAT LANGUAGE TOGETHER.

>> IF YOU DO THAT, I UNDERSTAND IF WE READ IT SO THAT THOSE ARE, IT MUST BE WITHIN THOSE CATEGORIES, THEN THAT INCLUDING BUT NOT LIMITED TO LANGUAGE IS MEANINGLESS.

>> WELL, NO, YOUR HONOR, IT'S NOT MEANINGLESS BECAUSE IT STILL LEAVES THE POSSIBILITY OF FINDING OTHER LEGITIMATE BUSINESS INTERESTS THAT AREN'T SPECIFICALLY LISTED IN THE STATUTE IF THEY RISE TO THE LEVEL OF A PROPRIETARY ASSET OF THE BUSINESS THAT THE BUSINESS OWNS.

AND I THINK THERE'S A VERY GOOD LAW REVIEW ARTICLE HERE WRITTEN BY THE SENATE SPONSOR AND THE PRINCIPAL DRAFTER OF THIS LAW REVIEW ARTICLE, THAT WAS THE GRANT AND STEELE ARTICLE, AND THEY EXPLAIN THAT WHAT THEY ATTEMPTED TO DO BY DEFINING LEGITIMATE BUSINESS INTERESTS THIS WAY IS TO MAKE SURE THAT THE DEFINITION OF LEGITIMATE BUSINESS INTEREST BECOMES MORE PRINCIPLED, AND IT ONLY ENCOMPASSES THOSE TYPES OF SPECIFIC BUSINESS ASSETS THAT IF A DEPARTING EMPLOYEE WERE TO TAKE THEM, IT WOULD CONSTITUTE UNFAIR TRADE, UNFAIR, YOU KNOW, PRACTICE.

AND SO IT REALLY HAS TO RISE TO THAT LEVEL OF A PROPRIETARY ASSET.

>> BUT LET ME ASK YOU THIS. IF I AS AN EMPLOYER HIRE SOMEONE AND SAY YOUR JOB IS TO GET REFERRALS FOR THIS BUSINESS, YOU ARE TO CULTIVATE CONTACTS WITH THE PEOPLE WHO NEED THE SERVICES, WHO HAVE CLIENTS WHO NEED SERVICES THAT WE PROVIDE,

AND YOUR SOLE MISSION IS TO CULTIVATE THOSE RELATIONSHIPS, TO BUILD RELATIONSHIPS, STRENGTHEN RELATIONSHIPS AND BRING IN THE BUSINESS BY WAY OF THOSE REFERRALS, AND I'M GOING TO PAY YOU THIS AMOUNT OF MONEY TO DO THAT-- MONEY TO DO THAT, THAT IS YOUR MISSION IN LIFE, I'M HAVING A HARD TIME UNDERSTANDING WHY THERE'S NOT SOME LEGITIMATE BUSINESS INTEREST THAT COMES OCCUPANT OF THAT ARRANGEMENT. NOW, TELL ME WHAT I'M MISSING THERE.

>> WELL, YOUR HONOR, THE REASON IT'S NOT A LEGITIMATE BUSINESS INTEREST IS BECAUSE THE STATUTE IS VERY, IT IS VERY SPECIFIC. FOR EXAMPLE, IT'S SIMILAR TO--

>> SPECIFIC ABOUT WHAT?

>> WELL, IT'S SIMILAR TO AN EMPLOYEE PROVIDING ON-THE-JOB TRAINING.

THIS EMPLOYEE WAS A LOW-LEVEL MARKETING REPRESENTATIVE. SHE WAS DOING HER JOB. SHE WAS GOING TO THE NURSING HOMES, THE ASSISTED LIVING FACILITIES, SHE WAS HEATING WITH THE TREATING PROVIDERS AND THE CASE MANAGERS, AND SHE WAS FACILITATING THEIR TRANSITION TO HOME HEALTH CARE.

>> YOU'RE NOT TELLING ME ANYTHING-- WHAT YOU'RE SAYING NOW IS NOT TELLING ME ANYTHING ABOUT THE STATUTE.

YOU STARTED OUT SAYING THAT THE STATUTE IS VERY SPECIFIC.

NOW, I KNOW THERE'S SOME SPECIFIC THINGS ENUMERATED.

>> UH-HUH.

>> BUT WE KNOW THAT THAT IS A NONEXCLUSIVE LIST.

AND SO NOW YOU'RE TELLING ME THINGS ABOUT THE PARTICULAR FACT PATTERN, BUT I'M, I GO BACK TO MY QUESTION ABOUT WHAT'S

SPECIFIC IN THE STATUTE SUPPORTS THIS PARTICULAR ARGUMENT THAT YOU'RE MAKING.

>> WELL, IF YOU LOOK AT THE STATUTE, THE TYPES OF EXAMPLES ARE CONFIDENTIAL TRADE SECRETS, CONFIDENTIAL BUSINESS INFORMATION, GOODWILL. IT'S EXTRAORDINARY OR SPECIALIZED TRAINING. IT'S NOT JUST ON THE JOB TRAINING.

AND AS TO RELATIONSHIPS WITH PROSPECTIVE CLIENTS, IT'S SUBSTANTIAL RELATIONSHIPS WITH-- OR EXISTING CUSTOMERS, ORGANIZATIONS OR CLIENTS. SO WHEN THE LEGISLATURE CONSIDERED WHAT TYPE OF RELATIONSHIPS WHEN A DOCTOR IS GOING TO BE SOLICITING CLIENTS, IT'S NOT JUST ANY PROSPECTIVE PATIENT, IT HAS TO BE A SPECIFIC PROSPECTIVE PATIENT.

AND SO A REFERRAL SOURCE AT BEST CAN ONLY, AS JUDGE LAWSON SAID IN THE TAMALA DECISION, IT ONLY PRODUCES A STREAM OF UNIDENTIFIED FUTURE PROSPECTIVE PATIENTS.

>> SO--

>> AND SO WHEN YOU LOOK AT THE LANGUAGE THE LEGISLATURE CHOSE, IT JUST DOESN'T FIT WITHIN THAT DEFINITION.

I'M SORRY, JUSTICE QUINCE.

>> SO IF WE TAKE, IF WE TAKE YOUR POSITION, THEN IT SEEMS TO ME WHAT WE'RE SAYING IS-- WHAT WE'RE SAYING IS A PERSON CAN GO TO A COMPANY, DO ALL OF THIS, LEARN ALL ABOUT THE REFERRALS, THE PROSPECTIVE DOCTORS, EVERYTHING THAT THEY USE TO GET THEIR BUSINESS.

THEY CAN THEN GO OUT FOR WHATEVER REASON AND TAKE THAT LIST AND DEAL WITH THOSE SAME PEOPLE AND TAKE ALL THAT BUSINESS AWAY DESPITE HAVING

SIGNED A NONCOMPETE AGREEMENT.

>> WELL, YOUR HONOR, IN THIS CONTEXT ESPECIALLY WHEN YOU CONSIDER THAT THIS IS A HOME HEALTH CARE AGENCY ASK WE'RE TALKING ABOUT THE PATIENT'S RIGHT TO CHOOSE THE BEST MEDICAL CARE, WE HAVE A RESTRICTIVE COVENANT THAT TRIES TO PREVENT THE HEALTH CARE PROVIDER FROM ARE GIVING A REFERRAL TO THE BEST POSSIBLE--

>> SO UNDER YOUR THEORY, A NONCOMPETE AGREEMENT IS JUST NOT APPLICABLE AT ALL, THAT YOU CANNOT BE ENFORCE IT NO MATTER HOW, YOU KNOW, LIMITED IN RANGE AND SCOPE IT IS. YOU SIMPLY CANNOT--

>> WELL, AS--

>>-- ENFORCE OR THAT NONCOMPETE BE AGREEMENT.

>> AS TO REFERRAL SOURCES, YOUR HONOR, YES.

HOWEVER, THERE ARE OTHER ASPECTS THAT WOULD-- LIKE, FOR EXAMPLE, IF THE EMPLOYEE HAD MADE A DATABASE.

THAT COULD CONSIDER, BE CONFIDENTIAL CLIENT INFORMATION. IN OUR SITUATION, MS. WHITE DID NOT LEAVE HER FORMER EMPLOYER WITH ANY INFORMATION OTHER THAN WHAT WAS INSIDE HER HEAD, WHICH SHE'S ALLOWED TO DO.

>> WELL, I MEAN, WHAT'S INSIDE HER HEAD THOUGH COULD JUST AS EASILY BE THE CONFIDENTIAL INFORMATION THAT THEY'VE ALL PUT TOGETHER.

AND SO I DON'T SEE HOW THE FACT THAT SHE DIDN'T HAVE A PIECE OF PAPER IN HER HAND WHEN SHE WALKED OUT OF THE DOOR DIFFERS.

>> WELL, IT WAS UNDISPUTED THAT THE REFERRAL SOURCES HERE ARE PUBLICLY AVAILABLE OR FOUND IN THE YELLOW PAGES OR HOSPITALS, THEIR NURSING HOME, THEIR HOME HEALTH CARE AGENCIES.

AND AN EMPLOYEE IS ALLOWED TO LEAVE THEIR FORMER EMPLOYMENT AND WITH ON-THE-JOB TRAINING THEY'VE RECEIVED AT THEIR PRIOR JOB.

ALL THEY WERE PAYING HER TO DO HERE WAS TO DO HER JOB WHICH WAS LOW-LEVEL MARKETING, CONTACTING DOCTORS.

AND IT DOES-- IT CAN'T RISE TO THE LEVEL OF A PROPRIETARY INTEREST HERE IN THE HOME HEALTH CARE AGENCY CONTEXT BECAUSE FEDERAL AND STATE STATUTES AND REGULATIONS PROHIBIT ANY TYPE OF FINANCIAL RELATIONSHIP BETWEEN THAT REFERRING THAT ORIGINAL DOCTOR, NURSE OR PHYSICIAN ASSISTANT WHO WRITES A TREATMENT ORDER FOR SKILLED CARE AND THE HOME HEALTH CARE AGENCY.

>> LET ME GO NOW-- THAT'S WHAT I WANTED TO GET BACK TO, WHICH IS NOT THE FACTS OF YOUR CASE. YOUR CASE ISN'T THE ONE WHERE CLEVELAND CLINIC GENERATED ALMOST A MILLION DOLLARS IN A YEAR FOR THIS PARTICULAR AGENCY.

>> NO, YOUR HONOR.

>> WE, WE START WITH FOR THE STATUTE THIS FLORIDA, THE SOLE SECTION WE'RE LOOKING AT IS THE DEFINITION OF LEGITIMATE BUSINESS INTERESTS?

>> YES, YOUR HONOR.

>> AND YOU'VE AGREED THAT IT SAYS INCLUDES BUT IS NOT LIMITED TO.

>> THAT'S RIGHT, YOUR HONOR.

>> YOU GOING OFF OF NUMBER THREE WHICH SAYS SUBSTANTIAL RELATIONS WITH SPECIFIC PROSPECTIVE OR EXISTING CUSTOMERS, PATIENTS OR CLIENTS.

NOW, FOR THIS HOME HEALTH AGENCY, THEY DON'T-- THERE WOULD NOT BE-- WOULD THERE BE EXISTING CUSTOMERS, PATIENTS OR CLIENTS?

>> THAT'S RIGHT.

THE PEOPLE WHO RECEIVED THE TREATMENT ARE THE PATIENTS. THAT'S WHAT THE FIFTH DISTRICT IN THE HILES DECISION DECIDED, EXACTLY THIS KIND OF--

>> SO IT COULD BE DIFFERENT? COULD THE DIFFERENCE IN THE DOCTOR REFERRAL VERSUS THE HOME HEALTH CARE REFERRAL BE DIFFERENT BECAUSE THERE ARE NOT EXISTING CUSTOMERS, PATIENTS OR CLIENTS?

>> NO, YOUR HONOR. IT'S ACTUALLY JUST THE SAME SITUATION AS IN TAMALA, BECAUSE THESE ARE PATIENTS OF A NURSING HOME, OF A ASSISTED LIVING FACILITY, AND THEY NEED TO TRANSITION TO SPECIALIZED CARE, AND THEY NEED A PRESCRIPTION FOR THAT.

THEY NEED A TREATMENT ORDER--

>> OKAY.

NOW, MY QUESTION GOES TO YOU TALKED ABOUT FEDERAL RESTRICTIONS.

>> YES, YOUR HONOR.

>> THERE ISN'T ANYTHING THAT IN THE FEDERAL LAW THAT PROHIBITS THE DEVELOPMENT OF REFERRAL RELATIONSHIPS OF SORT OF COURTING THESE FACILITIES, THE HOSPITALS AS YOU SAY, THE VARIOUS PLACES WHERE THEY GET THE REFERRALS.

THERE'S NOTHING THAT PROHIBITS IT.

>> THAT'S RIGHT, YOUR HONOR. BUT WHAT'S PROHIBITED IS A DIRECT FINANCIAL RELATIONSHIP. YOU CAN'T RECEIVE, YOU CAN'T GIVE YOUR REFERRING PHYSICIANS OR HEALTH CARE PROVIDERS ANY TYPE OF COMPENSATION, YOU CAN'T GIVE THEM EVEN ANY NONMONETARY COMPENSATION IS CAPPED AT--

>> [INAUDIBLE]

OKAY, AT THE FEDERAL LEVEL, BUT I GUESS WHAT I'M GETTING AT IS THIS SOUNDS TO ME TO BE A POLICY

DECISION FOR THE LEGISLATURE.
I MEAN, I MAY NOT BE PERSONALLY
HAPPY THAT THIS GOES ON, AND I
DON'T, YOU KNOW, HOW MUCH MONEY
GETS EXCHANGED.

YOU KNOW, AS YOU SAY, A PATIENT
WANTS THE BEST PLACE, THE BEST
HOME HEALTH CARE AGENCY TO GO
WITH--

>> RIGHT.

>> BUT THAT IS REALLY NOT WHAT
WE'RE ABOUT HERE.

SO I STILL HAVE PROBLEMS WITH
THE INCLUDED BUT NOT LIMITED TO
EXCLUDING REFERRAL RELATIONS AS
A HARM THAT THEY INTENDED NOT TO
BE COVERED.

>> RIGHT.

>> SO IS THERE ANYTHING ELSE
STATUTORILY--

>> WELL, THERE'S ALSO THE CANON
OF CONSTRUCTION THAT LONG-TERM
ACTION AFTER A JUDICIAL
INSTRUCTION, THE DECISION FROM
THE FIFTH DISTRICT WAS DECIDED
11 YEARS AGO--

>> ANYTHING OTHER THAN, ANYTHING
IN THE STATUTORY SCHEME ITSELF?

>> WELL, IN THE STATUE STORY
SCHEME ITSELF WE KNOW THAT IN
ORDER TO BE A LEGITIMATE
BUSINESS INTEREST BY LOOKING AT
THE OTHER EXAMPLES AND READING
THEM TOGETHER BECAUSE THEY'RE OF
THE SAME KIND OR CLASS, SO YOU
HAVE TO REALIZE THE GENERAL
LANGUAGE WITH THE SPECIFIC
LANGUAGE, THEY ALL RISE-- THEY
ARE ALL REQUIRING VERY
SIGNIFICANT INVESTMENT--

>> SO YOU WOULD SAY, FOR
EXAMPLE, NUMBER FIVE SAYS
EXTRAORDINARY OR SPECIALIZED
TRAINING.

>> THAT'S RIGHT.

>> IT COULDN'T BE, SO YOU
COULDN'T SAY IF IT'S NOT
EXTRAORDINARY, THAT IT WOULD BE
A LEGITIMATE BUSINESS.

>> THAT'S RIGHT.

AND THAT'S SIMILAR TO WHAT, YOU KNOW, WHAT WE HAVE HERE. IT WAS UNDISPUTED THAT ALL THIS EMPLOYEE, MS. WHITE, RECEIVED WAS ORDINARY, ON THE JOB TRAINING, THE SAME AS EVERY HOME HEALTH CARE AGENCY IN THE STATE RECEIVES.

SHE DIDN'T RECEIVE ANY SPECIAL TYPE OF TRAINING-- THERE THAT'S NOT OUR ISSUE HERE.

>> THAT'S NOT OUR ISSUE, BUT AS AN EXAMPLE, SHE WAS JUST BEING PAID TO DO HER JOB, NOT TO, NOT TO DEVELOP A PROPRIETARY ASSET OF THE COMPANY THAT WOULD BE UNTEAR--

>> BUT ISN'T THAT ALWAYS, AS YOU SIGN IN THE REAL WORLD, NOT JUST IN A LABORATORY OF A COURTROOM, IN THE REAL WORLD WHEN YOU SIGN AN EMPLOYEE TO DO WHAT THEY'RE SUPPOSED TO BE DOING, THEN IF THAT IS THE CRITERIA THAT YOU LOSE, THEN AGAIN, THERE'S NEVER GOING TO BE A VALID ANTI-PIRACY OR ANTI-COMPETITIVE CONTRACT THAT'S ALLOWED UNDER FLORIDA LAW BECAUSE THESE ARE SIGNED IN THE BUSINESS WORLD AS A NECESSITY. PEOPLE BELIEVE THAT THEY'VE WORKED FOREVER TO CREATE THEIR BUSINESS, AND SOME EMPLOYEE COME IN AND JUST TAKE ALL OF IT RIGHT OUT FROM UNDER THEM.

>> WELL, NO, YOUR HONOR. THERE'S STILL, THE LEGITIMATE BUSINESS INTEREST WOULD STILL RECOLLECT ALL KINDS OF ASSETS THAT RISE TO THAT LEVEL. YOU JUST CAN'T SAY THAT A HOME HEALTH CARE AGENCY HAS A PROPRIETARY INTEREST IN THE NURSING HOMES AND ASSISTED LIVING FACILITIES THAT MIGHT REFER THEM PATIENTS, BECAUSE IT HAS TO BE-- IT'S A GRATUITOUS--

>> IT'S NOT IN THOSE, IT'S IN THE FLOW OF BUSINESS.

I MEAN, THAT'S WHAT-- YOU CHARACTERIZE IT AS AN INTEREST IN THE NURSING HOME.

OF COURSE THEY DO NOT.

BUT THEY DO HAVE AN INTEREST IN THE FLOW OF BUSINESS AND THE FLOW OF PATIENT, DON'T THEY?

>> THEY HAVE AN INTEREST IN THE FLOW OF PATIENTS, YOUR HONOR.

BUT JUST BECAUSE THEY HAVE AN INTEREST DOESN'T MEAN IT RISES

TO THE LEVEL THAT THE LEGISLATURE PROTECTED AS PROPRIETARY.

AND IN THIS SITUATION, WHEN THEIR CANNOT BE ANY TYPE OF FINANCIAL INTEREST BETWEEN THE HOME HEALTH CARE AGENCY AND THE REFERRING PHYSICIANS, IT JUST CAN'T RISE TO THAT LEVEL TO SAY--

>> SO IT'S GOT TO BE A DOLLAR TRANSACTION, IS YOUR VIEW THEN.

>> WELL, NO--

>> YOU CAN'T HAVE THINKING THAT'S NOT A DOLLAR TRANSACTION.

>> WELL, AND THIS, I THINK IT ILLUSTRATES YOU CAN'T HAVE THAT TYPE OF FINANCIAL RELATIONSHIP WITH MAYBE ANOTHER INDUSTRY WHERE YOU INVESTED SIGNIFICANT AMOUNTS OF MONEY IN YOUR REFERRAL SOURCES.

>> WELL, HOW ABOUT AN APPELLATE LAWYER?

AN APPELLATE LAWYER DOESN'T DEAL NORMALLY--

>> RIGHT.

>>-- WITH CLIENTS.

THEY DEAL WITH TRIAL LAWYERS.

>> WELL, YOUR HONOR--

>> SO WHAT--

>> ASSUMING NONCOMPETES APPLY TO LAWYERS, THEN YOU WOULD, THE SAME REASONING WOULD APPLY HERE.

>> SO YOU COULDN'T HAVE ONE IN THAT CONTEXT.

>> THAT'S RIGHT, YOUR HONOR. YOU WOULD NOT.

>> JUSTICE PARIENTE WAS ASKING

ABOUT OTHER PROVISIONS OF THE
STATUTE.

THIS STATUTE SPECIFICALLY
STATEMENTS THAT A NUMBER OF THE
RULES OF STATUTORY CONSTRUCTIONS
DON'T APPLY, CORRECT?

>> THAT'S RIGHT, YOUR HORN.

>> OKAY.

>> WELL, IT CALLS THEM CONTRACT
CONSTRUCTION, BUT STILL I THINK
THE INTENT OF THIS 996 AMENDMENT
WAS TO BRING CLARITY TO THE LAW
AND TO ADOPT THE LEGITIMATE
BUSINESS INTERESTS DISCUSSION
OF-- AND TO DO AWAY WITH THE
CONTRACT-BASED APPROACH WHERE
THESE TYPES OF AGREEMENTS WERE
JUST ROUTINELY ARE ENFORCED, AND
THERE WAS A HEDGE TO POSSIBLE.
SO IT WAS A CAREFUL BALANCE OF
THE COMPETING POLICIES OF THE
EMPLOYEE'S RIGHT TO MOVE TO MORE
GAINFUL EMPLOYMENT, THE
COMPANY'S RIGHTS TO DEVELOP
THEIR EMPLOYEES, AND THAT'S THE
BALANCE WHERE THE LEGISLATURE
FELL BE.

AND RESPECTFULLY, YOUR HONOR, WE
BELIEVE THAT REFERRAL SOURCES IN
HOME HEALTH AGENCIES DON'T
AMOUNT TO THAT.

>> DOESN'T IT SEEM AS THOUGH
WE'RE THROWING IT INTO THIS
WORLD, THE NEBULOUS WORLD OF
BUSINESS INTERESTS?

ALL WE'RE DOING IS WE'RE
CREATING A CONTRACT SO WE CAN
SUE EACH OTHER LATER ON.
LITIGATION.

>> NO, YOUR HONOR.

AND ALSO THE TRIAL COURT
CERTAINLY STILL HAS DISCRETION
TO BLUE PENCIL THE AGREEMENT IF
PART OF IT WAS OVERBROAD.
YOU KNOW, FOR EXAMPLE, IF THEY
NEED TO PROTECT THE
CONFIDENTIAL--

>> WELL, NO, NOT IF IT'S A
BUSINESS INTEREST.
IF IT'S A BUSINESS INTEREST,

YOU'RE SAYING THE IF IT'S NOT WITHIN THE CATEGORY OF THIS ONE PROVISION, THEN YOU CAN'T HAVE IT AT ALL.

YOU CAN'T BLUE LINE THAT, CAN YOU?

>> NO, YOUR HONOR, I'M SAYING IT MAY NOT BE SPELLED OUT EXACTLY AS A LEGITIMATE BUSINESS INTEREST, BUT IT HAS TO BE OF THE SAME CLASS OR CHARACTER AS THOSE FIVE EXAMPLES THAT ARE SPELLED OUT IN THE STATUTE. AND WITH THAT, I'D LIKE TO RESERVE HI REMAINING TIME FOR REBUT A. THANK YOU.

>> GOOD MORNING.

PLEASE THE COURT, PATRICK MULL DOWN THINK FROM BAKER & HOSTETLER ON BEHALF OF THE RESPONDENT.

THIS, THESE PARTICULAR REFERRAL SOURCES ARE EXACTLY THE KIND OF INTEREST THAT THE STATUTE IS DESIGNED TO PROTECT.

>> LET ME ASK YOU JUST FOR THIS CASE, OKAY, YOU AGREE THAT HOME HEALTH AGENCIES RECEIVE THEIR BUSINESS PRIMARILY THROUGH REFERRALS FROM MEDICAL FACILITIES AND PHYSICIANS.

>> YES, YOUR HONOR.

>> NOW, THIS WHAT AREA OF THE STATE ARE WE THIS FOR OR THIS CASE?

>> THIS WAS IN, THIS PERSON WAS IN MARTIN AND ST. LUCIE COUNTIES.

>> OKAY.

AND THERE ARE HOW MANY, HOW MANY HOSPITALS ARE THERE IN MARTIN COUNTY?

>> THERE ARE A NUMBER OF THEM.

>> OKAY.

AND THEN THERE ARE A NUMBER OF PHYSICIANS.

>> CORRECT, YOUR HONOR.

>> I'M TRYING TO UNDERSTAND-- AND, AGAIN, THIS IS ON THE OTHER SIDE OF THINGS-- IS IT TRUE

THAT REFERRAL SOURCES IS PUBLIC AND COMMON KNOWLEDGE TO HOME HEALTH CARE AGENCIES?

IN OTHER WORDS, DO YOU HAVE-- IF YOU, IF MARTIN MEMORIAL WAS REFERRING TO YOUR AGENCY, IS THAT A, YOU HAVE A PROPRIETARY INTEREST IN OTHER, IF AN EMPLOYEE GOES TO ANOTHER AGENCY THAT CAN'T SOLICIT MARTIN MEMORIAL AS A REFERRAL SOURCE FOR THEIR-- BY SAYING WE HAVE BETTER NURSES OR WE HAVE BETTER PHYSICAL THERAPISTS?

I'M JUST TRYING TO SEE HOW IN THE REAL WORLD UNDERSTANDING EACH BUSINESS IS DIFFERENT. WHAT, IS IT THE LIST ITSELF THAT'S THE PROPRIETARY ASPECT?
?

>> YOUR HONOR, IT'S THE RELATIONSHIP.

CERTAINLY, YOU COULD GO TO THE WHITE PAGES, OR YOU COULD GO TO I THINK THEY CALL IT THE GREEN BOOK AND FIND A LISTING OF HEALTH CARE PROVIDERS.

BUT THAT DOESN'T INDICATE-- AND IT GIVES YOU THE ADDRESSES AND THE PHONE NUMBERS.

BUT THAT DOESN'T TELL YOU WHO IN THE OFFICE IS THE PERSON WHO YOU REALLY NEED TO DEAL WITH TO GET, TO MAXIMIZE REFERRALS.

IT DOESN'T GIVE YOU PERSONAL INFORMATION--

>> BUT THEY, SO THEY CAN'T-- THE IDEA WOULD BE, NOW AGAIN, YOU ALSO HAD A NONCOMPETE FOR THE AREA.

DOES THAT SOLVE IT WHERE YOU SAY YOU CAN'T GO WITH A COMPETING AGENCY WITHIN A YEAR, WITHIN THAT GEOGRAPHIC AREA?

IS THAT, IS THAT AN ISSUE HERE? I MEAN, WOULDN'T THAT COVER IT?

>>

>> WELL, WE'RE PROTECTING THE RELATIONSHIP HERE, YOUR HONOR.

>> WELL, BUT I'M WONDERING--

ISN'T THAT THE QUESTION?
IS THAT A LEGITIMATE BUSINESS
INTEREST?

IF YOU'RE NOT ALLOWED TO PAY
REFERRAL SOURCES AND WHAT YOU'RE
DOING IS YOU'RE WINING AND
DINING THE PEOPLE IN HOSPITALS
THAT ARE RESPONSIBLE FOR GIVING
PATIENTS A LIST OF AGENCIES AND
INSTEAD THEY'RE GIVING THEM ONLY
ONE BECAUSE THEY'VE GOT A
REFERRAL INTEREST, THAT'S THE
PROPRIETARY INTEREST?

>> WELL, YOUR HONOR, THE WAY
THAT THE BUSINESS WORKS IS THESE
SALES REPRESENTATIVES DEVELOP
RELATIONSHIPS WITH VARIOUS
PHYSICIANS--

>> AND HOW DO THEY DO THAT.

>>

>> BY GOING TO SEE THEM ON A
REGULAR BASIS.

>> AND THEY GIVE THEM GIFT THIS
IS.

>> THEY BRING DOUGHNUTS IN.
AS MY ESTEEMED COLLEAGUE SAID,
THERE ARE RESTRICTIONS ON HOW
MUCH YOU CAN DO.

YOU CAN'T REALLY WINE-- THERE
ARE NO GOLF TRIPS HERE.

THERE'S VERY, IT'S VERY LIMITED
IN TERMS OF WHAT FINANCIAL, WHAT
FINANCIAL TRANSACTIONS THEY CAN
PROVIDE.

BUT OVER THE PERIOD OF TIME,
THEY DEVELOP A RELATIONSHIP THAT
THE PHYSICIAN'S OFFICE CAN LEARN
TO TRUST THAT PARTICULAR AGENCY
BECAUSE THEY DEAL WITH THAT
PARTICULAR REPRESENTATIVE.

IF SALLY COMES THIS FROM XYZ
HEALTH AGENCY, THE PHYSICIAN AND
THE PEOPLE IN THEIR OFFICES GET
TO KNOW THAT PERSON, TEAL
COMFORTABLE WITH THAT PERSON, BY
EXTENSION FEEL COMFORTABLE WITH
THE AGENCY AND ARE MORE LIKELY
TO REFER.

IT'S A SALES RELATIONSHIP, YOUR
HONOR.

IT'S THE SAME AS--

>> SO IT'S THE, GOING BACK TO THE QUESTION, THERE WAS ALSO JUST A NONCOMPETE FOR THE GEOGRAPHICAL AREA FOR A YEAR. IS THAT ENFORCEABLE?

>> WE WOULD ARGUE, YES.

WE WOULD--

>> WELL, DOESN'T THAT THEN, ISN'T THAT THE ANSWER THAT-- BECAUSE, YOU KNOW, PEOPLE COME AND GO, SO SHE CAN'T WORK FOR A COMPETING AGENCY FOR A YEAR IN THE SAME GEOGRAPHICAL AREA.

>> RIGHT.

>> HOW DOES THAT NOT SOLVE THE PROBLEM THAT YOU'RE REFERRING TO?

BECAUSE, YOU KNOW, AGAIN, NOT LIKE SAYING THE SAME PERSON IN THE HOSPITAL IS GOING TO BE THERE FOREVER EITHER.

YOU KNOW, WHOEVER THEY DEVELOP THE RELATIONSHIP WITH.

SO IF THE PERSON LEAVES, I MEAN, THEY DON'T HAVE THE PROPRIETARY INTEREST IN THE HOSPITAL.

>> WELL, AGAIN, THE RESTRICTION-- WHAT WE'VE ASKED FOR, WHAT WE ARE ASKING FOR IS A YEAR RESTRICTION ON THIS PERSON, ON MS. WHITE GOING TO WORK FOR A COMPETITOR IN THE TERRITORY SHE WAS SERVICING ON BEHALF OF OUR CLIENTS.

>> BUT THAT WOULD, THAT WOULD ALSO INCLUDE, I WOULD THINK, HER DECIDING I'M NOT GOING TO WORK FOR XYZ AGENCY, I'M JUST GOING TO OPEN MY OWN AND USE ALL THESE REFERRALS.

WOULD THAT COVER THAT KIND OF SITUATION ALSO?

>> THAT WOULD-- WELL, AGAIN, THE RESTRICTION ON COMPETING WOULD ALSO PREVENT HER FROM OPENING UP HER OWN AGENCY IN COMPETITION.

>> WAS THERE ANY ARGUMENT MADE ABOUT EITHER THE LENGTH OF THE

RESTRICTION OR THE TERRITORY
THAT WAS COVERED BY THE
RESTRICTION?

BECAUSE DIDN'T IT INCLUDE ANY
AREA THAT THIS PARTICULAR HOME
HEALTH CARE AGENCY HAD A
BUSINESS IN?

>> WELL, WHAT WE WERE, WHAT MY
CLIENTS WERE SEEKING TO ENFORCE
WAS A RESTRICTION ON MS. WHITE
COMPETING IN THE TERRITORIES IN
WHICH SHE WAS WORKING.

WE NEVER GOT, THERE WAS NEVER
REALLY ANY ARGUMENT ON THE SCOPE
OF THE, THE SCOPE OF THE
RESTRICTIONS BECAUSE WE DIDN'T
GET PAST THE ISSUE OF LEGITIMATE
BUSINESS INTERESTS.

SO WE'VE SORT OF STUCK AT STAGE
ONE BEFORE WE GOT TO STAGE TWO.

>> LET ME ASK YOU THIS.

MY CONCERN IS THAT THE FACTS ARE
SO DIFFERENT IN THIS CASE AND
TAMALA, BUT YOU'RE ASKING US TO
MAKE A LEGAL RULING THAT WOULD,
I THINK, APPLY ON A LOT OF
DIFFERENT FACTS.

SO MY CONCERN IS WHERE THE
INDIVIDUAL REALLY IS THE ASSET
AND THE IMPETUS FOR THE
REFERRALS.

FOR EXAMPLE, IN TAMALA THERE WAS
A MEDICAL PRACTICE THAT COVERED
A LARGE AREA WITH SEVEN
DIFFERENT OFFICES OF A SPECIALTY
NATURE.

AND IT'S EASY TO SEE THAT
SOMEONE MIGHT GAIN A REPUTATION
TO BE REALLY GOOD IN THAT
SPECIALTY.

AND SO THE REFERRALS ARE NOT
COMING BECAUSE HE'S OUT
ADVERTISING OR, YOU KNOW, THE
REFERRALS ARE COMING BECAUSE
THAT'S THE GUY THAT THE DOCTOR
WANTS TO REFER TO.

AND IT SEEMS LIKE THAT CONTEXT
WHERE THE REAL ASSET IS THE
REPUTATION OF THE INDIVIDUAL
DOCTOR THAT REFERRALS ARE VERY

DIFFERENT THAN IN ANOTHER
CONTEXT.

SO IF WE ADOPTED YOUR
INTERPRETATION WOULD THAT
ALLOW FOR ENFORCEMENT OF A
RESTRICTIVE COVENANT IN A
SITUATION LIKE TAMALA?

>> WELL, I THINK THE QUESTION
BEFORE THE COURT I THINK FROM
BOTH THE FOURTH DCA AND THE
FIFTH DCA IN THE COMPANION CASE
IS THE REFERRAL SOURCES IN THE
HOME HEALTH AGENCY PROTECTED
RESOURCES.

I'M SORRY, PROTECTED BUSINESS
INTERESTS.

BE I THINK, I MEAN, I WOULD
POSIT, AND I DON'T WANT TO
CRITICIZE THE WELL-REASONED
DECISION IN TAMALA--

[LAUGHTER]

>> I COULD HAVE DEVELOP IT
WRONG, I DON'T KNOW.

THANK YOU.

>> BUT I WOULD TAKE THE POSITION
THAT IT, GENERALLY SPEAKING,
THAT REFERRAL SOURCES ARE
PROTECTABLE.

BUT THE ISSUE HERE BEFORE THIS
COURT IS--

>> SO YOUR POSITION IS IN SOME
INDUSTRIES IT MIGHT BE A
PROTECTABLE BUSINESS INTEREST
AND SOME IT MIGHT NOT.

>> AT THIS POINT, YES.

>> EVEN MORE FACT SPECIFIC, WHAT
IF, FOR EXAMPLE, AN EMPLOYEE IS
HIRED BY A NEW HOME HEALTH
AGENCY BECAUSE THEY HAVE
EXISTING RELATIONSHIPS WITH
LOCAL HOSPITALS AND THAT KIND OF
THING, THAT PERSON GOES IN THE
FIRST WEEK AND SAYS, HEY, YOU
KNOW, THIS NEW AGENCY, THEY ARE
STAFFED WELL.

YOU KNOW, YOU SHOULD MEET THEIR
DOCTORS, EVERYTHING, YOU SHOULD
START USING THEM.

ALL OF THESE HOSPITALS, MEDICAL
PROVIDERS START USING THEM, AND

BE THEN THEY FIRE THE PERSON.
AND THEN THEY WANT TO SAY, WELL,
YOU CAN'T GO ANYWHERE ELSE
BECAUSE, YOU KNOW, OUR REFERRAL
SOURCES WHICH ARE BASED ON YOUR
CONTACTS A WEEK AGO ARE OUR
RECOLLECTED LEGITIMATE BUSINESS
INTERESTS.

WOULD THE RULE THAT YOU'RE
PROPOSING TO ALLOW YOU TO
ENFORCE A RESTRICTIVE COVENANT
IN THAT CASE?

>> I THINK THERE'S SORT OF A
GENERAL ISSUE THERE, AND IT
APPLIES-- YOU SEE THIS A LOT
THERE THE SALES CONTEXT WHICH,
AGAIN, IS WHAT THIS IS--

>> RIGHT.

>> A MODIFIED VERSION OF.
IN THE SALES CONTEXT, THERE'S AN
ARGUMENT THAT IF A SALESPERSON
WRINGS CUSTOMERS-- BRINGS
CUSTOMERS WITH THEM, THOSE ARE
THEIR CUSTOMERS.

THEY WEREN'T DEVELOPED THROUGH
THE EFFORTS OF THEIR EMPLOYMENT
BY THEIR EMPLOYER.

SO, YOU KNOW, THERE'S AN
ARGUMENT, THERE'S AN ARGUMENT
THERE THAT THOSE PARTICULAR
INTERESTS, THOSE PARTICULAR
CUSTOMERS ARE NOT NECESSARILY A
PROTECTABLE INTEREST.

>> BUT IF YOU HAVE A RULE THAT
REFERRAL SOURCES ARE ALWAYS A
PROTECTED LEGITIMATE BUSINESS
INTEREST OF THE COMPANY IN THE
HOME HEALTH CARE ENVIRONMENT,
WHY WOULDN'T, WHY WOULD YOU--
WHAT WOULD ALLOW YOU TO MAKE
THE EXCEPTION YOU'RE SAYING IS
APPROPRIATE?

>> WELL, I THINK THE STATUTE
DOES--

>> OKAY.

>> BECAUSE THE STATUTE ALLOWS
FOR AN INDIVIDUALIZED ASSESSMENT
BY THE COURTS.

AND BE I THINK THAT'S WHY THE
LEGISLATURE DRAFTED THE STATUTE

THE WAY THEY DID, BECAUSE THEY
RECOGNIZE THAT YOU CAN'T MAKE
THAT ALL-INCLUSIVE DECISION.
YOU HAVE TO ALLOW THE COURTS TO
ASSESS ON AN INDIVIDUAL BASIS
WHETHER A PARTICULAR SITUATION
INVOLVING A PARTICULAR BUSINESS
OR INDUSTRY IS, SHOULD BE
ACCORDED THAT TYPE OF
PROTECTION.

>> WELL, LET ME ASK YOU THIS.
YOU SAID THAT THERE WOULD BE IN
A SALES CONTEXT EXISTING
CUSTOMERS.

THAT'S, ISN'T THAT THE WHOLE
PROBLEM HERE IS BECAUSE THE
STATUTE DOES PROTECT SUBSTANTIAL
RELATIONSHIPS WITH SPECIFIC
PROSPECTIVE OR KEYING
CUSTOMERS SO IN A SALES
SITUATION THEY'VE BEEN
DEVELOPING A CUSTOMER OR WITH
PATIENTS OR CLIENTS.

YOUR HOME HEALTH CARE AGENCY HAS
NEITHER FOR THESE HOSPITALS AND
FACILITIES, THEY'RE NOT A
CUSTOMER, THEY'RE NOT A PATIENT,
AND THEY'RE NOT A CLIENT.
AND I THINK THAT WAS WHAT,
WHAT'S THE OTHER SIDE OF THE
STATUTORY CONSTRUCTION, IS THAT
IT'S A-- THAT'S HOW THEY,
INSTEAD OF GETTING BUSINESS WAS
THEY'RE THE BEST AGENCY AROUND,
THEY GET BUSINESS BECAUSE THEY
DON'T WINE AND DINE.

THEY BRING THEM DOUGHNUTS OR
WHATEVER IT IS.

IT'S, AND SO THE ISSUE IS, IS
THAT A RESTRAINT OF TRADE, OR IS
IT A-- RIGHT?

ISN'T THAT WHAT WE'RE DEALING
WITH?

SO IF IT'S NOT IN THERE AS THE
CATEGORY TO SAY, WELL, IT SAYS
INCLUDED BUT NOT LIMITED TO, BUT
SHOULDN'T IT AT LEAST SINCE
THEY'VE BEEN VERY SPECIFIC IN
THE FIVE THAT ARE, SHOULDN'T YOU
HAVE TO LOOK AT THAT CATEGORY TO

SAY THIS IS NOT ONE OF THOSE THREE?

>> WELL, YOUR HONOR, IN ESSENCE, THE PHYSICIANS AND THE HEALTH CARE PROVIDERS ARE IN A VERY REAL SENSE CUSTOMERS OF MY CLIENTS.

>> SO THAT'S-- SO YOU WOULDN'T NEED TO GO IF YOU'RE SAYING THEN THAT IT'S, IF THERE ARE CUSTOMERS, THEN THAT'S A DIFFERENT THING.

THEN YOU'RE SAYING IF IT'S WITHIN THE SUBSECTION THREE, NOT ANOTHER-- INCLUDED BUT NOT LIMITED TO.

DO YOU MAKE THAT ARGUMENT, THAT THEY'RE CUSTOMERS?

>> I WOULD SAY, I MEAN, I WOULD SAY THAT THEY'RE BOTH SOMETHING DIFFERENT, BUT THEY'RE ALSO THE SAME.

THEY'RE ALSO CUSTOMERS IN THE SENSE OF WHEN YOU LOOK AT HOW, HOW HEALTH CARE, HOW A HOME HEALTH PROVIDER OPERATES.

A DOCTOR HAS TO PRESCRIBE, HAS TO FILL OUT AN ORDER, BASICALLY, A PRESCRIPTION FOR CERTAIN CARE. AND BASICALLY, IT'S CARE OF A PATIENT WHOM THEY HAVE HAD, SAY, IN A HOSPITAL OR HAD SOME OUTPATIENT PROCEDURE, AND THEN THEY HAVE TO GO, AND THEN THEY HAVE TO HAVE SOME RECUPERATION TIME.

AND SO AS SORT OF, AS SORT OF THE.

>>'S HANDS AND FEET-- THE DOCTOR'S HANDS AND FEET IN THE HOME AFTER THEY'RE RELEASED, THEY PRESCRIBE THE HOME HEALTH AGENCY.

>> SURE.

BUT THEY DON'T SAY, THEY DON'T WRITE A PRESCRIPTION FOR A SPECIFIC HOME HEALTH AGENCY. THE YOU'RE GETTING DISCHARGED FROM THE HOSPITAL, THERE'S, I WOULD ASSUME THAT THE HOSPITAL

IS GIVING THEM HERE ARE THE NAMES OF FIVE, AND MAYBE THEN IF THE PATIENT ASKS, WELL, DO YOU HAVE ONE YOU RECOMMEND, THEY MIGHT SAY, WELL, WE'VE HAD VERY GOOD RELATIONSHIPS WITH THIS PARTICULAR ONE.

BUT THEY'RE NOT A CUSTOMER. I MEAN, MARTIN MEMORIAL HOSPITAL WOULDN'T BE A CUSTOMER OF THE AGENCY.

>> WELL, THIS A SENSE THEY ARE-- IN A SENSE THEY ARE BECAUSE THEY WILL RECOMMEND PEOPLE--

>> THEY WILL ONLY-- YOU'RE TELLING ME THAT THESE HOSPITALS THAT YOU DEAL WITH ONLY RECOMMEND ONE HOME HEALTH CARE AGENCY?

>> NO, THEY'LL RECOMMEND A NUMBER OF THEM.

THEY MAY RECOMMEND SEVERAL, THEY MAY RECOMMEND MORE.

THE ISSUE IS THERE IS A-- AT THE END OF THE DAY, THERE IS A CERTAIN MARKET SHARE THAT WE HAVE, THAT OUR CLIENTS HAVE DEVELOPED THROUGH THE USE OF THEIR MARKETING REPRESENTATIVES IN THE DEVELOPMENT OF THE RELATIONSHIPS WITH THOSE HEALTH CARE PROVIDERS THAT, WITH RESPECT TO THAT MARKET SHARE, THEY HAVE A RIGHT TO PRESERVE THAT.

IT DOESN'T, WHETHER IT'S 100%-- WHICH IT WOULDN'T BE-- OR IT'S 30%--

>> THERE ARE AT LEAST SOME CIRCUMSTANCES WHERE A PROVIDER WILL SAY YOU NEED TO GO TO THIS HOME CARE AGENCY BECAUSE I BELIEVE THEY'VE GOT SPECIAL EXPERTISE TO DEAL WITH WHATEVER PARTICULAR NEED YOU HAVE, AND THEY'RE PARTICULARLY GOOD WITH AT DEALING WITH THIS KIND OF SITUATION.

>> EXACTLY.

AND, IN FACT, THEY, A LOT OF TIMES THEY KNOW THAT BECAUSE OF THE INFORMATION THAT PEOPLE LIKE MS. WHITE HAS GIVEN TO THEM.

>> [INAUDIBLE]

>> ISN'T THIS ALSO A DIFFERENT SITUATION THAN HERE THE EMPLOYEE IS ASSERTING YOU CAN NEVER, NEVER HAVE A BUSINESS INTEREST IN THIS KIND OF RELATIONSHIP IS A FAR DIFFERENT QUESTION-- A FAR DIFFERENT QUESTION IN WHETHER THIS ONE IS OR IS NOT.

>> CORRECT.

>> I MEAN, BECAUSE YOU HAVE SAID AND I THINK THEY HAVE ADMITTED THAT WE'RE GOING TO HAVE LITIGATION OVER ALL THESE THINGS, BUT IT'S A FAR DIFFERENT THING TO SAY YOU CAN NEVER HAVE IT, OR WE'RE GOING TO TEST AND SEE WHETHER YOU HAVE IT.

>> RIGHT.

AND BECAUSE YOU NEED TO, BECAUSE THE COURT-- THE WAY THE STATUTE'S DRAFTED, IT IS SET UP FOR THAT INDIVIDUALIZED ANALYSIS.

>> OKAY.

>> PARAGRAPH 12 OF YOUR CONTRACT BETWEEN THE PARTIES SAYS APPLICABLE LAW AND APPLICABLE COURTS.

BOTH ARE IN KENTUCKY.

FOR APPLICABLE COURTS, THIS CASE WAS BROUGHT IN A FLORIDA STATE COURT CAN, SO THAT PROVISION HAS BEEN WAIVED, RIGHT?

>> THAT'S RIGHT, YOUR HONOR.

>> ALL RIGHT.

LET'S TALK THEN ABOUT THE APPLICABLE CHOICE OF LAW FOR KENTUCKY LAW.

WE'VE BEEN TALKING ABOUT FLORIDA STATUTE, FLORIDA LAW, BOTH PARTIES, THAT'S WHAT'S BEEN BRIEFED.

WOULD YOU AGREE THEN NOT WITHSTANDING THE CHOICE OF LAW PROVISION IN THE CONTRACT THAT

YOU AGREE THAT FLORIDA LAW'S
GOING TO CONTROL THE OUTCOME OF
THIS CASE?

>> WELL, I WOULD ARGUE THAT IT
PROBABLY BECAUSE EITHER--

>> NO--

>> YEAH, I'LL-- I WOULD ARGUE
THAT KENTUCKY LAW SHOULD
CONTROL.

BUT, YOUR HONOR, THE OTHER THING
IS I'VE UNDERSTOOD HOW COURTS--

>> I DON'T EVEN KNOW WHAT
KENTUCKY LAW SAYS ABOUT THIS,
WAS THAT HAS NOT BEEN BRIEFED.
SO WOULD YOU AGREE THEN THAT
WE'RE GOING TO--

>> YOU'RE GOING TO DECIDE ON
FLORIDA LAW.

>> WE'RE GOING TO DECIDE ON
FLORIDA LAW, AND YOU AGREE ON
THAT.

>> I AGREE, YOUR HONOR.

>> OKAY.

>> LET ME ASK YOU THIS.

WOULD IT BE A REASONABLE
READING, DO YOU THINK, OF THE
STATUTE TO SAY THAT ALTHOUGH
REFERRAL SOURCES ARE NOT AN
INDEPENDENT LEGITIMATE BUSINESS
INTEREST, THEY COULD BE-- LET'S
SEE, WHERE'S THAT SECTION?
THEY COULD CONSTITUTE OR YOU
COULD HAVE TO PROTECT THEM IN
ORDER TO PROTECT YOUR GOODWILL
ASSOCIATED WITH A SPECIFIC
GEOGRAPHIC ASSOCIATION.

SO THERE'S A SPECIFIC PROVISION
REGARDING IT'S CUSTOMER, PATIENT
OR CLIENT GOODWILL ASSOCIATED
WITH A SPECIFIC GEOGRAPHIC
LOCATION IS A RECOGNIZED
BUSINESS INTEREST.

IS THAT ANOTHER WAY TO LOOK AT
THIS, PERHAPS?

>> YOU COULD LOOK AT IT THAT
WAY, YOUR HONOR, AS WELL.
THAT GOES HAND IN GLOVE WITH THE
IDEA THAT THEY'RE CUSTOMERS.
YOU LOOK AT THE REPUTATION, YOU
LOOK AT THE GOOD THAT OUR

CLIENTS HAVE DEVELOPED THROUGH THE DEVELOPMENT OF THE RELATIONSHIP THAT HAS BEEN, THE RELATIONSHIPS THAT OUR MARKETING REPRESENTATIVES HAVE CULTIVATED ON OUR BEHALF, AND YOU WOULD SAY THAT THERE IS GOODWILL INVOLVED THERE.

>> WHAT IS THE PORTION OF THE STATUTE THAT YOU SAY PROVIDES FOR THIS INDIVIDUALIZED ASSESSMENT OF WHETHER, WHETHER THERE'S A LEGITIMATE BUSINESS INTEREST?

I KNOW WHETHER IT'S A REASONABLE PROVISION UNDER THE CIRCUMSTANCES, IT ISN'T INDIVIDUALIZED, BUT WHAT ALLOWS YOU IN THE STATUTORY LANGUAGE TO SAY THIS PARTICULAR REFERRAL SOURCE IS AND THIS ONE ISN'T?

>> WELL, I THINK, YOUR HONOR, BECAUSE OF THE WAY THE STATUTE'S DRAFTED IN TERMS OF BEING AN EXAMPLE, THESE ARE ALL EXEMPLARY VISIONS AND ARE NOT EXCLUSIVE.

SO THAT DOES REQUIRE, THAT DOES REQUIRE AN INDIVIDUALIZED ASSESSMENT.

I BELIEVE THAT'S ALSO STATED IN THE ARTICLE THAT MY COLLEAGUE REFERRED TO CONCERNING, FROM THE AUTHOR OF THE STATUTE TALKING ABOUT THERE'S A DESIRE TO HAVE THE COURTS BEING ABLE TO LOOK AT THE INDUSTRIES, LOOK AT THE COUNTS.

AND BE ALSO THE FOURTH DCA IN THE INFINITY CASE REFERENCED THAT AS WELL.

>> AND ISN'T, DOESN'T A LOT HERE HEDGE ON THIS-- HINGE ON THIS WORD LEGITIMATE?

BECAUSE WE KNOW YOU CAN HAVE A BUSINESS INTEREST LIKE WITH THE EMPLOYEE THAT COMES IN FOR ONE DAY, AND YOU THINK YOU'VE CAPTURED--

[LAUGHTER]

THAT BUSINESS.

YOU HAD A BUSINESS INTEREST IN THAT, BUT THAT MIGHT NOT, THE CAPTURING OF THAT ONCE YOU DISCARD THAT EMPLOYEE, MIGHT NOT BE A LEGITIMATE BUSINESS INTEREST.

ISN'T THAT CORRECT?

>> THAT, THAT-- RIGHT.

I THINK WHEN YOU'RE LOOKING AT THE INTEREST, THE LEGITIMATE INTEREST IS GOING TO BE SOMETHING THAT, THERE'S GOING TO BE SOMETHING THAT WOULD BE REASONABLY EXPECTED BY ANY, ANY EMPLOYER IN THE NATURE OF AN ASS SET.

>> BUT TO DETERMINE IF IT IS LEGITIMATE, YOU NEED TO LOOK AT ALL THE FACTUAL CIRCUMSTANCES.

>> RIGHT.

>> AND THAT IS, THAT IS A CONTEXT-DEPENDENT DETERMINATION.

>> CORRECT.

THERE ISN'T A ONE SIZE FITS ALL HERE.

GIVEN THE DIVERSITY OF OUR BUSINESS IN THIS COUNTRY AND IN THIS STATE, YOU CAN'T JUST ADOPT A ONE-SIZE-FITS-ALL.

YOU HAVE TO BE ABLE TO ASSESS THE BUSINESS, THE INDUSTRY AND SAY IN THAT BUSINESS AND IN THAT INDUSTRY, HOW DOES THE BUSINESS WORK?

AND WHAT IS A VALUE TO, WHAT IS A VALUE IN THAT INDUSTRY?

WHAT IS OF LEGITIMATE VALUE?

NOT NECESSARILY-- I KNOW WE WERE, I THINK, IT WAS SAID THAT WE WERE SAYING WHATEVER THE EMPLOYER DECIDES IS A LEGITIMATE BUSINESS INTEREST IS.

THAT'S NOT WHAT WE'RE SAYING. WE'RE SAYING, THOUGH, WHEN YOU LOOK AT THE NATURE OF THE INDUSTRY, THIS IS ON A OBJECTIVE BASIS A LEGITIMATE BUSINESS INTEREST.

AND I SEE MY TIME IS UP.

I THANK YOU ALL.
>> BRIEFLY, YOUR HONORS--
>> CAN YOU JUST, JUST
PRACTICALLY SPEAKING, THIS CASE
WAS 2013, WE'RE NOW IN 2017.
THE YEAR HAS, I MEAN, SHED HAD A
YEAR NONCOMPETE?
>> THAT'S RIGHT, YOUR HONOR.
>> AND SO THE QUESTION ABOUT IT
IS AFTER A YEAR, IS SHE ALLOWED
TO COME BACK IN AND SOLICIT THE
SAME--
>> THAT'S RIGHT, YOUR HONOR.
>> AND THE YEAR HAS EXPIRED.
>> SO HOW IS, WHAT'S THE
PRACTICAL EFFECT OF THIS CASE?
>> WELL, THE PRACTICAL EFFECT IS
THEY HAVE A DAMAGES CLAIM.
THEY CLAIM THEY LOST A
SUBSTANTIAL AMOUNT OF MONEY
DURING ONLY-- IT WAS REALLY
ONLY TWO MONTHS AT ISSUE--
>> SO THAT WOULD BE A FACT BASIS
AS TO WHETHER THEY ACTUALLY
LOST--
>> THAT'S RIGHT.
ASSUMING THIS COURT WOULD FIND
REFERRAL SERVICES ARE A
LEGITIMATE BUSINESS INTEREST--
>>-- ANY GOODWILL INTERESTS
THAT ARE WHAT JUSTICE LAWSON
SAID, WHICH IS THAT MAYBE
THEY'RE NOT INDEPENDENT, BUT
THEY COULD BE PART OF THE
GOODWILL OF AN AGENCY?
>> WELL, THERE COULD BE--
GOODWILL REALLY IS A SEPARATE
THING.
THAT WOULD BE MORE OF A
SUBSTANTIAL INVESTMENT INTO THE
BUSINESS COSTING SUBSTANTIAL
AMOUNTS OF MONEY, AND THAT IS
CERTAINLY PROTECTED UNDER THE
STATUTE AS A LEGITIMATE BUSINESS
INTEREST HERE.
THERE'S BEEN NO CLAIM IN THE
PLEADINGS BELOW THAT THERE WAS A
GOODWILL AT ISSUE.
>> IS GOODWILL DEFINED IN THE
STATUTE?

>> NO.
IT JUST SAYS GOODWILL.
>> OKAY.
AND SUBSTANTIAL INVESTMENT?
IS THAT DEFINED IN THE STATUTE
AS PART OF GOODWILL OF A
BUSINESS?
>> WELL, YOUR HONOR, IN THE LAW
REVIEW ARTICLE I WAS REFERRING
TO EARLIER, THE GRANT AND
STEELE--
>> I'M NOT WORRYING ABOUT A LAW
REVIEW ARTICLE.
I'M LOOKING TO WHAT THE STATUTE
SAYS.
>> RIGHT.
>> IS THERE ANYTHING IN THE
STATUTE?
>> THE STATUTE SAY GOODWILL,
YOUR HONOR.
IT JUST INCORPORATED THE COMMON
LAW DEFINITION OF GOODWILL.
AND AS FAR AS THE CONSTRUCTION
OF THE STATUTE, EVEN THOUGH THE
STATUTE SAYS THAT THE RULES OF
CONTRACT CONSTRUCTION DON'T
APPLY, THIS RULE-- THE COURT'S
GENERAL STATUTORY CONSTRUCTION
RULES DO APPLY AS FAR AS READING
RELATED LANGUAGE TOGETHER AND
COMING AT A LANGUAGE THAT GIVES
EFFECT TO ALL PARTS OF THE
STATUTE INCLUDING THE VERY
SPECIFIC LANGUAGE AS TO WHAT
CONSTITUTES LEGITIMATE INTEREST
AND THE SUBSTANTIAL ASSETS.
IN THIS CASE, REFERRAL SOURCES
IN THE HOME HEALTH CARE AGENCY
SIMPLY CAN'T DO YOU WANT A
PROPRIETARY ASSET THAT RISES TO
THAT LEVEL.
I THANK YOU FOR YOUR TIME.
>> THANK YOU FOR YOUR ARGUMENTS.