Filing # 32861966 E-Filed 10/05/2015 05:43:09 PM

RECEIVED, 10/05/2015 05:43:35 PM, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

PLANNED PARENTHOOD OF GREATER ORLANDO, INC., n/k/a PLANNED PARENTHOOD OF SOUTHWEST AND CENTRAL FLORIDA, INC., a Florida non-profit corporation,

Petitioner,

vs.

MMB PROPERTIES, a Florida general partnership,

Respondent.
_____/

Case No. SC15-1655

5th DCA Case No. 5D14-2920

Osceola Case No. 14-CA-1636-OC

RESPONDENT MMB PROPERTIES'S JURISDICTIONAL BRIEF

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STATEMENT OF THE CASE AND OF THE FACTS

Defendant/Appellant/Petitioner PLANNED PARENTHOOD OF GREATER ORLANDO, INC. n/k/a PLANNED PARENTHOOD OF SOUTHWEST AND CENTRAL FLORIDA, INC. shall be referred to as "Planned Parenthood." Plaintiff/Appellee/Respondent MMB PROPERTIES shall be referred to as "MMB."

As a preliminary matter, Planned Parenthood's Brief on Jurisdiction violates Rule. 9.120(d), which states that the accompanying appendix is to "contain[] only a conformed copy of the decision of the district court of appeal." Planned Parenthood's appendix includes the appropriate Fifth District opinion (the "Op.") in addition to two additional orders – the trial court's order granting MMB's motion for temporary injunction and the Fifth District's subsequent nonfinal order granting Planned Parenthood's emergency motion for stay of injunction. Respectfully, these two orders and all references to them in Planned Parenthood's Brief on Jurisdiction should be disregarded as outside the scope of jurisdictional review.[1]

The facts, as properly derived from the Opinion, are relatively straightforward. Planned Parenthood, a well-known abortion provider, purchased

[1] Nor should this Court consider Planned Parenthood's argument speaking to the merits of the Conflict Question. *See* 1977 Comm. Ns., Fla. R. App. P. 9.120(d). This includes Planned Parenthood's references to the constitutional right to abortion, B.o.J. at 9, an issue which is not even mentioned in the Opinion.

property in the Oak Commons medical office park where MMB also owns property. Op. at 1-2. The entire Oak Commons park is subject to private restrictive covenants prohibiting, among other things, outpatient surgical centers, emergency medical centers, and diagnostic imaging centers "unless ancillary and incidental to a physician's practice of medicine." Op. at 2, 5. "As the [trial] court correctly noted, Planned Parenthood was aware of the restrictions and proceeded forward at its own peril." Op. at 10.

MMB sued Planned Parenthood and moved for a temporary injunction to enjoin the performance of abortions in violation of the covenants. Op. at 1-2. The trial court granted the motion following an evidentiary hearing. Op. at 1-2, 5. Planned Parenthood then filed a "Motion to Reconsider, Dissolve, or Modify Order Granting Motion for Temporary Injunction," which the Fifth District later construed as consisting of two separate motions. Op. at 2 n.1. That "motion" included affidavits offering new asserted evidence. Op. at 4-5. The trial court denied the motion. Op. at 2 n.1.

Planned Parenthood appealed the temporary injunction pursuant to Rule 9.130(a)(3)(B), Op. at 2 n.1, and immediately moved for an emergency motion to stay the injunction pending appeal, Op. at 4. The Fifth District granted the stay in a published opinion located at 148 So. 3d 801. *Id.* However, as the later Opinion would observe, the stay order considered "the record as a whole, *including the*

affidavits filed in support of its motion for rehearing." Op. at 4 (emphasis in original). The court continued that the affidavits would not be considered in the merits appeal "for the basic reason that they were not presented to the court until after issuance of the order and therefore could not have been considered by the court when it made its ruling." Op. at 4.

In a footnote, the Fifth District also "acknowledged" a conflict of law with the Third and Fourth Districts. Op. at 4 n.3. The Conflict Question can be phrased as: "Must a party who moves to dissolve or modify a temporary injunction show changed circumstances from the issuance of the temporary injunction?" (the "Conflict Question"); *See Minty v. Meister Fin. Grp., Inc.*, 132 So. 3d 373, 376 n.4 (Fla. 4th DCA 2014). But in this case, Planned Parenthood already had the benefit of reviewing the initial temporary injunction without regard to any "changed circumstances." Indeed, the Fifth District examined and affirmed the temporary injunction *itself*.

The Opinion included a lengthy interpretation of the pertinent restrictive covenants – by far the most significant issue in the case – and held that the covenants prevented the performance of abortions within Oak Commons. Op. at 5-9. Once that de novo determination was made, the temporary injunction was due to be affirmed so long as it was supported by "competent, substantial evidence."

Op. at 8. Given the evidence adduced at the hearing, the Fifth District found that MMB had "readily" met this burden. Op. at 8.[2]

The remainder of the Opinion addressed two additional legal issues: whether a showing of irreparable harm was required to substantiate the injunction (it was not, Op. at 9-11) and whether either party would be awarded attorneys' fees (they were not, Op. at 11-12). Neither question has anything to do with the late-filed affidavits that serve as the asserted basis for Supreme Court review.

SUMMARY OF THE ARGUMENT

The Conflict Question is literally a footnote in these proceedings. Resolving the conflict in either direction would have no impact on the ultimate disposition of the appeal, epitomizing mootness. The Fifth District construed the restrictive covenants to prohibit the operation of an outpatient surgical center. And substantial, competent evidence supported the finding that "surgical abortions" are "outpatient surgical procedures." Adding late-filed, un-cross-examined affidavits to the record cannot logically impact this result.

Planned Parenthood is attempting to take advantage of a fortuitous conflict of law as a pathway to plenary review of the Fifth District's conclusions. The Conflict Question would be lost in the shuffle if this Court were to accept the case.

[2] The Opinion did, however, reverse the portion of the temporary injunction enjoining Planned Parenthood's performance of sonograms. Op. 2-3.

Respectfully, the Court should await a later opportunity to answer the Conflict Question where it is genuinely determinative. This is not that case.

ARGUMENT

I. Planned Parenthood only argued for reversal of the initial temporary injunction, and the Conflict Question does not bear on that order.

The District Courts have taken differing views on whether an enjoined party must show "changed circumstances" to challenge a previously-entered temporary injunction. The First, Second, and Fifth Districts have held that a "temporary injunction should be dissolved only where the facts and circumstances have changed to the point that equity dictates the injunction is no longer needed." *Brock v. Brock*, 667 So. 2d 310, 312 (Fla. 1st DCA 1995); *see also Thomas v. Osler Med., Inc.*, 963 So. 2d 896, 900 (Fla. 5th DCA 2007); *Hunter v. Dennies Contracting Co.*, 693 So. 2d 615, 616 (Fla. 2d DCA 1997). The Third and Fourth Districts disagree; in South Florida, "modification of a temporary injunction entered after notice and hearing does not require an evidentiary showing of a change in circumstances demonstrating the temporary injunction is no longer equitable." *Minty v. Meister Fin. Grp., Inc.*, 132 So. 3d 373, 376 (Fla. 4th DCA 2014); *see also Bay N Gulf, Inc. v. Anchor Seafood, Inc.*, 971 So. 2d 842, 843 (Fla. 3d DCA 2007). MMB therefore concedes that a bona fide conflict exists.

But this case was not about changed or unchanged circumstances. Rather, Planned Parenthood merely attempted to use its post-injunction motion as a vehicle

to introduce additional evidence in a desperate attack on the just-entered temporary injunction. This is tantamount to filing an affidavit with new evidence following a lost trial.

In a detailed analysis, the Fifth District explained that Planned Parenthood appealed two orders – the temporary injunction itself and the order denying Planned Parenthood's post-injunction "motion." The Fifth District recognized that the post-injunction motion was itself actually two motions, a motion to reconsider the injunction and a motion to dissolve the injunction. Op. 2 n.1. The portion of the second order denying the motion to reconsider the temporary injunction was not even reviewable because it sought to reconsider a non-final ruling. Op. 2 n.1 (citing *Agere Sys. Inc. v. All Am. Crating, Inc.*, 931 So. 2d 244, 245 (Fla. 5th DCA 2006)). The portion of the second order denying the motion to dissolve or modify the temporary injunction required a change in circumstances, ostensibly broaching the Conflict Question. Op. 2 n.1. But critically, the footnote continued that "[n]one of Planned Parenthood's appellate arguments, however, relate to the second order." Op. 2 n.1.

Indeed, the Court also observed, "In its initial brief, Planned Parenthood does not challenge the denial of its motion to dissolve or modify the injunction, much less argue that it established changed circumstances." Op. 4-5 (emphasis added). And as a matter of appellate procedure, "an argument not raised in the

initial brief is barred." *Sanislo v. Give Kids the World, Inc.*, 157 So. 3d 256, 261 n.2 (Fla. 2015) (citation omitted). Respectfully, it would not be appropriate to review the denial of the motion to dissolve or modify the injunction here where that argument was not perfected before the Fifth District.

Accordingly, the only issue relating to the Conflict Question was whether the post-hearing affidavits could be considered in reviewing the temporary injunction order itself. The Fifth District concluded that they could not "for the basic reason that they were not presented to the court until after issuance of the order and therefore could not have been considered by the court when it made its ruling." Op. 4. This finding should be self-evident. The Conflict Question, while perhaps determinative in other matters, is essentially irrelevant here.

II. The Conflict Question is ancillary to the Opinion's central holding and is moot in this case.

Although this litigation involves the emotionally charged arena of abortion law, the Opinion turned on the otherwise benign interpretation of private land use restrictions. There were three key holdings that led the Fifth District to affirm the trial court's temporary injunction against abortions. None would be impacted by the consideration of the late-filed affidavits.

First, the court interpreted the declarations to "prohibit[] the property from being used as an outpatient surgical center, the common and ordinary meaning of which is a facility or place for, or the purpose of, performing outpatient surgical

procedures." Op. 8. This de novo construction followed a lengthy analysis necessitated by what the court considered to be "a rather poorly worded restrictive covenant." Op. 5-6. Importantly for jurisdictional purposes, this holding and analysis have nothing to do with *any* evidence, much less the evidence asserted in the late-filed affidavits. The Conflict Question is therefore irrelevant to this issue, which can be fairly described as the most significant issue in the case.

The second dispositive holding was that "substantial, competent evidence" supported the trial court's factual findings "that abortions are outpatient surgical procedures; that Planned Parenthood's facility is not a physician's practice of medicine; and, that even if the facility is operated as a physician's practice of medicine, its performance of abortions was not ancillary or incidental to that practice." Op. 8. This is the only conceivable aspect of the Opinion that could be affected by consideration of the late-filed affidavits.

But by their nature, the affidavits could only offer *additional* evidence to the evidence properly adduced at the hearing. They would not have somehow rendered the properly adduced evidence insubstantial or incompetent. *See, e.g.*, *Charlotte Cnty. v. Vetter*, 863 So. 2d 465, 469 (Fla. 2d DCA 2004) ("On review of an order granting a preliminary injunction, the trial court's findings of fact cannot be reversed if they are supported by competent, substantial evidence."). Moreover,

given the affidavits' late-filed status, MMB was denied the opportunity to cross-examine the veracity of the affiants.

Therefore, while the late-filed affidavits might have thickened the trial court record, they could not have logically led to a different result. Affirmance would have followed even if Planned Parenthood was not required to prove changed circumstances. The Conflict Question is moot in these proceedings.

Finally, the third significant holding was that irreparable harm is not required to impose injunctions to enforce restrictive covenants on real property. Op. 9 (citing, inter alia, *Stephl v. Moore*, 114 So. 455 (Fla. 1927)). There is no independent jurisdictional basis to review that well-established point of law.

III. Planned Parenthood is attempting to use the Conflict Question as a conduit to plenary second-tier review.

Planned Parenthood's attempt to invoke this Court's jurisdiction is not really about evidentiary standards or late-filed affidavits. Instead, Planned Parenthood is attempting to take advantage of a serendipitous conflict of law to initiate second-tier review of the *truly* dispositive issues. After all, "once this Court has accepted jurisdiction in order to resolve conflict, we may consider other issues decided by the court below which are properly raised and argued before this Court." *Caufield v. Cantele*, 837 So. 2d 371, 377 n.5. (Fla. 2002).

Planned Parenthood's argument that the Opinion "turned on what evidence should be considered by an appellate court" is pure fancy. B.o.J. at 9. If the Court

were to accept this case, the Conflict Question would almost certainly become an afterthought in a full revisitation of the key issues. Very respectfully, that is not this Court's constitutional role in exercising its Article 5 § 3(b)(3) interdistrict conflict of law jurisdiction.

CONCLUSION

This Court should await another case where the "changed circumstances" test is dispositive to resolve the Conflict Question. It should decline to exercise its discretionary jurisdiction in these proceedings.

WHEREFORE, Respondent MMB PROPERTIES hereby respectfully requests that the Honorable Supreme Court of Florida declines to accept jurisdiction to review the Fifth District Court of Appeal's decision in Case No. 5D14-2920.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by Electronic Service through the District Court of Appeals and/or Florida E-Portal System to: **Donald E. Christopher, Esq.** and **Kyle A. Diamantas, Esq.**, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, SunTrust Center 200 South Orange Avenue Post Office Box 1549, Orlando, FL 32802; dchristoper@bakerdonelson.com; kdiamantas@bakerdonelson.com; fedcts@bakerdonelson; sdenny@bakerdonelson; on this **5th** day of **October**, 2015.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this submission complies with the font and spacing requirements of Fla. R. App. P. 9.210, in that it was generated with 14-point Times New Roman and/or 12-point Courier New fonts and 1" margins.

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